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# 'A Right to Water' in International Human Rights Law: Flow from Implicit to Explicit Right

Swechhya Sangroula\*

## Abstract

*The paper relies on doctrinal method of study in determining whether a right to water exists under international human rights law. As primary source, the paper relies on the International Covenant on Economic, Social and Cultural Rights and the products of the ICESCR's monitoring system: Economic and Social Council (ECOSOC) and particularly the work of the CESCR, which is the subsidiary body of the ECOSOC, tasked with monitoring functions, since 1985. The paper relies on the international interpretation of relevant ICESCR provisions made by the CESCR as 'evidence of the meaning and application of the Covenant'.<sup>1</sup> The paper also relies on the study of relevant Concluding Observations issued by the CESCR during the course of its monitoring of states' periodic reports. The primary reason, being, that unlike ICCPR's Human Rights Committee jurisprudence, the ICESCR has not developed a body of jurisprudence from its treaty body. As secondary sources, scholarly writings and published academic debates have been referred to gauge the contents of the academic debate surrounding the issue.*

## Introduction

In 2010, the United Nations General Assembly in its Resolution 64/292 noted that right to safe and clean drinking water is a human right essential for the full enjoyment of life and all human rights.<sup>2</sup> Although, the very basis of existence of human life, the debate on whether a right to water exists continues. As noted by the OHCHR, the earliest traces of identifying right to have access to drinking water in quantities and of a quality equal to their basic needs can be seen in the 1977 United Nations Water Conference in Argentina and the Agenda 21 adopted at the United Nations Conference on Environment and Development in 1992.<sup>3</sup> As regards, the normative content of the implicit right to water, it has been noted that the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.<sup>4</sup>

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\* Ms. Swechhya Sangroula is practicing advocate and former student of Kathmandu School of Law, Nepal. This paper was submitted by the author for Fulfilment of Academic Requirement under ISSJF4711- Human Rights, OSLO International Summer School 2017.

<sup>1</sup> Ben Saul, David Kinley & Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights Commentary Cases and Materials* (Oxford University Press, 2014), p. 4.

<sup>2</sup> United Nations General Assembly, The human right to water and sanitation, 64<sup>th</sup> session A/RES/64/292 (03 August 2010), 1.

<sup>3</sup> OHCHR, The Right to Water, Fact Sheet 25, August 2010, p. 1.

<sup>4</sup> CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 29<sup>th</sup> sess. E/C.12/2002/11 (20 January 2003), p. 2.

The paper addresses in the *first* chapter the question as to whether there is a right to water under international human rights law, even if implicit. In order to support the finding that there exists a right to water (and not just a non-binding aspiration goal of a state), the paper highlights the implicit reference to water in numerous international instruments, the subsequent practice of states, judicial and quasi-judicial bodies and the interpretation of the normative content of the right to water by the Committee on Economic, Social and Cultural Rights.

In the *second* chapter, the paper addresses the question of whether, independently, of existence or non-existence of a right to water, there should be a right to water under international human rights law. The paper addresses the need to have an explicit and an independent right to water in international instruments as a specific right by providing justifications for such and the problems having such a right might solve. Implicit right in the paper means right that does not find an express reference in international instruments as a right but rather is derived through interpretation. ‘Explicit’, ‘independent’ right means the inclusion of ‘right to water’ expressly in the text of international instruments.

### Right to Water as an Implicit Right

The question of whether “a right to water” exists in international human rights law has long been a subject of debate and the conceptualization of the right to water, a relatively new endeavor.<sup>5</sup>

The International Covenant on Economic Social and Cultural rights makes no reference to the right to water. Scholars have noted that the right to water was never discussed in the formative deliberations of the ICESCR, as revealed by the *travaux préparatoires* of the Covenant.<sup>6</sup> Scholars have taken different positions in this regard. Notably, in response to Tully’s argument that the drafters of the Covenant rejected the inclusion of a right to water, Langford points out that the right to water was never ‘rejected’ by the drafters since the records indicate that it was never discussed by the UN Commission on Human Rights or the Third Committee.<sup>7</sup>

Despite having omitted expressly to include the right to water in the text of Article 11, or anywhere else in the ICESCR, the Committee on Economic, Social and Cultural Rights, as a monitoring mechanism of the treaty and a subsidiary organ of the Economic and Social Council of the United Nations<sup>8</sup>, noted, in its

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<sup>5</sup> Saul et al (n 1) pp. 899, 904.

<sup>6</sup> Matthew Craven, ‘Some Thoughts on the Emergent Right to Water’ in Eibe Riedel and Peter Rothen (eds), *The Human Rights to Water* (Berlin: Berliner Wissenschafts Verlag, 2006) Chapter 2 cited in Saul et al (n 1) p. 899.

<sup>7</sup> Malcolm Langford, ‘Ambition that overleaps itself? A response to Stephen Tully’s Critique of the General Comment on the Right to Water’, *Netherlands Quarterly of Human Rights*, vol. 24/3, 2006, p. 439.

<sup>8</sup> ECOSOC Res. 1985/17, Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights, E/RES/1985 (28 May 1985) cited in Saul et al (n 1), p. 4.

General Comment No. 15 in 2002 that ‘the human right to water is indispensable for leading a life in human dignity.’<sup>9</sup>

In its General Comment No. 15, the CESCR noted that the right to water falls within the domain of Article 11, paragraph 1 of the ICESCR which specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living “including adequate food, clothing and housing.”<sup>10</sup> It reads:

“The use of the word “including” indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival”.<sup>11</sup>

Even prior to the 2002 GC 15, in 1995, the CESCR made references to access to adequate water, *inter alia*, as basic rights, and water was included alongside adequate food, shelter, clothing and health care under Article 11.<sup>12</sup>

While the CESCR, for issuing General Comment No. 15, has received criticism as being ‘revisionist’<sup>13</sup> and ‘unreflective’<sup>14</sup> and ‘unhelpful’<sup>15</sup>, it has been widely accepted that the General Comment No. 15 was neither radical nor conservative but a reasonable interpretation of the ICESCR.<sup>16</sup> Ben Saul, in his commentary of the ICESCR, while discussing the efforts of the CESCR to ‘retrofit’ the right to water into the structure and content of the ICESCR<sup>17</sup>, notes that the right to water is now sufficiently established in various legal formats and has gained wide acceptance as an enforceable right in both international and domestic jurisdictions.<sup>18</sup>

In fact, the subsequent practice of the United Nations and its bodies has largely favored the interpretation of the CESCR. In 2010, the OHCHR noted in its Fact Sheet No. 35, that while water has not been explicitly recognized as a self-standing human right in international treaties, international human rights law entails specific obligations related to access to safe drinking water.<sup>19</sup> In the same year, the UN made its position clear by adopting Resolution 64/292 which recognized that

<sup>9</sup> General Comment No. 15 (n 4) p. 1.

<sup>10</sup> General Comment No. 15 (n 4) p. 3.

<sup>11</sup> Ibid.

<sup>12</sup> CESCR General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, 13<sup>th</sup> sess. E/1996/22 (8 December 1995), p. 5, p. 32.

<sup>13</sup> Stephen Tully, ‘A Human Right to Access Water? A Critique of General Comment No. 15’, *Netherlands Quarterly of Human Rights*, vol. 23, No. 1, 2005, p. 37 quoting M. Dennis and D. Stewart, ‘Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?’, *American Journal of International Law*, vol. 98, 2004, pp. 462-515.

<sup>14</sup> Stephen Tully, ‘Flighty Purposes and Deeds: A Rejoinder to Malcolm Langford’, *Netherlands Quarterly of Human Rights*, vol. 24, 2006, p. 461.

<sup>15</sup> Tully (n 13) p. 35.

<sup>16</sup> Langford (n 7) p. 434.

<sup>17</sup> Saul et al (n 1) p. 906.

<sup>18</sup> Ibid p. 899.

<sup>19</sup> Fact Sheet 25 (n 3) p. 1.

the right to safe and clean drinking water is a human right essential for the full enjoyment of life and all human rights.<sup>20</sup>

Notably, water is mentioned in most international instruments are being implicit within the right to adequate standard of living.<sup>21</sup> References to water within the domain of adequate living conditions finds reference in numerous international instruments such as Article 14(2) of the Convention on the Elimination of All Forms of Discrimination Against Women, Article 24(2) of the Convention on the Rights of the Child requiring parties to combat disease and malnutrition through the provision of adequate clean drinking water. The UN Watercourses Convention, generally considered to reflect norms of customary international law, as a general rule recognize water as ‘vital human needs’ of civilian populations, and states should not unilaterally take measures to the detriment of such.<sup>22</sup>

Bulto identifies a ‘tacit assent’ by states that human rights to water exists under the ICESCR based on the silence on the part of the ICESCR State parties in the face of CESCR’s criticisms of their domestic implementation (or violation) of the human right to water.<sup>23</sup> Furthermore, he concludes that the human right to water is more a discovery than an invention, as it is a free-standing human right that has been recognized in the relevant rules of international treaties and is supported by growing state practice.<sup>24</sup> As obvious examples of relevant state practices, constitutions such as that of South Africa,<sup>25</sup> Bolivia (Article 16), Kenya (Article 43(1)(d)), Uruguay (Article 47) have expressly recognized the right to water in their constitutions.<sup>26</sup>

The Vienna Convention on the Law of Treaties in its Article 31(3) stresses that subsequent agreements and subsequent practice shall be taken into account when a treaty is to be interpreted in light of its object and purpose.<sup>27</sup> Seen in this light, it is fair to argue that the subsequent practice of states supports the CESCR’s derivation approach<sup>28</sup> in deriving the human right to water from the other explicitly guaranteed rights.<sup>29</sup>

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<sup>20</sup> UNGA Right to Water Resolution (n 2) p. 1.

<sup>21</sup> Ilias Bantekas & Lutz Oette, *International Human Rights Law and Practice* (2<sup>nd</sup> edn: Cambridge University Press, 2016) p. 433.

<sup>22</sup> *Convention on the Law of the Non-navigational Uses of International Watercourses*, 21 May 1997, 36 ILM 700 (Entered into force: on 17 August 2014), articles 6(1)(b), 10(2) cited in Bantekas & Oette (n 21), p. 433.

<sup>23</sup> Takele Soboka Bulto, ‘The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?’ (2011), *Melbourne Journal of International Law*, vol. 12, 2011, p. 17.

<sup>24</sup> *Ibid* pp. 5, 25.

<sup>25</sup> Constitution of South Africa, Article 27(1)(h): “Everyone has the right to have access to sufficient food and water”.

<sup>26</sup> Saul et al (n 1) p. 915.

<sup>27</sup> *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, 1155 UNTS 331 (Entered into force: 27 January 1980) article 31(3).

<sup>28</sup> Bulto (n 23) p. 15.

<sup>29</sup> *Ibid*.

## Normative Content of the Right to Water

In its endeavor to conceptualize the right to water, the CESCR refers to the right to water containing both freedoms and entitlements. Paragraph 10 reads:

“The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.”<sup>30</sup>

The obligation of States with respect to water, further provide evidence that a right to water exists. The General Comment 15 speaks of a special obligation on the State parties, with respect to the right to water, to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination. Generally, states should guarantee that the right to water is enjoyed guided by non-discrimination and equality.<sup>31</sup> In addition, states have specific legal obligations to respect, protect and fulfil right to water, like any human right.<sup>32</sup>

There is a duty to refrain from denying or limiting water or destroying water services and infrastructure, obligation to protect requiring State parties to adopt necessary measures to restraining access to water or polluting and inequitably extracting from water resources and obligation to fulfil includes facilitating, promoting and providing, through positive measures to assist individuals and communities directed towards full realization of the right.<sup>33</sup>

Referring to freedoms and entitlements, in its Concluding Observation to Canada, the CESCR urged states to enshrine the right to water in domestic law so that it becomes a legal entitlement and not merely a ‘desirable policy goal’.<sup>34</sup>

## Critique of The “Right to Water”

The views and legal reasoning of the CESCR has been criticized, most notably, by the United States of America. At the request of the OHCHR to provide information on “human rights obligations related to equitable access to safe drinking water and sanitation”, the United States noted that it supports the “goal” of universal access to safe drinking water.<sup>35</sup> It noted: “the fact that the provision

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<sup>30</sup> General Comment No. 15 (n 4) p. 10.

<sup>31</sup> Ibid p. 13.

<sup>32</sup> Ibid p. 20.

<sup>33</sup> Ibid pp. 20-24.

<sup>34</sup> CESCR, Concluding Observations: Canada, E/C.12/CAN/CO/4, E/C.12/CAN/CO/5 (22 May 2006), p. 30.

<sup>35</sup> Views of the United States of America on Human Rights and Access to Water, Submitted to the Office of the United Nations High Commissioner for Human Rights, June 2007, available at:

of a particular good or service may be essential to the realization of a Covenant right does not make that good or service itself the subject of a distinct international human right.”<sup>36</sup>

In disagreement with the CESCR’s reference to right to water and the legal bases for its foundation,<sup>37</sup> the United States noted, in paragraph 4, that it ‘does not share the view that a “right to water”...exists under international human rights law’ as there is not internationally agreed “right to water” and neither the UDHR nor the ICESCR mentions water at all.<sup>38</sup>

Stephen Tully argues that interpretation of the word ‘including’ could mean that the list of rights to be added would be endless, such as ‘postal delivery’ and ‘access to the internet’. He has gone so far as to state that an amendment to the Covenant under Article 29 is legally required in order to incorporate the right to water in the treaty. He additionally speaks of the deference to be given to the State’s omission of water in the drafting of the Covenant. He concludes: “that an entitlement to access water for personal or domestic use available to all does not exist under contemporary international law”.<sup>39</sup>

In the face of criticism that these comments are ‘outdated’ or ‘unhelpful’<sup>40</sup>, some scholars have maintained that the General Comment No. 15 was neither radical nor conservative but a reasonable interpretation of the ICESCR<sup>41</sup> and that the right to water exists under international human rights law.

### **Towards an Explicit ‘Right to Water’**

As highlighted in the previous chapter, despite some critique, the right to water as an implicit right can be located in a multiplicity of international instruments, the authoritative interpretation of the CESCR on Article 11 of the ICESCR, supported by subsequent practices of the states after the adoption of the ICESCR and scholarly writings. The purpose of this Chapter is to make a case that the right to water needs to form part of international human rights law as an explicit, self-standing right, rather than a derivative, implicit one.

### **Problems of The Derivative Approach**

In the face of skepticism regarding whether a right to water exists at all, it is appreciable that courts and tribunals (domestic and international) and even quasi-judicial bodies have creatively derived the right to water by making connections to various other rights. In *Moselthanyane* case,<sup>42</sup> the Botswana Court of Appeal held that the deprivation of water to a population lawfully occupying land which was

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<http://www2.ohchr.org/english/issues/water/contributions/UnitedStatesofAmerica.pdf>, accessed on 01 August 2017, p. 1.

<sup>36</sup> Ibid p. 12.

<sup>37</sup> Ibid p. 8.

<sup>38</sup> Ibid, p. 4.

<sup>39</sup> Tully (n 13) cited in Langford (n 7) p. 437, footnote 11.

<sup>40</sup> Ibid.

<sup>41</sup> Langford (n 7) p. 434.

<sup>42</sup> *Moselthanyane and Others v. Attorney-General* (Kalahari Bushmen case), (Botswana) (2011) cited in Bantekas & Oette (n 21), pp.435-436.

arid (as in the given case) amounted to inhuman or degrading treatment.<sup>43</sup> In the *Angela Poma Poma v. Peru* in 2009, a communication to the Human Rights Committee involved a dispute, primarily over right to water. The “Ayro Wells” dug by the Peruvian Government significantly reduced the water supply to the pasture lands affecting the livelihood of the indigenous Aymara Peoples.<sup>44</sup> The Committee found that the diversion of water led to the impairing of right to enjoy culture (Article 27 of the ICCPR) of the Aymara people.<sup>45</sup> In India, a free standing right to water was derived from the right to life.<sup>46</sup> The African Commission on Human and Peoples’ Rights found in *SERAC v. Nigeria* (2002) that among the many rights that the Nigerian Government had breached by way of its military operations in and around the operations of the Shell Oil company in the Niger Delta was the right to water as embedded in the Charter’s rights to health and a clean environment.<sup>47</sup>

In its GC 15, the CESCR notes that right to water is to be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.<sup>48</sup> In particular, in relation to the importance of water to realize right to food and right to health, the CESCR has highlighted the importance of water.<sup>49</sup>

The challenge of using a derivation approach has been considered a ‘double edged sword’<sup>50</sup> because it carries potentially contradictory implications about the legal basis of the human right to water. Because the human right to water is protected because of its utility to other rights, the human right to water would take the form of a derivative or a subordinate right, the violation of which can only be complained of when the patent rights- for instance, the right to food, health, or life- are violated.<sup>51</sup> The reasoning of CESCR in GC 15 on the justification of right to water seems to be based on the importance of water in realization of other rights<sup>52</sup> and for the fundamental conditions of survival. This observation is subject to criticism because the General Comment reaffirms the prevalent notion that water is not a right in itself but a prerequisite for the realization of other human rights, begging for the question as to whether a separate right to water is required or not. It is for this reason, that an explicit right to water is essential.

### Problems of A Goal-Based Approach to Water

The advantages of ‘individuated’ character of rights is that identifiable parties can claim them, protecting these interests as enforceable rights, rather than ‘leaving

<sup>43</sup> Ibid, p. 436.

<sup>44</sup> *Angela Poma Poma v. Peru*, (Human Rights Committee), Communication No. 1457/2006 (27 March 2009) p. 7.6.

<sup>45</sup> Ibid p. 7.7.

<sup>46</sup> *Attakoya Thangal v. Union of India* (1990) 1 KLT 580 cited in Saul et al (n 1), p. 916.

<sup>47</sup> *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (Communication No. 155/96), (2001) cited in Saul (n 1), p. 918.

<sup>48</sup> General Comment No. 15 (n 4) p. 4.

<sup>49</sup> CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 29<sup>th</sup> sess. E/C.12/2002/11 (20 January 2003), p. 6.

<sup>50</sup> Bulto (n 23), p. 15.

<sup>51</sup> Ibid p. 15.

<sup>52</sup> General Comment No. 15 (n 4), p. 1.



them to the good will of volunteers.<sup>53</sup> Human rights have been known to support general welfare by making governments less dangerous and as James Griffin notes, as ‘protections of our agency’- what one might call our personhood.<sup>54</sup> Shue, in a similar vein, defined right as “a rationally justified demand for social guarantees against standard threats”.<sup>55</sup> In his book, James Nickel writes that to justify a specific human right, additional premises are needed, which in his paper are referred to as Nickel’s tests. He notes that an early step in justifying a specific right as a human right involves showing that important interests or claims are significantly threatened in the area that the right would protect.<sup>56</sup>

Notably, the CESCR, in General Comment 15 notes that violations through *acts of omission* can take place if a state, for example, fails to have a national policy on water or enforce relevant laws.<sup>57</sup> A violation of the right to water can occur through *acts of commission*, when direct actions of State parties or other entities insufficiently regulated by States, take retrogressive measures such as the formal repeal or suspension of legislation necessary for the enjoyment of the right to water, or the adoption of legislation or policies manifestly incompatible with *pre-existing* domestic or international legal obligations in relation to the right to water.<sup>58</sup> Some of these violations can take the form of arbitrary or unjustified disconnection or exclusion from water services or facilities, discriminatory or unaffordable increases in the price of water.<sup>59</sup> The CESCR in the General Comment 15, recalling its General Comment No. 8, notes that water should never be used as an instrument of political and economic pressure.<sup>60</sup>

Nickel notes that when a proposed right to something is subjected to test of restraint or assistance which is- could some weaker norm such as a ‘goal or a duty of charity’ be as effective. This basis seems to have found ground in states and skeptics to right to water arguing that water is not a right but a goal or an aspiration that the state should strive to achieve. However, Nickel argues that the in order to show that the proposed right can be justified, it is to be shown that any other approach other than a rights-based, would provide ‘inadequate protection.’<sup>61</sup>

In any event, a goal-based approach to water cannot yield results or provide adequate protection to human persons against state’s use of water as a tool to benefit some at the expense of others, or as a sanction. The OHCHR in its UN Fact Sheet No 25 on the Right to Water, in respect of Target 7(c) of the Millennium Development Goals stated that ‘a systematic human rights-based approach to understanding and achieving the MDGs remain an unmet challenge.

<sup>53</sup> James W. Nickel, ‘Chapter 5: A Framework for Justifying Human Rights’ in James W. Nickel, *Making Sense of Human Rights* (Blackwell Publishers, 2007), p. 76.

<sup>54</sup> *Ibid* p. 54.

<sup>55</sup> Henry Shue, *Basic Rights* (2<sup>nd</sup> edn Princeton University Press, 1996), p. 32 cited in Nickel (n 53) p. 71.

<sup>56</sup> Nickel (n 53) p. 71.

<sup>57</sup> General Comment No. 15 (n 4) p. 39.

<sup>58</sup> *Ibid* p. 43.

<sup>59</sup> *Ibid* p. 44.

<sup>60</sup> CESCR, General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights E/C.12/1997/8 (1997), p. 3, p. 5.

<sup>61</sup> Nickel (n 53) p. 75.

Human Rights have not yet played a significant role in supporting and influencing MDG-related activities.<sup>62</sup>

If right to water is a directly claimable right, states will be under a binding legal obligation to refrain from carrying out violations through acts of omission or commission and in case of any violation, the right holders will be in a position to directly claim remedy.

## Conclusion

A human right to water exists under international human rights law, even if implicitly. It is clear that a discussion on inclusion of a right to water under Article 11 of the ICESCR did not take place, if not expressly rejected and while criticized by some as being revisionist, the CESCR can be credited with making a purposive interpretation of Article 11 of the ICESCR in locating an implicit human right to water. This interpretation has been supported by subsequent state practices, position of international organization, particularly the United Nations and a wide variety of scholarly writings. Rather creatively, a human right to water has been derived, in addition, by international and domestic jurisdictions, from a number of other explicit rights such as the right to life, right to health and even a right against inhuman and degrading treatment. However, such as derivation approach can be problematic since the enjoyment of right to water independent of the derivative or 'parent' rights cannot be claimed or enforced in the absence of an explicit right to water. In the absence of an explicit right to water, or at least, the reference to water as a right, and not merely a goal, states are able to get away from their obligations, citing the non-binding authority of the normative content of right to water, as interpreted by the CESCR. As a specific right, that is able to be justified, a right to water can act as a safeguard against threats such as the use of water as a tool of discrimination, exclusion and sanctions. This flow from an implicit right to an explicit right is essential to lead a life of dignity by those to whom it belongs.

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<sup>62</sup> OHCHR Fact Sheet 25 (n 3), pp. 29-30.