



Follow-up joint submission

to the

United Nations Special Rapporteur on the human rights to safe drinking water and sanitation

19 October 2022

INTRODUCTION

1. In his “planning and vision report” to the 48th session of the Human Rights Council,¹ the Special Rapporteur on the human rights to safe drinking water and sanitation, Mr Pedro Arrojo Agudo (the UNSR), identified his objectives for the first three years of the mandate. In application thereof, the UNSR will focus his two thematic reports in 2022 on:
 - 1.1. The human rights to safe drinking water and sanitation of indigenous peoples: state of affairs and lessons from ancestral cultures to the 51st session of the Human Rights Council in September 2022; and
 - 1.2. The human rights to safe drinking water and sanitation of people living in impoverished rural areas to the 77th session of the United Nations General Assembly in October 2022.
2. In August 2021 the UNSR issued a call for inputs to all States and stakeholders in the form of two questionnaires, one for States and one for non-State actors.
3. On 20 January 2022, the following organisations made a submission to the UNSR: Survivors of Lesotho Dams (SOLD)² and the Freshwater Action Network Mexico (FANMex), which submission was compiled and edited by End Water Poverty (EWP)³ and the Centre for Applied Legal Studies (CALs).⁴ The

¹ A/HRC/48/50 (5 July 2021) para 9.

² The Survivors of Lesotho Dams (SOLD) advocates for safe drinking water and sanitation to be free and accessible for all affected persons in Lesotho, Southern Africa.

SOLD was founded in 2004 after the World Summit for Sustainable Development (WSSD) in South Africa. It is a registered, ecumenical, non-profit, and non-governmental organisation committed to working for justice, good governance, and inclusiveness and participation in decisions that affect communities affected by dams and other large infrastructure developments.

³ End Water Poverty (EWP) is a global civil society coalition campaigning for governments to respect, protect and fulfil people’s rights to safe water and sanitation. Our coalition members and allies include organisations like Dig Deep (United States), FANMex (Mexico) and Survivors of Lesotho Dams (SOLD), who work closely with indigenous peoples or people living in impoverished rural areas. Through the Claim Your Water Rights campaign, we fund civil society to mobilise people to claim their water and sanitation rights using a variety of strategies and tactics.

These include community, policy, and media advocacy; research and evidence gathering; and supporting litigation. Claim Your Water Rights insists on the human rights principle of non-discrimination by affirming that every person - regardless of their ethnicity, class, geography, or citizen status - has a right to water and sanitation.

⁴ The Centre for Applied Legal Studies (CALs) is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand, Johannesburg, South Africa. CALs is committed to the protection of human rights through the empowerment of individuals and communities and the pursuit of systemic change.

submission was endorsed by the African Forum and Network on Debt and Development (AFRODAD) and Oxfam South Africa.

4. The submission focused *inter alia* on the human rights to safe drinking water and sanitation of indigenous peoples and people living in rural areas in Lesotho and Mexico.

PURPOSE OF THIS FOLLOW-UP SUBMISSION

5. Following the reception of inputs, the UNSR held a series of consultations with rights holders and experts to dialogue on the relevant issues to be included in the two reports and raise questions and concerns based on the information already received.
6. The submission partners held a call in English with the UNSR on 27 January 2022. In that engagement, the UNSR requested that partners provide additional details of observations and concrete experiences that can be included in the report. This follow-up submission sets out these observations and experiences as requested.
7. The submission partners welcome the opportunity to make a follow-up submission to the UNSR, which further expands on the nature and availability of the human right to water in Lesotho, particularly as it relates to indigenous and rural communities.
8. In doing so, the submission partners note that the UNSR had undertaken an official visit to Lesotho, and note in particular the mandate's country visit report on Lesotho in 2019. That report sets out the relevant factual and legislative background governing access to water and sanitation in Lesotho. The submission partners nevertheless note that the UNSR failed to adequately consult with representatives of civil society during the course of that country visit.

THE NATURE AND CONTENT OF THE RIGHT TO WATER IN LESOTHO

CALS' vision is a country and continent where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power; the dismantling of systemic harm; and a rigorous dedication to justice. CALS uses a combination of research, advocacy, and litigation to advance human rights and social justice in South Africa across a range of programme areas, in order to achieve this vision.

9. Lesotho has no constitutional right to water and sanitation. The Water Act (2008) operates alongside the Water and Sanitation Policy (2007) and the Long-Term Water and Sanitation Strategy (2016). However, as the UNSR noted in 2019,⁵ the implementation of this legislative strategy remains an issue, with many rural households remaining without access to clean running water and sanitation, and not being supplied with the 30 litres per person per day guaranteed therein.⁶

Issues experienced in the provision of the right to water in Lesotho

10. Rural and indigenous communities live in remote areas where the climate is harsh with both flooding and droughts. They experience poor service delivery, if any is forthcoming from the State.
11. Communities typically self-access water and sanitation due to a lack of formal infrastructure with people defecating in the open and walking up to 5 km to collect water from rivers, dams, lakes and other unprotected sources.
12. The *status quo* is exacerbated by increasing climate risks.
13. More generally, SOLD has identified several key issues obstructing the full realisation of rural and indigenous communities' water and sanitation rights, including: lack of legal recognition of rural and indigenous communities' rights; the State's failure to implement policy and legal frameworks, which is compounded by severe funding cuts; a dearth of community participation in decisions which affect their rights to water and sanitation, compounded by the State failing to legislate such rights; ineffective accountability mechanisms to address rights' violations; a weak State response to the COVID-19 pandemic; and ongoing threats to and persecution of human rights defenders.

The gendered nature of accessing the right to water in Lesotho

14. The UNSR's country visit report on Lesotho in 2019 gives a clear picture of the gendered effect of a lack of access to clean running water;⁷ women and girls

⁵ 'Visit to Lesotho: Report of the Special Rapporteur on the human rights to safe drinking Water and sanitation' A/HRC/42/47/Add.1 (8 July 2019) para 18.

⁶ See Lesotho Water and Sanitation Policy (2007) pp v; 4(j).

⁷ 'Visit to Lesotho: Report of the Special Rapporteur on the human rights to safe drinking water and sanitation' A/HRC/42/47/Add.1 (8 July 2019) paras 7-10.

bear the burden of ensuring that the household has water, which they are often required to fetch from far-off water sources. In rural areas, the collection of water may exacerbate existing vulnerabilities by placing women and girls in quiet, unsafe environments where they are at risk of gender-based violence and harassment.

THE EFFECT OF THE OPERATIONS OF NON-STATE ACTORS, INCLUDING DEVELOPMENT FINANCE INSTITUTIONS, ON THE RIGHT TO WATER IN LESOTHO

15. In 1986, Lesotho and South Africa signed the Lesotho Highlands Water Project Treaty for the purposes of providing water to the Gauteng province of South Africa while generating hydroelectricity for Lesotho.⁸
16. The Lesotho Highlands Water Project (LHWP) Phase II was signed in August 2011 between the South African and Lesotho governments. Phase II of the project entails that the Polihali Dam is to be constructed in Lesotho's Mokhotlong District, to form a reservoir on the Orange and Khubelu rivers, covering an area of 5053 hectares with a total storage capacity of 2,325 million cm.⁹
17. South Africa approached the New Development Bank (NDB) for funding for the Phase II Tunnel building from Polihali to South Africa. The NDB approved a loan of ZAR 3.2 billion to South Africa, constituting approximately 10% of the total cost of the project which has an estimated capital expenditure cost of R32.6 billion. The balance of the project cost is financed by other multilateral development banks (including the Development Bank of Southern Africa and the African Development Bank), commercial (including Investec) and institutional investors.¹⁰

The effect of the LHWP Phase II on surrounding communities

⁸ AFRODAD, 'Briefing Paper: The Role of the New Development Banks Africa Regional Centre in Facilitating BRICS Finance in Africa: The Case of the Lesotho Highlands Water Project' (2022), p 16.

⁹ AFRODAD, 'Briefing Paper: The Role of the New Development Banks Africa Regional Centre in Facilitating BRICS Finance in Africa: The Case of the Lesotho Highlands Water Project' (2022), p 13.

¹⁰ AFRODAD, 'Briefing Paper: The Role of the New Development Banks Africa Regional Centre in Facilitating BRICS Finance in Africa: The Case of the Lesotho Highlands Water Project' (2022), p 25.

18. AFRODAD report the following anticipated extent of the effect of the LHWP Phase II project on surrounding communities as follows:

“[I]n interviews conducted by SOLD to the communities to be affected, it was discovered that 1597 Households, 7992 people are to be relocated. Most of them are to lose households, land, fields, fruit trees, cemeteries, kraals and family bonds. SOLD also discovered that at least 10 villages are to face involuntary resettlement and 5 villages will not face resettlement but have been and will be affected by the Polihali dam construction.”¹¹

19. The organisation has further reported that the majority of the affected persons and communities are unclear on the nature and timeline of their relocation, indicating an inadequate consultation process. With their new location not being identified (or at least communicated to them), it is unclear whether they will be able to sustain themselves as subsistence farmers in their traditional manner.¹²
20. The submission partners are not against relocations in their entirety. Rather, we insist on free, prior and informed consent (FPIC) of the affected communities at all levels of the decision-making process, regardless of whether or not relocation is a possibility.
21. Moreover, where relocation is mooted, we insist *inter alia* that –
- 21.1. the affected communities participate in determining whether the relocation will ensure their sustainability and be afforded the Right To Say No if not;
 - 21.2. the relocation *must* result in an improvement to the affected communities’ lives;
 - 21.3. the affected communities be afforded adequate compensation, which comprises at least the following:
 - 21.3.1. both land with secure title and a financial component;
 - 21.3.2. sustainable livelihoods programs;

¹¹ AFRODAD, ‘Briefing Paper: The Role of the New Development Banks Africa Regional Centre in Facilitating BRICS Finance in Africa: The Case of the Lesotho Highlands Water Project’ (2022), p 29.

¹² AFRODAD, ‘Briefing Paper: The Role of the New Development Banks Africa Regional Centre in Facilitating BRICS Finance in Africa: The Case of the Lesotho Highlands Water Project’ (2022), pp 29-30.

21.3.3. a share of the royalties in the LHWP; and

21.3.4. the sustainable development of the areas affected by the LHWP.

22. In a discussion paper which explores the information disclosure practices of the NDB, an individual who has been affected by the LHWP Phase II project reflected that –

“There was an attempt to make community engagement. But the position of different groups was not, let's say, solicited for . . .

The Community engagement was done by the Lesotho Highlands Water Authority alone; there were no other institutions like the financial institutions, hence why we have so many gaps in the engagement in the Community participation strategies. One is the failure to take the views of the people in terms of how many years they have to be compensated, so the compensation for life was not picked up.”¹³

23. The affected communities have thus far not received compensation for this upheaval and the attendant violations, despite a promise to that effect.¹⁴

The accountability of DFIs operating in Lesotho

24. The NDB loans monies directly to its member states, of which South Africa is one. In respect of the LHWP Phase II loan, South Africa is the NDB member state which formally received the loan, and Lesotho is only the implementing country. There is accordingly significant distance between the NDB as funder and the affected Lesotho-based communities, which underscores the affected communities' inability to hold the NDB directly accountable and thereby obtain redress.

25. It is apparent that the experience of affected rural and indigenous communities is such that international principles governing Business and Human Rights, such

¹³ Oxfam South Africa and International Development Law Unit (University of Pretoria) 'Discussion paper 2: Enhancing the New Development Bank's practice of information disclosure - A community perspective' (2022), as yet unpublished.

¹⁴ AFRODAD, 'Briefing Paper: The Role of the New Development Banks Africa Regional Centre in Facilitating BRICS Finance in Africa: The Case of the Lesotho Highlands Water Project' (2022), p 30.

as those contained in the United Nations Guiding Principles on Business and Human Rights,¹⁵ have not been adhered to.

The hijacking of Lesotho's natural resources for the benefit of a neighbouring country

26. The LHWP operates for the benefit of South Africa, its stated purpose being to provide a landlocked and water-scarce South African province with fresh drinking water.
27. As per the above, this operates to the detriment of Lesotho's own people and communities, depriving them of their ancestral lands and livelihoods, and access to vital resources such as water, without compensation being provided for that loss.
28. The rich water resources of Lesotho are accordingly being siphoned off without any benefit being accrued for the persons and communities which originate from the resource-rich areas, either directly through enrichment programmes for the affected communities, or indirectly through the funding of state provision of services.

CONCLUSIONS AND RECOMMENDATION

29. In summary, the submission partners call on the UNSR to take the following steps:
 - Recommend that the Lesotho state enshrine a constitutional right of access to water and sanitation;
 - Recommend that the Lesotho State immediately implement the 2007 Water and Sanitation Policy in full;
 - Recommend that the Lesotho State legislate the right to public participation of affected communities, particularly where decisions are taken which implicate their access to water resources;

¹⁵ 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).

- Engage with development finance institutions that support and/or fund the Lesotho Water Highlands Project Phase II (the New Development Bank, the African Development Bank and the Development Bank of Southern Africa) and ensure they meet social and environmental safeguards, including meaningful community consultation. This includes free, prior and informed consent (FPIC) of the affected communities at all levels of the decision-making process, regardless of whether or not relocation is a possibility.
- Recommend that Lesotho and surrounding States first ensure that Lesotho residents have full access to water and sanitation and appropriate infrastructure, before such resources are directed elsewhere;
- Recommend that the Lesotho State ensure that infrastructure projects not traverse communal lands or necessitate the relocation of rural and/or indigenous communities without adequate compensation;
- Recommend that the Lesotho State ensure that rural and/or indigenous communities which are adversely affected by infrastructure projects are appropriately consulted and compensated;
- Recommend that the Lesotho State ensure that all businesses operating within its borders act in compliance with the UN Guiding Principles on Business and Human Rights;
- To update the mandate's 2019 Country Report to reflect the issues highlighted above; and
- To undertake a country visit to Lesotho to further investigate these issues and provide tangible support to affected persons and communities on the ground, including meeting with such communities and civil society representatives.

ENDS.