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Amy Hardberger

St. Mary's University School of Law, ahardberger@stmarytx.edu

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Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates

Amy Hardberger¹

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”²

“By means of water, we give life to everything.”³

I. INTRODUCTION

Water is necessary for the survival of all life, yet, over one billion of the world's more than six billion people do not have available sources of clean water for drinking.⁴ An additional 1.6 billion people who have access to water for basic survival do not have sufficient water for health and hygiene.⁵ Over two million people die every year due to a lack of safe water.⁶ In some third-world countries, over fifty percent of the population does not have access to safe drinking water.⁷ The global population, now estimated at 6.4 billion people, is rapidly increasing. By 2050, the United Nations (UN) projects the world will hold an additional 2.5 billion people.⁸ The increasing population will create larger global demand for water, and greater numbers of people will have inadequate water supplies.

Types of water uses can vary based on the individual customs of a community. While all societies need water for drinking, cooking, hygiene, agriculture and livestock, some societies also use water for religious ceremonies, exercise, diversion, and even aesthetics.⁹ In addition to the obvious consequences created by the lack of an adequate

¹ Judicial Law Clerk to the Honorable William Wayne Justice, Eastern District of Texas; B.A. Geology 1994, Earlham College; M.S. Hydrogeology 2001, University of Texas at San Antonio; J.D. 2005, Texas Tech University School of Law. The author would like to thank Gabriel Eckstein for his endless enthusiasm and complete support of all of my ideas.

² International Covenant of Civil and Political Rights, G.A. Res. 2200A, art. 6, ¶ 1, U.N. GAOR, 21st Sess., Supp. No. 52, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

³ World Health Organization [hereinafter WHO], *The Right to Water*, at 12 (2003) (quoting Koran 21:30).

⁴ *Id.* at 7.

⁵ *Id.* at 6, 12; Peter Gleick, *The Human Right to Water*, at 2 (1999), available at <http://www.thewaterpage.com/Human%20Right.pdf>, reprinted in 1(5) WATER POL'Y 487-503.

⁶ WHO, *supra* note 3, at 6.

⁷ Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1, 6 (1992).

⁸ UNFPA, *State of World Population 2004*, available at <http://www.unfpa.org/swp/2004/english/ch1/page7.htm#1> (last visited Oct. 22, 2005).

⁹ WHO, *supra* note 3, at 6.

water supply, there are secondary non-obvious effects, such as reducing school attendance or harming a family's ability to earn a living through livestock, farming, or other water-dependent livelihoods.¹⁰

The importance of water and its primacy for many cultures has prompted a movement to establish water as a human right and create governmental obligations to provide citizens with sufficient water resources.¹¹ Human rights involve the protection of the rights of man.¹² Human rights law has many sources including the UN, governmental bodies, and non-governmental organizations (NGOs).

Early human rights were written in general terms and did not explicitly define all possible implied rights. One of the basic rights represented in the initial human rights documents was the right to life.¹³ The right to life was originally read narrowly and did not include basic life necessities.¹⁴ Instead, it simply prohibited the arbitrary deprivation of life without details of what behavior would be prohibited.¹⁵ The right to life has been applied to preventing murder and wartime atrocities, and it has been linked to the abolition of capital punishment.¹⁶ The right to life is now read more broadly to include measures that increase life expectancy like personal health and hygiene.¹⁷

Early proponents of the right to water sought to include it as naturally implicit in the right to life.¹⁸ More recently, groups have endeavored to establish water as a separate and individual right of citizens.¹⁹ Although awareness regarding the human right to water

¹⁰ *Id.* at 7.

¹¹ See SALMAN M. A. SALMAN & SIOBHAN MCINERNEY-LANKFORD, *THE HUMAN RIGHT TO WATER* 7-8 (2004).

¹² MAURICE CRANSTON, *WHAT ARE HUMAN RIGHTS?* 1 (1973). For the purposes of this paper, references to "man" connotes humankind generally and has no gender specific implications.

¹³ See Universal Declaration of Human Rights, G.A. Res. 217A (III), at 72, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

¹⁴ HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 734 (2d ed. 2000).

¹⁵ See William N. Nelson, *Human Rights and Human Obligations*, in *HUMAN RIGHTS NOMOS XXIII* 281, 288-89 (J. Roland Pennock & John W. Chapman eds., 1981) (discussing the possible definitions of the right to life and the problems that occur when the right is expanded).

¹⁶ See STEINER & ALSTON, *supra* note 14, at 47-48; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 4, para. 2. In an effort to strengthen the right to life contained in the original convention articles, Protocol 13 of the European Convention on Human Rights specifically proposes the abolition of the death penalty. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12, and 13, at Protocol 13 (Feb. 2003) at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

¹⁷ STEINER & ALSTON, *supra* note 14, at 734. This broad interpretation was expressed in General Comment No. 6 to the ICCPR which noted that the right to life "cannot properly be understood in a restrictive manner" and should include "measures to reduce infant mortality and to increase life expectancy." U.N. International Human Rights Instruments, *General Comments Adopted by the Human Rights Committee*, General Comment 6, art. 6, ¶ 5, U.N. Doc. HRI/GEN/1/Rev. 1 (1994).

¹⁸ See JOHN SCANLON ET AL., *INTERNATIONAL UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES [IUCN] ENVTL. POL'Y & L. PAPER NO. 51, WATER AS A HUMAN RIGHT* 18-19 (2004) (explaining that the right to water is not a recognized fundamental right but is an implicit component of other rights), available at <http://www.iucn.org/themes/law/pdfdocuments/EPLP51EN.pdf>.

¹⁹ See Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, at art. 14 (2)(h), U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979) [hereinafter CEDAW]; Convention on the Rights of the Child, G.A. Res. 44/25 annex, at art. 24, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989).

has increased dramatically in recent times, the inclusion of water within the right to life or water as a stand alone right has not become customary international law.²⁰

The purpose of this paper is to demonstrate the need to establish water as a human right and thereby raise the right to water to the status of customary international law. Human rights law is the best approach for ensuring people's access to water for many reasons. First, human dependency on water for life and health closely parallels those rights that are already considered customary international law. Seeking to create water as a human right also corresponds with the movement for increased rights and protections for women and children. Further, human rights is a powerful mechanism to establish obligations globally by including enforcement mechanisms within the right. If water becomes a human right, the right would be vested in all citizens in a more effective manner than if it were established through domestic or international law.

This paper will define the right to water and determine governmental responsibility once that right has been established.²¹ Part II provides a basic review of human rights, its major advances, and the treatment of human rights in international law.²² Understanding the basics of human rights law and its evolution is critical to recognizing the mechanisms available to develop water as a human right as well as to visualizing how human rights law can be applied to provide water for people in need.²³

Part III reviews the historic introduction of water as an individual human right.²⁴ This section applies several legal theories to the right to water and catalogues its development through declarations and treaties.²⁵ Part IV defines the proposed right.²⁶ The purpose of this section is to ascertain the extent of the right to water, assuming water is determined to be a human right in and of itself.²⁷ This section reviews past documents and discussions in order to establish the minimal ways in which governments must provide for their citizens to be in compliance with customary international law.²⁸ The conclusion indicates the need for further evaluation in this area and lays the foundation for the author's upcoming work on governmental responsibilities for providing water to their citizens, as well as like intergovernmental obligations. The conclusion also proposes how the right to water can reach the status of customary international law.

II. THE DEVELOPMENT OF HUMAN RIGHTS

“Human rights are protected by internationally guaranteed standards that ensure the fundamental freedoms and dignity of individuals and communities.”²⁹ This definition is

²⁰ Compare SCANLON ET AL., *supra* note 18, at 18-19 (stating that the right to water has not been clearly defined in international law), with SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at ix (explaining that a human right to water exists because it is included in other recognized rights).

²¹ See discussion *infra* Part IV.

²² See discussion *infra* Part II.

²³ See discussion *infra* Part II.

²⁴ See discussion *infra* Part III.

²⁵ See discussion *infra* Part III.

²⁶ See discussion *infra* Part IV.

²⁷ See discussion *infra* Part IV.

²⁸ See discussion *infra* Part IV.

²⁹ WHO, *supra* note 3, at 7. The concept of human rights was not common terminology until as recently as post-World War II. J. Roland Pennock, *Rights, Natural Rights, and Human Rights-A General View*, in HUMAN RIGHTS NOMOS XXIII 1, 1 (J. Roland Pennock & John W. Chapman eds., 1981). Although many

often reduced to the simple phrase, “the rights of man.”³⁰ These rights are generally held by citizens and enforceable against the state.³¹ Human rights are considered universal and can cover a range of services including civil, cultural, economic, political, and social rights.³²

Human rights fall into two distinct categories: 1) welfare rights, defined as rights which assure the provision of certain goods or services considered necessary for human well-being; and 2) liberty rights, which include the right not to be interfered with or maltreated.³³ Welfare rights include economic, social, and cultural rights. They are considered positive rights because they require affirmative action by governments.³⁴ In contrast, a government generally secures liberty rights, which include civil and political rights, by ensuring noninterference with the right.³⁵ The category in which a right is placed determines the governmental duties it imposes and defines whether a state must take affirmative steps to provide the right or simply guard against its deprivation.

Sometimes human rights are codified into a government document such as a Bill of Rights.³⁶ These rights, called positive rights, are the easiest to enforce because the state has recognized their existence and incorporated their enforcement into the local law.³⁷ More frequently, rights are unwritten and are only implicit requirements of society.³⁸ These are called moral rights and their enforcement is much more difficult.³⁹ Nevertheless, when a government does not explicitly recognize certain rights of its citizens, international law can provide a means to require the protection of those rights.

Provisions and obligations included in international treaties are a frequent source of international law. An international treaty can be binding on a country in one of two ways. If a country ratifies a treaty, it is bound by its contents.⁴⁰ Ratification is an affirmative step reflecting a state’s consent and intent to be bound.⁴¹ Although a signature can construe consent, a more authoritative act is usually required.⁴² Ratification, in whatever form it takes in a particular government, is the most common.⁴³

human rights can be related back to natural law, the motivation to codify these protections was to avoid future atrocities like those that occurred in Germany and later in Vietnam. *Id.* at 1, 4.

³⁰ CRANSTON, *supra* note 12, at 1.

³¹ WHO, *supra* note 3, at 7.

³² CRANSTON, *supra* note 12, at 7; WHO, *supra* note 3, at 7.

³³ McCaffrey, *supra* note 7, at 8.

³⁴ SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 24.

³⁵ *Id.*

³⁶ CRANSTON, *supra* note 12, at 1; see VIRGINIA BILL OF RIGHTS ¶ 1 (1776). This early Bill of Rights included the proclamation “that all men are by nature equally free and independent, and have certain inherent rights . . . namely the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness.” *Id.* Similar language was later seen in the United States Declaration of Independence; however, the United States Constitution does not provide for basic human needs. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). See also Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1196 (1987).

³⁷ CRANSTON, *supra* note 12, at 5-6.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 582-83 (6th ed. 2003).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* The United States Constitution requires the ratification of a treaty by the Senate to make that treaty binding on U.S. citizens. U.S. CONST. art. III, § 2, art. VI, cl. 2 (“This Constitution, and the Laws of

International law does not require a country to agree upon an idea for it to be bound.⁴⁴ For example, non-signatory countries can be bound by a provision in an international treaty if the principle rises to the level of customary law.⁴⁵ A principle is considered custom when there is a general acceptance of a rule. There are two requirements which evidence general acceptance: 1) state practice must be shown to be consistent with a rule; and 2) states must conform to a rule due to a sense of legal obligation or *opinio juris*.⁴⁶ Once both of these are present, a doctrine qualifies as customary international law.⁴⁷

In order for a doctrine to be considered customary international law, it must be extensive and virtually uniform. Additionally, only states that are particularly affected by the proposed norm are subject to this implicit customary international law.⁴⁸ Time is not a necessary element to proving custom.⁴⁹ It is also not necessary to show a rigorous conformity to the practice; however, if conduct was inconsistent, the government must consider the variation to be an infringement of state practice.⁵⁰ For the second prong, *opinio juris*, one must show that adherence to a rule is the function of a legal obligation, not simply a moral one.⁵¹

Once this international custom has been established as law, it is recognized as obligatory.⁵² The Vienna Convention on the Law of Treaties expands this by stating that, “[i]f a new peremptory norm or general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”⁵³ These laws are obligatory, but not necessarily absolute. Within customary law, however, there are decrees that cannot be changed. These norms are referred to as *jus cogens*.⁵⁴

Perhaps the most prominent human right to reach *jus cogens* status, and certainly the right most often linked to water, is the right to life. Generally speaking, man’s

the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”).

⁴⁴ BROWNLIE, *supra* note 40, at 6.

⁴⁵ *Id.* See, e.g., Universal Declaration of Human Rights, *supra* note 13. The International Court of Justice (ICJ) applies international law to solve disputes set before it. Statute of the International Court of Justice, 1945 I.C.J., at art. 38 ¶ 1, available at <http://www.icj-cij.org/icjwww/basicdocuments/basicstatute.htm> (last visited Nov. 8, 2005). The sources of international law that are binding within the court include:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id. In order for the ICJ to hear disputes, a state must first accept its jurisdiction. The International Court of Justice, at <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html> (last updated Sept. 17, 2004).

⁴⁶ BROWNLIE, *supra* note 40, at 6-12.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 7.

⁵⁰ *Id.* at 7-8.

⁵¹ *Id.* at 8-10.

⁵² *Id.* at 6.

⁵³ *United Nations Convention on the Law of Treaties Signed at Vienna*, 1155 U.N.T.S. 331, at art. 64 (1969).

⁵⁴ BROWNLIE, *supra* note 40, at 488-90; see *United Nations Convention on the Law of Treaties Signed at Vienna*.

greatest wish is to stay alive.⁵⁵ Some scholars believe that “the right to life . . . is a guarantee against the arbitrary deprivation of life by the state.”⁵⁶ Under this theory, there is no requirement for a state’s affirmative action towards these means.⁵⁷ For example, a state that apathetically allows its citizens be deprived of adequate water supplies is not in violation of any human right. However, if these treaties and agreements are interpreted more proactively, a government’s inaction in building water systems or otherwise interfering with the delivery of water to its people also violates its obligations.⁵⁸

More recently, the emphasis has been to read the right to life more broadly and positively to include the pursuit of policy and legislation to support those means as well as the more traditional protection against arbitrary deprivation of rights.⁵⁹ Even a broad interpretation raises questions as to what exact action is required. Perhaps the minimum requirement for governments is due diligence.⁶⁰ Although due diligence has the disadvantage of being an undefined standard, it provides an adjustable criterion that depends on a particular government’s capabilities and resources.⁶¹ The flexibility of the due diligence standard could also be its downfall in implementation. It raises several questions regarding who gets to determine a state’s capabilities and who determines what diligence is sufficient. In spite of its drawbacks, the usefulness outweighs the uncertainty by providing a start that, in theory, can incorporate all countries.

A. Organizations, Treaties, and Agreements

Although human rights is an evolving area of international law, existing organizations and landmark documents must be considered in any human rights discussion. These groups and landmark documents broke ground by raising general awareness and generating voluminous support at the international level. Understanding these documents is the first step in comprehending how an additional right can be added to the foundation they have built.

1. The United Nations and its Declaration

The UN is one of the leading international organizations in the area of human rights. Its Charter, adopted in 1945, states that the UN shall promote “respect for, and observance of, human rights and fundamental freedoms,” and it is the duty of all members to promote these goals.⁶² The UN Charter was the first attempt at comprehensive protection for individuals, but it lacked an explanation of the rights it

⁵⁵ CRANSTON, *supra* note 12, at 25.

⁵⁶ McCaffrey, *supra* note 7, at 9.

⁵⁷ *Id.*

⁵⁸ See Susan Moller Okin, *Liberty and Welfare: Some Issues in Human Rights Theory*, in HUMAN RIGHTS NOMOS XXIII 230, 240 (J. Roland Pennock & John W. Chapman eds., 1981).

⁵⁹ See ICCPR, *supra* note 2, art. 6 gen. cmt.

⁶⁰ McCaffrey, *supra* note 7, at 13. This type of approach is reflected in the UN’s International Covenant of Economic, Social, and Cultural Rights. Article 2 asserts that states are to take steps “to the maximum of [their] available resources, with a view of achieving progressively the full realization of the rights recognized.” International Covenant of Economic, Social, and Cultural Rights, G.A. Res. 2200A, art. 2, U.N. GAOR, 21st Sess., U.N. Doc A/6316 (1966) [hereinafter ICESCR].

⁶¹ McCaffrey, *supra* note 7, at 13.

⁶² U.N. CHARTER arts. 55 & 56.

included.⁶³ Based on the goals listed in the Charter, the UN created the Commission on Human Rights in the following year.⁶⁴ This commission drafted the concerns of the UN in the Universal Declaration of Human Rights (UDHR) in 1948.⁶⁵ The purpose of the UDHR was to define the rights listed by the Charter.⁶⁶

One of the critical ideas expressed by the UDHR is that human rights are universal and international.⁶⁷ The preamble states that human rights “should be protected by the rule of law” such that man has a recourse to demand what is deserved.⁶⁸ The Declaration provides for many important rights; perhaps the one most critical to the right to water is Article 3 which provides, “[e]veryone has the right to life, liberty and security of person.”⁶⁹

Although there is no specific definition of “life” in the UDHR, some clarification can be found in its later articles. For example, Article 25 states, “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”⁷⁰ It is important to note, that of the many specifics listed in this document as human rights essentials, water is not one of them.

The UN subsequently adopted two human rights covenants: the International Covenant on Civil and Political Rights (ICCPR); and the International Covenant of Economic, Social, and Cultural Rights (ICESCR) to further explain the rights listed in the Declaration of Human Rights.⁷¹ After twelve years of consideration, both covenants entered into force in 1976.⁷² Although the rights were divided into two separate covenants, they were seen by the General Assembly as interrelated and indivisible.⁷³ Therefore, one covenant should not be given precedence over the other. Although all of the articles in these documents are not binding customary international law, the fundamental provisions, especially of the UDHR, can be considered customary or “an authoritative interpretation of relevant UN Charter provisions, or both.”⁷⁴ Even if the UDHR is not entirely customary international law, certain principles raise the level of awareness for moral and political standards.⁷⁵

The ICCPR is primarily concerned with political rights; however, its declarations can be applied to other situations. This covenant contains strong language guaranteeing all people the right to life.⁷⁶ Because the ICCPR does not define the limitations meant by

⁶³ LINDA A. MALONE, INTERNATIONAL HUMAN RIGHTS 2 (2003).

⁶⁴ SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 18.

⁶⁵ *Id.* at 19.

⁶⁶ MALONE, *supra* note 63.

⁶⁷ SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 20.

⁶⁸ Universal Declaration of Human Rights, *supra* note 13, at 71.

⁶⁹ *Id.*

⁷⁰ *Id.* at 76.

⁷¹ MALONE, *supra* note 63, at 21-22.

⁷² *Id.* at 21.

⁷³ Indivisibility and Interdependence of Economic, Social, Cultural, Civil, and Political Rights, G.A. Res. 42/102, para. 5-6, U.N. GAOR, 93d Plen. Mtg., U.N. Doc. A/RES/42/102 (Dec. 7, 1987).

⁷⁴ McCaffrey, *supra* note 7, at 8.

⁷⁵ SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 20-21.

⁷⁶ See *supra* note 1 and accompanying text.

the word “life,” it is reasonable to infer that the deprivation of life-sustaining substances such as water violates the right to life, but the document does not specifically state this.⁷⁷

The ICESCR addresses people’s basic social rights, which include the right to “an adequate standard of living” as well as the right to “the highest attainable standard of physical . . . health.”⁷⁸ The ICESCR further explains that, to achieve these ends, a country should improve environmental hygiene and prevent disease.⁷⁹ The covenant also provides that, “[i]n no case, may a people be deprived of its own means of subsistence” or adequate food.⁸⁰ Both of these allowances could implicitly include water. Another important aspect to this document, in contrast to its sister document, is that the ICESCR attempts to protect “second generation rights,” which are generally positive in nature and require the government to affirmatively provide the services defined.⁸¹

2. Regional Agreements

Other organizations have also contributed to the development of human rights law on a regional scale. Europe has the most developed regional system of human rights law.⁸² One of the leaders of this movement is the Council of Europe, a multinational agency created in 1949 that now has forty-nine member states.⁸³ In 1950, the Council completed the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights, which established the rights guaranteed to everyone within its jurisdiction.⁸⁴ Subsequent protocols expanded the document with additional rights.⁸⁵

Similar to the language seen in the UDHR and the ICCPR, the European Convention emphasizes that “[e]veryone’s right to life shall be protected by law. No one shall be deprived of his life intentionally.”⁸⁶ Also, similar to previous documents, the convention does not define the perimeters of the right to life, though proponents have argued that water should fall under this purview.⁸⁷ The Convention also established its own enforcement mechanism called the European Court on Human Rights.⁸⁸ States and

⁷⁷ See Gleick, *Human Right to Water*, *supra* note 5, at 4.

⁷⁸ ICESCR, *supra* note 60, arts. 11, 12.

⁷⁹ *Id.* at art. 12(2)(b)-(d).

⁸⁰ *Id.* at arts. 1(2), 11.

⁸¹ SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 22.

⁸² MALONE, *supra* note 63, at 6.

⁸³ Council of Europe, *About the Council of Europe*, http://www.coe.int/T/e/Com/about_coe/ (last modified Jan. 2005).

⁸⁴ Council of Europe, *The European Convention on Human Rights*, http://www.coe.int/T/e/Com/about_coe/human_rights.asp (last modified June 2004).

⁸⁵ *Id.* In 1994, Protocol 11 changed how a citizen can bring a human rights claim by removing the government’s option to grant the right to an individual petition and instead established a *de facto* acceptance. Vaughne Miller, *Protocol 11 and the New European Court of Human Rights*, at 12, HOUSE OF COMMONS LIBR. RES. PAPER 98/109 (Dec. 4, 1998), available at <http://www.parliament.uk/commons/lib/research/rp98/rp98-109.pdf>.

⁸⁶ Eur. Consult. Ass., *Convention for the Protection of Human Rights and Fundamental Freedoms*, at art. 2 ¶ 1 (1950) (amended by Protocol Nos. 3, 5, 8, 11).

⁸⁷ See Centre on Housing Rights and Evictions, *Legal Resources for the Right to Water*, 41 (2004), available at http://www.cohre.org/downloads/water_res_8.pdf.

⁸⁸ Council of Europe, *The European Court on Human Rights*, *supra* note 84.

individuals can bring suit for an alleged violation that is guaranteed by the convention to this court.⁸⁹ The court has jurisdiction over the parties to the Convention.⁹⁰

There are corollary documents from the other side of the world. The first of these is the American Declaration of the Rights and Duties of Man (ADRDM). Predating the UDHR by six months, it was the first international human rights instrument of a general nature.⁹¹ This document was drafted by the ninth international conference of American States, held in Bogotá, Colombia in 1948.⁹² Similar to many other general rights documents, Article One of the ADRDM seeks to protect the right to life, liberty, and security of person.⁹³

The American Declaration on the Rights and Duties of Man has been largely superseded by the more detailed American Convention on Human Rights (ACHR). This document was drafted in 1969 by the Inter-American Commission on Human Rights (IACHR) and entered into force in 1978.⁹⁴ The preamble of the ACHR reaffirms the goal of the Americas to protect the essential rights of man which are intrinsic rights based on attributes of human personality.⁹⁵ At present, the ACHR has been ratified by twenty-four of the Organization of American States member countries.⁹⁶ Although the ACHR's right to life provision is more detailed than that of its predecessor, adding that no one should arbitrarily be deprived of their right to life, the article does not specifically include food, water, or health.⁹⁷ Despite its lack of enumeration regarding all possible aspects of the right to life, the document is an important part of general human rights development.

The development of human rights is a new and quickly evolving source of international law. In a historically short period of time, many protections, such as the right to life, have been established as a right from which there can be no derogation.⁹⁸ These rights are protected by international custom and can be considered obligatory regardless of whether the protection is codified by local law.⁹⁹ Although this type of right has important consequences for individuals, existing rights do not guarantee the right to

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Inter-American Commission on Human Rights, *What is the IACHR?*, <http://www.cidh.org/what.htm> (last visited Nov. 2004).

⁹² STEINER & ALSTON, *supra* note 14, at 868.

⁹³ Inter-American Commission on Human Rights, *American Declaration of the Rights and Duties of Man* art. 1, 1948, AG/RES. 1591 (XXVIII-O/98), available at <http://www.cidh.org/Basicos/basic2.htm>

⁹⁴ Inter-American Commission on Human Rights, *supra* note 91, at *Brief History of the Inter-American Human Rights System*. The IACHR, formed in 1959, is one of two sections of the Inter-American system that deal with human rights. *Id.* Elected by the General Assembly of the Organization of American States, the IACHR's seven members act independently – not as representatives of any particular country. *Id.* The Commission also acts as an enforcement body where any person, group of persons, or non-governmental organization may allege violations of rights protected in the American Convention or the American Declaration. *Id.* The petitioner must show that the victim has exhausted all means of remedying the situation domestically before the Commission has jurisdiction. *Id.*

⁹⁵ American Convention on Human Rights, *supra* note 16, ¶ 2.

⁹⁶ NationMaster.com, *Encyclopedia: American Convention on Human Rights*, <http://www.nationmaster.com/encyclopedia/American-Convention-on-Human-Rights#Ratifications> (last visited Aug. 2005).

⁹⁷ *Am. Convention on Human Rights*, *supra* note 16, art. 1; *Universal Declaration of Human Rights*, *supra* note 13, art. 4(1).

⁹⁸ *See id.* at art 3.

⁹⁹ BROWNLIE, *supra* note 40, at 6.

water. Nevertheless, present documents provide the underpinning for the creation of the human right to water.¹⁰⁰

III. WATER AS A HUMAN RIGHT

Establishing water as a human right is a changing process that finds its foundation in a dependent human rights past and that seeks an independent future. Early discussions focused on whether water should be an independent human right. Many developmental theories support this conclusion. A rights-based approach, environmental justice theory, and sustainable development proponents all agree that water must be a right, each advancing different but related assertions to support this need.

Past discussions and documents must be reviewed to understand the right to water's current status and extent. Its impact and obligations depend on whether water will be implicitly included in other human rights or will be a stand-alone right. Human rights debates have attempted to establish water as an independent right to ensure maximum benefits and enforcement mechanisms for citizens. Although global recognition of this need is increasing, it has not reached the level of customary international law as a separate right. This issue aside, great strides have been made in the global recognition of the basic right to water and the need to ensure widespread access.

A. *Why Water?*

At first blush, the importance of water seems simple; life cannot exist without it. However, the implications of this life-sustaining quality are more complicated. Even recognizing its importance, some argue that it is not necessary to establish the right to water as a separate human right.¹⁰¹ This issue becomes especially complex if water is incorporated into the right to life.

Simply assuming that water is included in the right to life will not create the recognition or enforcement that is necessary to help people who are in need of the resource.¹⁰² The importance of water in the daily life of the world's population raises its importance beyond academic conjecture and into action. Past sustainability efforts have shown that shining a light directly on an issue is often the best way to bring it out of the shadows.¹⁰³ Providing rules and creating accountability through enforcement mechanisms is often the only way to ensure change.

¹⁰⁰ See, e.g., *Am. Convention on Human Rights*, *supra* note 16, art. 2 (1992); *Universal Declaration of Human Rights*, *supra* note 13, art. 3.

¹⁰¹ See Gleick, *Human Right to Water*, *supra* note 5, at 3 (noting that although the right to food has been recognized, widespread famine still remains).

¹⁰² See SCANLON ET AL., *supra* note 18, at 1.

¹⁰³ See *id.* at 21 (discussing the Rio Earth Summit as an example of how academic discussions can raise excitement but not necessarily ensure implementation without sufficient governance arrangements). *Cf.* United Nations Dev. Programme, *The Montreal Protocol*, <http://www.undp.org/seed/eap/montreal/montreal.htm> (last visited Apr. 23, 2005) (showing an example of a successful world-wide sustainability effort in the handling of the ozone depletion crisis in the late 1980s, when joint agreements such as the Montreal Protocol, formed as a result of scientific data and media attention, created widespread participation to reduce ozone depleting gases in the atmosphere).

Establishing water as a right puts people in the center of development as opposed to passive recipients.¹⁰⁴ The method of incorporating norms and principles with policy is called the “rights-based approach.”¹⁰⁵ This approach focuses on empowerment: “approaching development from a rights perspective informs people of their legal rights and entitlement and empowers them to achieve those rights.”¹⁰⁶ The rights-based approach also serves to level the playing field for gender and economic divisions.¹⁰⁷ In the context of water, establishment of a right provides an enforcement mechanism. Once this mechanism is in place, governments are held accountable when they take no tangible steps towards the right’s protection or satisfaction.¹⁰⁸

1. Sustainable Development

This recognition of water as a right has also been tied to the sustainable development movement that links human rights to the environment.¹⁰⁹ There is an interrelation between social and environmental rights, creating a chain reaction if one is considered independent from the other:¹¹⁰ “the link between social well-being and environmental health will become increasingly important and securing social well-being without acknowledging the environmental realities will ultimately fail.”¹¹¹ Proponents argue that human rights must be supported in both spheres simultaneously for success to occur because “[h]uman rights cannot be secured in a degraded or polluted environment.”¹¹² Following this logic, the explicit inclusion of water is an integral factor in the elimination of poverty and ensuring a better environment for the future.¹¹³ Although the right to a healthy environment is not customary international law, this theory is still useful because it links the right to water to existing poverty eradication efforts and other environmental movements.

On the international level, sovereignty issues limit the types of actions that can be used to enforce a global initiative.¹¹⁴ The most effective action to overcome this

¹⁰⁴ See WHO, *supra* note 3, at 9.

¹⁰⁵ *Id.* at 10.

¹⁰⁶ *Id.* at 9.

¹⁰⁷ *Id.* at 10.

¹⁰⁸ *Id.*

¹⁰⁹ Scanlon et al., *supra* note 18, at 14.

¹¹⁰ See *id.* See also United Nations General Assembly, *supra* note 73, ¶ 5 (stating that “all human rights and fundamental freedoms are . . . interdependent and that the promotion and protection of one category of rights can never exempt or excuse States from the promotion and protection of the other rights”).

¹¹¹ Scanlon et al., *supra* note 18, at 1.

¹¹² *Id.* at 14.

¹¹³ See U.N. Comm. on Economic, Social, and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15: The right to water: arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights*, ¶ 1, U.N. Doc. E/C.12/2002/11 (Nov. 26, 2002) (stating that “depletion and unequal distribution of water is exacerbating existing poverty”) [hereinafter Comment 15].

¹¹⁴ See BROWNIE, *supra* note 40, at 287- 88 (noting that under the theory of sovereignty, all states are considered equal with discretionary power regarding the resources within their borders); *Id.* at 290 (stating that “a corollary of the independence and equality of states is the duty on the part of states to refrain from intervention in the internal or external affairs of other states”); *Id.* at 291 (observing that despite the latter statement, international law favors the theory that “no subject is irrevocably fixed within the reserved domain,” and when enforcement of one state’s policy is only possible *vis-à-vis* another state, the issue in no longer domestic and falls under the international purview and is subject to international legal principles).

limitation is to promote the cause in such a way that it rises to the level of customary international law.¹¹⁵ Once this occurs, both the countries that ratified existing declarations or treaties, as well as non-parties are bound to adhere to their requirements. Without this movement to identify water as a human right, there would be no means to protect those who struggle to live each day without access to the minimum water necessary for life: “ensuring that access to sufficient safe water is a human right constitutes an important step towards making it a reality for everyone.”¹¹⁶

2. Environmental Justice Approach

Establishing water as a human right also finds support in the relatively new theory of environmental justice. Environmental justice is a theory which started in the United States during the late 1970s and is now recognized around the world.¹¹⁷ President Clinton described it as “disproportionately high and adverse human health or environmental effects . . . on . . . low-income populations.”¹¹⁸ The United States Environmental Protection Agency later expanded that definition to require the fair treatment of people of all races, cultures, incomes, and educational levels with respect to the development and enforcement of environmental laws, regulations, and policies. It described “fair treatment” as meaning that no population should be forced to shoulder a disproportionate share of exposure to the negative effects of pollution due to lack of political or economic strength.¹¹⁹

The primary foci of environmental justice are “fairness” and “justice”.¹²⁰ Justice is further broken down to include: distributive, procedural, corrective, and social justice.¹²¹ Distributive justice means that all citizens have an equal right to goods and opportunities.¹²² This includes equal distribution of environmental hazards as well as protections.¹²³ Some advocates argue that the duty imposed is the overall reduction in environmental risks.¹²⁴ Among the goods included in distributive justice are environmental benefits, such as safe drinking water.¹²⁵

¹¹⁵ See Scanlon et al., *supra* note 18, at 11-13.

¹¹⁶ WHO, *supra* note 3, at 9.

¹¹⁷ John Byrne et al., *A Brief on Environmental Justice*, in ENVIRONMENTAL JUSTICE: DISCOURSES IN INTERNATIONAL POLITICAL ECONOMY – ENERGY AND ENVIRONMENTAL POLICY 3, 3 (John Byrne et al. eds., 2002).

¹¹⁸ Robert R. Kuehn, *A Taxonomy of Environmental Justice*, in ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 6, 7 (Clifford Rechtschaffenn & Eileen Gauna eds., Carolina Academic Press 2002) (citing Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994), amended by Exec. Order No. 12,948, 60 Fed. Reg. 6381, (Feb. 1, 1995)).

¹¹⁹ See Env'tl. Prot. Agency, *Environmental Justice*, <http://www.epa.gov/compliance/basics/ejbackground.html> (last visited Nov. 11, 2005).

¹²⁰ ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 6 (Clifford Rechtschaffenn & Eileen Gauna eds., 2002).

¹²¹ *Id.*

¹²² Kuehn, *supra* note 118, at 8.

¹²³ Deohn Ferris & David Hahn-Baker, *Environmentalists and Environmental Justice Policy*, in ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 66, 66 (Bunyan Bryant ed., 1995).

¹²⁴ Kuehn, *supra* note 118, at 8.

¹²⁵ *Id.*

More advantaged communities often receive greater environmental protections as a result of their ability to participate in regulatory decisions.¹²⁶ Procedural justice provides for equal treatment of citizens in procedural aspects to ensure that everyone has a voice.¹²⁷ Many agencies have attempted to achieve this through public participation, creating an open forum that is free from economic favoritism.¹²⁸

Corrective justice, also called compensatory or restorative justice, looks at the punishment mechanism of non-compliant governments.¹²⁹ Finally, social justice looks to the better ordering of society so that people's needs are fully met.¹³⁰ This merge of socialism and the environmental movement broadens the focus of environmental justice, viewing it as part of the greater problem of disparity that needs to be addressed.¹³¹

Although environmental justice finds its roots at a national level in the United States, this theory has been applied in an international context and has applications to the human right to water because "[w]ater is a major part of the human environment."¹³² The lower socio-economic brackets, women, and children are most often affected by the consequences of an inadequate water supply.¹³³ Similar disparities can be seen between urban and rural areas.¹³⁴ For example, "some 80% of those who have no access to improved sources of drinking-water are the rural poor."¹³⁵ Excessively poor shanty towns located on the edges of large cities, such as Mexico City, are often not recognized by city authorities, so support infrastructures are not extended into these areas.¹³⁶

Environmental justice will have increased application as water becomes more scarce.¹³⁷ The American southwest is already facing the challenge of rich businessmen trying to buy water for resale at a large profit.¹³⁸ The ability of the rich to take water from the poor for a profit violates the idea of distributive justice. International documents, such as the UN's General Comment No. 15 (Comment 15), attempt to remedy this

¹²⁶ Rechtschaffenn & Gauna eds., *supra* note 120, at 3.

¹²⁷ Kuehn, *supra* note 118, at 9. *See also* Comment 15, *supra* note 113, ¶¶ 55-56, for the United Nations' specific recommendation for procedural safeguards for water stating that, "any person or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies," and that there should not be any interference with a person's right to water without an opportunity for consultation.

¹²⁸ Kuehn, *supra* note 118, at 9-10.

¹²⁹ *Id.* at 10.

¹³⁰ *Id.*

¹³¹ *Id.* at 10-11.

¹³² *See* Ruchi Anand, *International Environmental Justice: A North-South Dimension*, in ETHICS AND GLOBAL POLITICS 15 (Tom Lansford & Patrick Hayden eds., 2004); THE ENVIRONMENTAL JUSTICE READER: POLITICS, POETICS & PEDAGOGY 21 (Joni Adamson et al. eds., 2002) [hereinafter POLITICS, POETICS & PEDAGOGY].

¹³³ WHO, *supra* note 3, at 22, 25.

¹³⁴ *Id.* at 22.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See* POLITICS, POETICS & PEDAGOGY, *supra* note 132, at 23.

¹³⁸ *Id.* at 22 (describing a situation where a multimillionaire proposed to mine a confined aquifer in the rural San Luis Valley to sell the water to the cities of Reno and Las Vegas). A similar situation arose in Northern Texas in 2001 when millionaire T. Boone Pickens bought land with a plan to mine the fossil Ogallala aquifer of 200,000 acre-feet of water and sell it to larger cities. Joe Nick Patoski, *Boone Pickens Wants To Sell You His Water*, TEXAS MONTHLY, August 2001. Many farmers who rely on the aquifer for their farming livelihood protested this idea. Under the right of capture in Texas, however, there may not be legal means to stop this type of sale from occurring. *Id.*

disparity by stating that although everyone has a right to water, “[s]tates parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees.”¹³⁹

Environmental justice is intertwined with human rights and sustainable development.¹⁴⁰ Intrinsic to the sustainable development approach is the protection of vulnerable members of society.¹⁴¹ This method of evaluation examines the relationship “between the social and environmental aspects of economic development.”¹⁴² As commodity production increases, with the effect of benefiting the wealthy, pollution and resource depletion that is necessary for manufacturing victimizes poor communities and nations.¹⁴³ Working from the premise of an international economy and shared ownership of the world environment, a shift towards risk minimization in commodity production will have positive benefits on long-term global protection and sustainability.¹⁴⁴ Increasing human rights, including the right to water, will assist in the reduction of poverty by bringing poor people’s living conditions to a higher standard that is more comparable to that of people with greater means.¹⁴⁵ This argument becomes particularly applicable in the north/south debate.

The north/south debate argues that more developed nations environmentally exploit less developed nations.¹⁴⁶ Less developed regions are distinguished by “historically determined social and economic conditions resulting from their colonial and imperial past,” creating a “qualitative dividing line” between them.¹⁴⁷ The economically powerful northern countries have focused on the environmental issues that are more important to them, but the rise of environmental justice would obligate a shift in priorities to ensure that the needs of southern countries are met.¹⁴⁸ The question then becomes whether the northern countries have an obligation to assist the southern countries in achieving their goals. If world maintenance is viewed as a global responsibility, cooperation and implementation of policies would be the duty of all nations, especially those with greater resources.¹⁴⁹

Environmental justice is not without criticism. One complaint is that the movement focuses more on procedure, such as public participation, than on improving the

¹³⁹ Comment 15, *supra* note 113, ¶ 16.

¹⁴⁰ Nicholas Low & Brendan Gleeson, *Ecosocialization and Environmental Justice*, in 8 ENVIRONMENTAL JUSTICE: DISCOURSES IN INTERNATIONAL POLITICAL ECONOMY – ENERGY AND ENVIRONMENTAL POLICY 203, 210 (John Byrne et al. eds., 2002).

¹⁴¹ Scanlon et al., *supra* note 18, at 14.

¹⁴² Low & Gleeson, *supra* note 140, at 226.

¹⁴³ John Byrne et al., *The Production of Unequal Nature*, in 8 ENVIRONMENTAL JUSTICE: DISCOURSES IN INTERNATIONAL POLITICAL ECONOMY – ENERGY AND ENVIRONMENTAL POLICY 261, 287 (John Byrne et al. ed., 2002).

¹⁴⁴ See Low & Gleeson, *supra* note 140, at 210.

¹⁴⁵ See SCANLON, et al., *supra* note 18, at 14.

¹⁴⁶ Kuehn, *supra* note 118, at 6.

¹⁴⁷ ANAND, *supra* note 132, at 1 (quoting MARIAN A.L. MILLER, THE THIRD WORLD IN GLOBAL ENVIRONMENTAL POLITICS 19 (1995)).

¹⁴⁸ *Id.* at 16.

¹⁴⁹ *Id.* at 17-18; Vandana Shiva, *Ecological Balance in an Era of Globalization*, in GLOBAL ETHICS & ENVIRONMENT 47 (Nicholas Low ed., 1999). The 1992 Earth Summit in Rio was the first major recognition of the international responsibility for protection of the global environment.

environmental effects on human health.¹⁵⁰ Because the movement focuses more on politics than public health, improvements to health standards are often secondary to political advocacy.¹⁵¹ Another complaint is that the shift from a health or risk focus to one of nondiscriminatory prioritization actually endangers those it seeks to protect.¹⁵² Despite the possible weaknesses of environmental justice in enforcement and policy implementation, its strength is its ability to empower and mobilize people at a grassroots level.¹⁵³ The focus on social and political power, as opposed to economics, make it a powerful tool at the international level by giving less fortunate states leverage to demand equality in environmental and distributive matters, including the demand for sufficient quantities of water.¹⁵⁴

B. *Establishing Water as a Human Right*

The first recognition that water should be a human right sought to attach it to the existing rights of health or life. Many of the earlier treaties and declarations now used to support the premise that water is fundamental do not explicitly mention such a claim. Although it is unclear why water was not specifically listed, its presence might have been assumed based on water's obvious relation to life.¹⁵⁵ This is supported by the necessity of water to fulfill the existing goals that are listed.¹⁵⁶ More support is raised for this theory when it is considered that other, lesser rights were listed in those treaties and declarations.¹⁵⁷ If the UDHR made an effort to protect against unemployment, surely it intended something as fundamental as water to be implicitly included in naturally related provisions.¹⁵⁸ Even if the drafters did intend to include it, its physical absence in the provisions makes enforcement difficult.

More recently, groups have recognized the importance of establishing water as an independent right. The IUCN expressed this goal well when it stated, “[f]ormally acknowledging water as a human right, and giving content and effect to this right, may be a way of encouraging the international community and governments to enhance their efforts to satisfy basic human needs.”¹⁵⁹ Although reference and even inclusion of water as a human right has increased awareness in the international community, this has not yet raised the right to water to the level of customary international law.¹⁶⁰

¹⁵⁰ CHRISTOPHER H. FOREMAN, JR., *THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE*, 64-65 (1998).

¹⁵¹ *Id.* at 65-66.

¹⁵² *Id.* at 117-118.

¹⁵³ *Id.* at 122-23, 126-27.

¹⁵⁴ *See id.* at 12; Byrne et al., *Brief, supra* note 117, at 3.

¹⁵⁵ *See* Gleick, *Human Right to Water, supra* note 5, at 5 (discussing that the list of factors included in the UDHR's Article 25 standard of living provision was not meant to be all-inclusive, based on the drafting debates).

¹⁵⁶ *Id.* Rights such as those related to the prevention of health and disease are particularly conditioned on the ability of the person to have access to a sufficient water supply. *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ SCANLON, et al., *supra* note 18, at vii.

¹⁶⁰ *Contra* SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at ix.

One of the indications that the right to water has not risen to the level of customary international law is the lack of a clear scope.¹⁶¹ Most human rights documents do not mention water and those that do provide little to no indication of the extent of the right. It is often unclear if the obligation is limited to drinking water or if it also includes water for agriculture and hygiene. Various human rights documents also conflict on whether a government fulfills its duty by not interfering with access to water or whether the obligation requires more affirmative action for compliance. For instance, some merely require the right to access¹⁶² while others place the burden on the state to provide adequate drinking water.¹⁶³

The first official debate on the right to water occurred in 1977 at the Mar del Plata Conference in Argentina.¹⁶⁴ The Conference's Resolution II on "Community Water Supply" made the landmark declaration that all peoples have a right to access of sufficient quantity and quality of drinking water.¹⁶⁵ This resolution linked these needs to the necessity of human life and provided the basis for subsequent documents that sought to confirm and delineate the right.¹⁶⁶ Although it did not define the right to water, it recognized a need and set a precedent for future discussions.

1. Landmark Documents

In the short time since the Mar del Plata Conference introduced the idea of water as a human right, several important documents have attempted to explicitly establish the right. Similar to human rights generally, these treaties and agreements are the result of work by the UN, NGOs, and individual governments. Although these documents have greatly increased the recognition of the importance of water, there are lingering questions about enforceability and the scope of the right.

i) The United Nations

As in the movement for human rights overall, the UN has been instrumental in promoting water as a human right. The UN has made efforts to raise awareness of both the need for water and other related issues. For example, the UN declared 2003 the International Year of Freshwater.¹⁶⁷ The goal was to raise awareness and implement the work of previous conferences such as the Millennium Declaration, which established a goal to reduce the proportion of people unable to reach or afford safe drinking water by one half before 2015.¹⁶⁸

¹⁶¹ Scanlon et al., *supra* note 18, at 12.

¹⁶² See Comment 15, *supra* note 113.

¹⁶³ See CEDAW, *supra* note 19, art. 14(2)(h).

¹⁶⁴ SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 8-9.

¹⁶⁵ Report on the United Nations Water Conference, Mar del Plata, G.A. Res. 32/158, U.N. GAOR, 107th Plen. Mtg., U.N. Doc. E.77.II.A.12 (1977).

¹⁶⁶ SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 8.

¹⁶⁷ U.N., *International Year of Freshwater 2003*, <http://www.wateryear2003.org> (last visited Nov. 7, 2004).

¹⁶⁸ *Id.*; U.N. Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess. ¶ 19, U.N. Doc. A/RES/55/2 (Sept. 8, 2000). Similarly, a 2002 goal of the World Summit on Sustainable Development was to halve the proportion of people that do not have access to basic sanitation by 2015. *Johannesburg Summit*, <http://www.johannesburgsummit.org/index.html> (last updated Mar. 24, 2003).

In addition to raising awareness, the UN has drafted several important documents. The first human rights treaty to explicitly mention the right to water was the Convention for the Elimination of all Forms of Discrimination against Women (CEDAW) in 1979. This convention obligates states to “take all appropriate measures . . . [to] ensure” the right “to enjoy adequate living conditions particularly in relation to . . . water supply.”¹⁶⁹ The express inclusion of water in the treaty may have stemmed from the fact that women are generally responsible for gathering water.¹⁷⁰ Women are also the group most negatively affected by lack of adequate water for hygiene.¹⁷¹

A second, equally important document was the 1989 Convention on the Rights of the Child, entered into force in September 1990. The preamble to this document recognized that “childhood is entitled to special care and assistance . . . [and] children should be afforded the necessary protection and assistance.”¹⁷² To achieve these ends, states are to ensure, among other things, that an infrastructure exists to provide an accepted standard of health care.¹⁷³ A familiar edict is found in Article 6, stating “[s]tates Parties recognize that every child has the inherent right to life.”¹⁷⁴ Unlike the UDHR, which provided no clarification of this idea, Article 6 of the convention document goes on to explain that states are required to ensure survival of the child to the “maximum extent possible.”¹⁷⁵ This broad phrasing may be sufficient to create an affirmative duty on the state to protect the survival of children and would implicitly include water. However, this interpretation may be unnecessary because a direct duty regarding water is already placed on the state.

Analogous to what was frequently seen in previous human rights documents, this document discusses the right to health, but the Convention on the Rights of the Child also included a specific provision for clean drinking water.¹⁷⁶ The document directs the state to take appropriate means to provide adequate, clean drinking water to combat disease and malnutrition.¹⁷⁷ Interestingly, this clause does not specify whether the state holds this obligation for children, expectant mothers, or society at large. Together, CEDAW and the Convention on the Rights of the Child are the only two human rights treaties that refer directly to a right to water.¹⁷⁸

Perhaps the greatest victories to date for those seeking to establish water as a human right were the 2000 and 2002 General Comments to United Nations Committee on Economic, Social, and Cultural Rights. In 1987, a committee was invited to create general comments on the ICESCR.¹⁷⁹ Comments are released to clarify rights given in the source document in order to assist states’ implementation of the Covenant and its

¹⁶⁹ CEDAW, *supra* note 19, art. 14(2)(h).

¹⁷⁰ Scanlon et al., *supra* note 18, at 5-6. An African woman may spend over one quarter of her time collecting water. *Id.* at 6 n.25.

¹⁷¹ WHO, *supra* note 3, at 25.

¹⁷² *Convention on the Rights of the Child*, *supra* note 19.

¹⁷³ *Id.* at art. 24.

¹⁷⁴ *Id.* at art. 6.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at art. 24(2)(c).

¹⁷⁷ *Id.*

¹⁷⁸ Scanlon et al., *supra* note 18, at 5.

¹⁷⁹ SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 45.

articles.¹⁸⁰ Comments are not binding *per se*, can only elucidate existing rights, and cannot create new rights or expand existing ones. Therefore, support for all conclusions must be present in existing documents.¹⁸¹

The first important comment for this discussion was General Comment No. 14 (Comment 14) released in 2000. Comment 14 linked the need for potable water with the right to health by explaining that Article 12 of the ICESCR included things that contribute to health, including “access to safe and potable water.”¹⁸² Comment 14 also places immediate obligations on governments in relation to the right to health, but limits expectations by the resources available to the governments.¹⁸³ Obligations include access, as well as protection of water resources from contamination.¹⁸⁴ This specific enumeration of water established a right that previously existed only by implication.

The obligation to provide water was further clarified in 2002’s Comment 15 where the Committee recognized water as a separate right included within the ICESCR, stating it was “one of the most fundamental conditions for survival.”¹⁸⁵ Analogous to Comment 14, this Comment not only recognized that water is a limited resource, but also linked the right to other human rights including the right to life, health, an adequate standard of living, and adequate food.¹⁸⁶ The central hypothesis behind Comment 15 is summarized in the second paragraph, which states:

The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.¹⁸⁷

The right is divided into three categories: availability, quality, and accessibility, each of which creates separate requirements for compliance.¹⁸⁸ Availability includes quantities for continuous personal and domestic uses.¹⁸⁹ Comment 15 further defines quantity by listing the World Health Organization’s (WHO) minimum water requirement,

¹⁸⁰ *Id.* at 46.

¹⁸¹ *Id.* at 5, 56.

¹⁸² U.N. Comm. on Economic, Social, and Cultural Rights, *The Right to the Highest Attainable Standard of Health: General Comment No. 14: art. 12 of the International Covenant on Economic, Social, and Cultural Rights*, § 4, U.N. Doc. E/C.12/2000/4 (2000).

¹⁸³ *Id.* at §§ 12(a), (d), 30 (explaining that the availability and quality of health care available will be limited by safe and potable water).

¹⁸⁴ *Id.* at §§ 30, 34.

¹⁸⁵ Comment 15, *supra* note 113, ¶ 3.

¹⁸⁶ *Id.* at ¶¶ 1-2. Support for the inclusion of water within the rights granted by the ICESCR came from other UN documents including, the Declaration on the Right of Development (DRD), CEDAW, and Convention on the Rights of a Child, which all specifically listed water. *Declaration on the Right of Development*, G.A. Res. 44/128 (1986); CEDAW, *supra* note 20, art. 14(2)(h); *Convention on the Rights of the Child*, *supra* note 20, art. 24(c). Article 8 of the DRD states conditions where millions of humans are “denied access to such essentials as food [and] water. . .in inadequate measure” present a “massive violation of human rights.” *Declaration on the Right of Development*, *supra* note 187, art. 8.

¹⁸⁷ Comment 15, *supra* note 113, ¶ 2.

¹⁸⁸ *Id.* at ¶ 12(a)-(c).

¹⁸⁹ *Id.* at ¶ 12(a).

but allows for flexibility depending on location-specific circumstances.¹⁹⁰ The quality condition attempts to ensure the water is free of disease-causing contaminants.¹⁹¹ The accessibility prong is the most developed, including the subcategories of physical accessibility, economic accessibility, and non-discrimination.¹⁹² The basic premise is that water should be physically available to all people and free of economic encumbrances.¹⁹³ The scope of all these requirements is conditioned on local settings.¹⁹⁴

One of the important effects of Comment 15 was to bring the sanction model of the ICCPR to the ICESCR and give the Committee the power to require action from the states.¹⁹⁵ States must implement their obligations in a manner that is “deliberate, concrete and targeted towards the full realization of the right to water.”¹⁹⁶ This means that state’s protection against the arbitrary deprivation of water would not be adequate to satisfy the obligation. The obligations to respect, protect, and fulfill the right to water extend the duty to providing access, ensuring that access is not cost prohibitive, and protecting the access against interference by third parties.¹⁹⁷ Although circumstances differ based on regional characteristics, Comment 15 provides minimal duties that must be achieved in all locations.¹⁹⁸ This lowest duty must include the supply of water needed for personal and domestic survival, access to the water on a non-discriminatory basis, equitable distribution of the water, governmental awareness including a national water strategy, monitoring of the local water situation, and efforts towards water sanitation.¹⁹⁹ Efforts should be implemented at a national level, and violations can occur by acts of commission or omission.²⁰⁰

Although it is not binding authority, there are several important impacts of Comment 15.²⁰¹ First, it creates strong support for water as a human right by explicitly incorporating the right into the ICESCR and recognizing its existence in other documents such as CEDAW. Second, because of its level of detail Comment 15 commands “considerable state responsibility and action” by extending the requirement to include uses other than drinking water.²⁰² Perhaps most important, in addition to defining who has the obligation, the Comment takes a major step toward defining the extent of the right to water regarding quantity, quality, and accessibility.²⁰³ These documents create a solid base for establishing the right to water. Together with increased global awareness and government enforcement, change is possible.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at ¶ 12(b).

¹⁹² *Id.* at ¶ 12(c)(i)-(iii).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at ¶ 12.

¹⁹⁵ SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 47.

¹⁹⁶ Comment 15, *supra* note 113, ¶¶ 17 & 21-29.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at ¶ 37.

¹⁹⁹ *Id.* at ¶ 37(a)-(i); *see* discussion *infra* Part IV.

²⁰⁰ *Id.* at ¶ 42-43, 45-59.

²⁰¹ *See* SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 5.

²⁰² *Id.* at 65.

²⁰³ *Id.*

ii) *NGOs*

Around the world, NGOs²⁰⁴ strive to promote the goals they were formed to advance.²⁰⁵ Similarly, human rights organizations, including those attempting to establish water as a human right, have struggled to achieve their objectives.²⁰⁶ At a minimum, NGOs raised global awareness of the issue. However, it could be argued that they also placed pressure on governments to create policy and even assisted in defining the right to water.²⁰⁷ “Above all, human rights NGOs bring out the facts They provoke and energize.”²⁰⁸ The UN’s Economic and Social Council and Human Rights Committee have repeatedly recognized NGOs’ ability to reach out to large groups of people and assist in human rights efforts.²⁰⁹ NGOs were invited to participate in the implementation of the ICESCR by submitting written statements to help the ICESCR realize its goals.²¹⁰

NGOs are particularly effective because they operate under different mandates than other entities involved in these discussions, allowing for a range of information and viewpoints.²¹¹ While governments are often concerned with political posturing, an NGO can supply independent information.²¹² Although human rights are enforceable by a citizen against his or her state, it is sometimes difficult for an individual to have the strength or the knowledge of the system in order to bring a claim. NGOs assist by informing people of their rights and facilitating the judicial process.²¹³ The influence achieved by NGOs has not been without criticism. However, they remain a great mechanism to assist citizens and create governmental accountability.²¹⁴

A simple internet search with the terms “water” and “human rights” quickly reveals the involvement of NGOs in this debate. Well known human rights NGOs such as Amnesty International recognize the importance of water as a right.²¹⁵ Green Cross International released its own Fundamental Principles on the right to water.²¹⁶ This

²⁰⁴ For the purposes of these discussions, reference to NGOs will include both national and international non-governmental organizations.

²⁰⁵ STEINER & ALSTON, *supra* note 14, at 938.

²⁰⁶ *Id.*

²⁰⁷ See SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 39.

²⁰⁸ STEINER & ALSTON, *supra* note 14, at 938.

²⁰⁹ SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 39.

²¹⁰ *Id.*

²¹¹ STEINER & ALSTON, *supra* note 14, at 938.

²¹² *Id.* at 940.

²¹³ See *id.*

²¹⁴ See *id.* at 940-944.

²¹⁵ See Amnesty International, *Human Right to Water* (Mar. 24, 2004), <http://web.amnesty.org/library/Index/ENGIOR100022003?open&of=ENG-375>. Amnesty International released a public statement on the “Human Right to Water” in response to the final Ministerial Declaration of the Third World Water Forum. See *id.*

²¹⁶ Green Cross International, *Mission*, at <http://gcinwa.newaccess.ch/index.htm#> (last visited Sept. 14, 2005). Green Cross is an NGO created in 1993 to build on the Earth Summit in Rio de Janeiro. Bertrand Charrier et al., *Water, Conflict Resolution and Environmental Sustainability in the Middle East*, at <http://www.gci.ch/en/programs/confprevention/wfp/archives/waterconflict.htm> (last visited Sept. 14, 2005). The stated purpose of the organization is to “help[] to create a sustainable future by cultivating harmonious relationships between humans and the environment.” *Id.* A recently released critique of the Global Framework criticizes the work, calling it “seriously flawed.” Steven Shrybman, *Assessing the “Green Cross” Proposal for a Global Framework Convention to the Right to Water* (April 3, 2005), available at http://www.blueplanetproject.net/cms_publications/summary%20gc%20critique.pdf. The Blue Planet Project lists several “deficiencies” including how the right to water was defined, failure to incorporate binding obligations, and a lack of international legal remedies when the right to water is denied. *Id.* This

petition reflects an “inalienable and universal right” to water.²¹⁷ The document defines the right as a “fundamental right of access to . . . water of a quality, quantity and accessibility sufficient to satisfy [] basic human needs.”²¹⁸ It goes on to discuss the obligations created by the right to water and the specific actions that states must perform to comply with the right.²¹⁹ Green Cross explains the basis of the responsibility through theoretical concepts such as sustainable development and social justice.²²⁰ Although documents like these are not binding, they provide valuable tools in constructing more enforceable models.

iii) Local Governmental Action

Human rights are present in two forms. First, many governments have sought to include the right to basic needs among their state policies.²²¹ Second, human rights have been extensively recognized through international documents or treaties similar to those described above.²²² Although some governments include basic human rights in their legal systems, very few include detailed rights, such as water. A stark contrast to this practice can be found in the South African Bill of Rights. South Africa is one of a handful of countries to include the human right to water in its rights afforded to all citizens.²²³ Section 27 of their Bill of Rights states that “[e]veryone has the right to have access to . . . sufficient food and water.”²²⁴ The Water Services Act passed in 1997 gives effect to Section 27.²²⁵ It echoes the Bill of Rights’ sentiment that everyone has a right to a basic water supply and provides a protocol for the discontinuation of service.²²⁶ This protocol requires that the discontinuation of service be fair and equitable, and that reasonable notice be provided.²²⁷ It also states that service cannot be denied if the person proves to the utility company that she cannot pay.²²⁸

South African courts have been successful in enforcing this right, proving that the inclusion of water as a right can empower citizens who normally might not be heard.²²⁹

debate is just one example of the ongoing debate regarding what should be included in the relatively new concept of the human right to water.

²¹⁷ Green Cross International, *Fundamental Principles for a Global Convention on the Right to Water* (Mar. 2005), available at <http://www.gci.ch/docs/principlesofconvention.pdf>.

²¹⁸ *Id.* at art. 1(1).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Louis Henkin, *International Human Rights as “Rights,”* in HUMAN RIGHTS NOMOS XXIII 257, 258-60 (J. Roland Pennock & John W. Chapman eds., 1981). Many national laws were considered deficient paving the way for international human rights; however, in other locations international regulations mirror that of local law. *Id.* at 259.

²²² *Id.* at 257-60. The international human rights movement encourages countries to include these obligations in their legal construct or, in the alternative, provides basic rights for people when these protected locally. *Id.* at 259.

²²³ The countries of Gambia, Ethiopia, Zambia, and Uganda also include constitutional provisions ensuring the right to clean water for their citizens. See *The Right to Water, Legislation on Right to Water*, at http://www.righttowater.org.uk/code/Legislation_2.asp (last visited Nov. 7, 2004).

²²⁴ S. AFR. CONST. ch. 2 § 27(1)(b).

²²⁵ Michael Kidd, *Not a Drop to Drink: Disconnection of Water Services for Non-Payment and the Right of Access to Water*, 20 S. AFR. J. ON HUM. RTS. 119, 122 (2004).

²²⁶ Water Services Act 107 of 1998 § 3 (S. Afr.).

²²⁷ *Id.* at § 4(3)(a)-(b).

²²⁸ *Id.* at § 4(3)(c).

²²⁹ See *The Right to Water, Legal Redress: The Right to Water under the Right to Life: South Africa*, at

In *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*, residents of Bon Vista Mansions claimed the Local Council had unlawfully discontinued their municipal water supply for lack of payment.²³⁰ The court held that the citizens' constitutional right to water was infringed upon because the Council's procedures for disconnection were not fair and equitable.²³¹ Specifically, the court was concerned with the lack of reasonable termination notice.²³² The court went further to say that, even in the event of nonpayment, service could not be terminated if the person proved to the satisfaction of the utility company that she was unable to pay.²³³ Interestingly, the court's opinion did not require the government to provide access to water services, but limited the responsibility to the non-affirmative obligation to respect the right to access.²³⁴ Other cases in South Africa have been less successful in protecting access to water, supporting the concept that the right to water must be carefully defined to ensure proper application and maximum protection.²³⁵

In India, water is not an explicit right listed in the constitution. However, courts at the state and federal levels have interpreted the constitutional right to life to include the right to safe and sufficient water.²³⁶ In one Indian case, a group raised concerns that the pumping of groundwater was increasing the salinity of the resource, causing long-term detriment.²³⁷ The judge, stating that the right to water should be afforded to citizens as an extension of the right to life, ordered more research to understand the effects that pumping may have on a water source.²³⁸

Most United States citizens are familiar with the phrase, "all men are . . . endowed . . . with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."²³⁹ The full understanding of the rights included in the phrase is somewhat less clear. Generally, the rights implied through the U.S. Constitution and accompanying documents are not evident in the document itself, but are established through legislation and case law.²⁴⁰ Although the United States does not specifically list a right to water in government documents, there is evidence its importance is recognized.

http://www.righttowater.org.uk/code/legal_2.asp (last visited Apr. 24, 2005).

²³⁰ *Residents of Bon Vista Mansions v. S. Metro. Local Council*, 2002 (6) BCLR 625, 643-44 (W) (S. Afr.).

²³¹ *Id.* at 645.

²³² *Id.*

²³³ *Id.*

²³⁴ Socio-Economic Rights Project, *South African Cases: High Court Cases*, at http://www.communitylawcentre.org.za/ser/casereviews/2002_6_BCLR_625.php (last visited Nov. 7, 2004).

²³⁵ See *The Right to Water, Legal Redress: Remaining Challenges in the Legal Enforcement of the Right to Water: South Africa*, at http://www.righttowater.org.uk/code/legal_6.asp (last visited Sept. 27, 2005). In *Manqe v Durban Transitional Metropolitan Council*, petitioners raised a similar issue to that seen in *Bon Vista Mansions*. See *Manqe v Durban Transitional Metro. Council*, 2002 (6) SA 423 (D&CLD) at 424 (S. Afr.). The court in *Manqe* denied the request to reinstate service holding no current regulations existed to enable the court to interpret the extent of the right of access. *Id.* at 437.

²³⁶ *The Right to Water, Legal Redress: The Right to Water under the Right to Life: India*, at http://www.righttowater.org.uk/code/legal_3.asp (last visited Apr. 24, 2005).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²⁴⁰ SCANLON ET AL., *supra* note 18, at 9. Although not enumerated in the United States Constitution, the Supreme Court has extended the right of privacy to its citizens including the right to marry and the right of a woman to have control over her own body. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Roe v. Wade* 410

During the 108th Congress, Representative Janice Schakowsky of Illinois submitted a resolution titled “Expressing the sense of the Congress with respect to the world’s freshwater resources.”²⁴¹ This resolution recognizes the critical situation of the world’s water supply and states that Congress shall consider water a public trust, a public good, and not a private commodity.²⁴² The resolution also recognizes that policies should be implemented to ensure all individuals have sufficient access to meet their basic human needs and prohibits denial of access to water based on economic restraints.²⁴³ Other goals of the resolution include: organizational involvement in local water management, sustainable agricultural practices, commitment to the UN’s Millennium Development Goals, consideration of water issues in financial and trade agreements, and accountability for pollution of a water resource.²⁴⁴ Although this resolution is not yet approved, it indicates increased awareness of the importance and need to protect U.S. Citizens’ right to water.²⁴⁵ Regional recognition of the right to water is a significant step in establishing local accountability and detailing the extent of that right.

IV. DEFINING THE RIGHT

Although establishing water as a separate human right would be significant, many questions would still remain. Assuming water reaches this status, its mere presence as a right provides little guidance regarding the behavior it seeks to require. As seen in the prior section, official and unofficial documents have attempted to define the right to water by listing specific expectations with little consistency. Comment 15 defines the right as “sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”²⁴⁶ The IUCN’s opinion of what should be included is vaguer, stating, “The content of the right to water should be defined as a right to access water of *adequate quality* and in *sufficient quantity* to meet basic human needs.”²⁴⁷ Other experts reduce it even further, to “a sufficient supply of safe drinking water to sustain life.”²⁴⁸ An additional obstacle to understanding the right to water is the frequently seen caveat that conditions requirements on local situations.²⁴⁹ Although, this provides a more flexible standard, it may also provide an avenue for states to evade requirements by claiming circumstantial limitations.

The requirements enforceable on a state depend on how a right is categorized. A liberty right, such as the right to life, requires protection from interference, as opposed to

U.S. 113 (1973).

²⁴¹ H.R. Con. Res. 468, 108th Cong. (2004).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ In the United States’ 2004 presidential candidate, Dennis Kucinich included the human right to water in his election platform. Dennis Kucinich, *Water as a Human Right*, at <http://www.kucinich.us/issues/water.php> (last visited Nov. 7, 2004). Mr. Kucinich included ten principles in the right. *Id.* The specifics of the duty imposed on the government closely mirror that of the House Resolution. See H.R. Con. Res. 468, *supra* note 241.

²⁴⁶ Comment 15, *supra* note 113, ¶ 2.

²⁴⁷ SCANLON ET AL., *supra* note 18, at 28.

²⁴⁸ McCaffrey, *supra* note 7, at 12.

²⁴⁹ See, e.g., Comment 15, *supra* note 113, ¶ 17.

a welfare right, which requires the provision of certain services or goods.²⁵⁰ In order for a state to comply with a liberty right, it must only guard against interference with the right and would not have any positive obligation to provide water.²⁵¹ In contrast, if water is viewed as part of the right to sustenance, it would qualify as a welfare right.²⁵²

Categorizing the right to water as a welfare right would require governments to take a more proactive role in the provision of the right to water.²⁵³ The drawback to including water as a welfare right is that liberty rights have received more international recognition and effective enforcement than social rights.²⁵⁴ Therefore, were water a liberty right, a government would have fewer positive obligations regarding the right, but the right might be applied more readily.²⁵⁵

Although water is not yet an individual right under customary international law, the amount of attention it has received indicates that it is moving in that direction.²⁵⁶ If water is determined to be included within the right to life, it would qualify as a liberty right, obligating governments to prevent interference with access. On the other hand, if water becomes an individual right, it will likely be a welfare right similar to other social rights.²⁵⁷ A welfare right usually imposes affirmative duties and therefore guarantees greater rights for the public.²⁵⁸ Violations can occur through acts of commission, direct acts by states in violation of the right, or by acts of omission including “the failure to take appropriate steps towards the full realization of everyone’s right to water.”²⁵⁹ The extent of these duties remains a question. Defining details of the right is a dynamic process, but a few certainties do exist: these essential requirements form the basis for the new, developing right to water.

A. *Accessibility v. Delivery*

To define the responsibilities created by the right to water, the first question to be answered concerns the source of water. Is a government simply required to protect access to a water source or do they need to ensure its delivery to its citizens? The WHO stated the ultimate goal is to provide in-home service for all citizens.²⁶⁰ Due to the restrictive expense of installing indoor plumbing, accessibility becomes the minimum goal.²⁶¹ Comment 15 defines physical accessibility as “safe physical reach for all sections of the population.”²⁶² The “immediate vicinity” stipulation of paragraph 12(c)(i)

²⁵⁰ Okin, *supra* note 58, at 237.

²⁵¹ *Id.*

²⁵² McCaffrey, *supra* note 7, at 12.

²⁵³ See SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 24.

²⁵⁴ Okin, *supra* note 58, at 238, 242-244, 246. Compare Comment 15, *supra* note 113, ¶ 17 (receiving less support internationally), with ICCPR, *supra* note 2, art. 6, ¶ 1 (containing many basic rights such as the right to life that have been widely recognized).

²⁵⁵ Okin, *supra* note 58, at 238, Okin explains that liberty rights can be secured through legislation, while implementation of welfare rights often requires the expenditure of large amounts of money.

²⁵⁶ See SCANLON ET AL., *supra* note 18, at 12.

²⁵⁷ See Okin, *supra* note 58, at 237.

²⁵⁸ *Id.*

²⁵⁹ Comment 15, *supra* note 113, ¶ 43.

²⁶⁰ WHO, *supra* note 3, at 15.

²⁶¹ *Id.*

²⁶² Comment 15, *supra* note 113, ¶ 12(c)(i).

indicates that household delivery is not required. However, delivery should be accomplished whenever possible.²⁶³

Comment 15 states that all are entitled to physically accessible water without discrimination.²⁶⁴ This implies that only non-interference is required. However additional provisions imply greater obligations. Paragraph ten of Comment 15 implicates a duty exceeding access by stating that citizens have an “entitlement . . . to a system of water supply and management.”²⁶⁵ There is also the general obligation to take deliberate and concrete steps “towards the full realization of the right to water.”²⁶⁶ Access is a critical element of that right.

Positive and negative requirements are also placed on states under the listed obligations to respect, protect, and fulfill the right to water.²⁶⁷ The right to respect and protect are primarily negative rights, requiring protection against interference. However, the right to fulfill explicitly imposes positive measures on governments to “facilitate, promote and provide” water.²⁶⁸ Pairing Comment 15 with other water rights conventions, it can be inferred that in locations where water is currently available only at a central access point, states should implement a delivery plan prioritized by need.²⁶⁹ This obligation can also arise as part of the human right to health because a positive correlation exists between hygiene and location of a water source.²⁷⁰

In locations with indoor plumbing, other problems arise because accessibility is often dictated by cost.²⁷¹ Affordability must be included in right to water discussions because it is often the poor who have the lowest service of water.²⁷² This is particularly applicable in areas where water is not collected from a freely available central location, but is only accessible through in-home delivery.²⁷³ Comment 15 links the access requirement with the word “affordable” explaining that charges associated with water delivery must be such for all.²⁷⁴ The Comment also explains that states have a “special obligation to provide those who do not have sufficient means with [] necessary water.”²⁷⁵ The IUCN defines the right to water as the “right to access sufficient water, with the term ‘access’ [] including economic accessibility.”²⁷⁶ The resolution introduced in the U.S. House of Representatives also included the requirement for governments to provide equitable access to water and stated that no one should be denied water due to economic constraints.²⁷⁷ This is not a recommendation for free water, which may encourage

²⁶³ See *id.*

²⁶⁴ *Id.* ¶ 2, 12(c)(iii).

²⁶⁵ *Id.* ¶ 10.

²⁶⁶ *Id.* ¶ 17.

²⁶⁷ *Id.* ¶ 21-29.

²⁶⁸ *Id.* ¶ 25.

²⁶⁹ See The International Secretariat for Water, *Fundamental Principles for a Framework Convention on the Right to Water* (2005), available at http://www.i-s-w.org/en/PDF/Brochure_EAU_1.pdf.

²⁷⁰ Guy Howard & Jamie Bartram, *Domestic Water Quantity, Service Level and Health*, at 14-15 (2003), available at http://whqlibdoc.who.int/hq/2003/WHO_SDE_WSH_03.02.pdf.

²⁷¹ See SCANLON ET AL., *supra* note 18, at 2.

²⁷² WHO, *supra* note 3, at 16.

²⁷³ See WHO, *supra* note 3.

²⁷⁴ Comment 15, *supra* note 113, ¶ 2, 12(c)(ii), 27.

²⁷⁵ *Id.* ¶ 15.

²⁷⁶ SCANLON ET AL., *supra* note 18, at 2.

²⁷⁷ H.R. Con. Res. 468.

waste.²⁷⁸ Instead the obligation is that water pricing should not be cost prohibitive to the individual user.²⁷⁹

Applying the court's reasoning in *Bon Vista Mansions*, lack of payment cannot be a reason to deny service and disconnections of service must be fair and equitable.²⁸⁰ The court in that case directed the utility company to review and approve the customer's reason for nonpayment.²⁸¹ It is unclear if the utility provider would be accountable to local government for their decision to discontinue service after review.²⁸² The accountability of the utility provider would depend on whether it is a government entity or private contractor.²⁸³ As a state actor a government agency would be liable under the state law.²⁸⁴ On the other hand, a private company would not be liable under a state's constitution, but could commit a permit violation depending on the applicable contract.²⁸⁵ If the utility company's decisions are not subject to review by courts or contract, the ruling in *Bon Vista Mansions* may lose its impact by allowing the service provider to deny service without accountability.

Reviewing existing right-to-water documents and recommendations, the minimum requirement is access.²⁸⁶ This must be done in a non-discriminatory manner and may entail positive and negative requirements.²⁸⁷ The state must protect against any threat to existing water sources and must create a source if none is available.²⁸⁸ If the state has the economic capacity to deliver water, it must do so. All water must be affordable to be considered accessible.²⁸⁹ This limits the price that can be charged for water delivery and likely imposes a prohibition on discontinuation of service for economic reasons.²⁹⁰

B. Types of Use

It seems obvious that to the extent a right to water exists, it would include drinking water; however, other included uses are less clear.²⁹¹ Water needs vary according to many factors including climate, lifestyle, diet, and wealth, but some minimum requirement must be established for human rights purposes.²⁹² One method to determine need is to consider the ways in which water is used for survival.²⁹³ In addition to

²⁷⁸ SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 70.

²⁷⁹ *Id.* at 71.

²⁸⁰ Residents of Bon Vista Mansions v. S. Metro. Local Council 2002 (6) BCLR 625 (W) (S. Afr.).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ See SCANLON ET AL., *supra* note 18, at 31-32.

²⁸⁴ *Id.*

²⁸⁵ *Id.* Comment 15 suggests the creation of a regulatory system for private contractors and imposition of penalties by governments when these third parties do not comply with the right to water. Comment 15, *supra* note 113, ¶ 24.

²⁸⁶ See Comment 15, *supra* note 113, ¶¶ 2, 27; H.R. Con. Res. 468; SCANLON ET AL., *supra* note 18, at 2.

²⁸⁷ Comment 15, *supra* note 113, ¶ 12(c).

²⁸⁸ See *id.* at ¶ 10.

²⁸⁹ *Id.* at ¶ 2.

²⁹⁰ See *id.* at ¶¶ 24, 27. See also The Right to Water, *supra* note 229.

²⁹¹ See McCaffrey, *supra* note 7, at 12.

²⁹² Peter H. Gleick, *Basic Water Requirements for Human Activities: Meeting Basic Needs*, 21 WATER INT'L 83, 83 (1996).

²⁹³ See *id.*

drinking, water is also required for human hygiene, sanitation services, and food preparation.²⁹⁴ A similar but more detailed tactic attempts to define the right as including those purposes for which water is needed to meet basic human needs. The IUCN recommends the inclusion of “drinking, bathing, cleaning, cooking, and sanitation” in this approach.²⁹⁵ A more conservative methodology is to consider average household or domestic uses. Domestic water has been described as “water used for all usual domestic purposes including consumption, bathing and food preparation.”²⁹⁶ Although similar to the prior procedures because this amount is dependent on culture and standard of living, this method differs in that it does not specifically include hygiene (besides bathing) or sanitation needs. Neither approach incorporates agricultural needs.²⁹⁷

Sanitation and bathing requirements, although secondary to drinking water for survival, have significant impacts on human health.²⁹⁸ The quantity needed for hygienic purposes is variable, spanning from the amount of water necessary for regular hand washing to water needed for waste removal.²⁹⁹ Quantities used also vary depending on technology and local resources.³⁰⁰ Similarly, water for cooking has a direct affect on human hygiene.³⁰¹ At a minimum, states should provide sufficient water to facilitate basic cleanliness and regular hand-washing.³⁰²

The omission of agricultural water can have significant impacts on poor communities.³⁰³ Many populations depend on locally-grown food for their survival. However, including agriculture in the human right to water has many drawbacks.³⁰⁴ Agricultural uses are generally water intensive, but it is difficult to quantify the water that supports these practices because usage varies depending on local food practices.³⁰⁵ Unlike drinking water, other alternatives exist to meet agricultural needs. Water-scarce regions can import agriculture from water-rich areas, allowing limited water resources to be used for more critical needs.³⁰⁶ Because alternatives are available and agriculture is water intensive, ensuring its availability should be secondary to meeting basic human needs.³⁰⁷ This hierarchy of usage may conflict with a nation’s sovereignty; water requirements may infringe on the state’s ability to make the ultimate decision in water

²⁹⁴ *Id.* This appears most similar to the tact taken by Comment No. 15 requiring states to provide “access to the minimum essential amount of water, that is sufficient and safe for personal land domestic uses to prevent disease.” Comment 15, *supra* note 113, ¶ 37(a).

²⁹⁵ SCANLON ET AL., *supra* note 18, at 29. The United States Congressional Resolution also uses the phrase “basic human needs” to describe what should be met, but does not define what uses are included. H.R. Con. Res. 468, 108th Cong. (2004). The preamble indicates that the requirement is limited to providing safe drinking water. *Id.*

²⁹⁶ Howard & Bartram, *supra* note 270, at 2.

²⁹⁷ *Id.*

²⁹⁸ See Gleick, *Basic Water Requirements*, *supra* note 292, at 84-85.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 87-88.

³⁰¹ WHO, *supra* note 3, at 17.

³⁰² See *id.*

³⁰³ *Id.* at 15.

³⁰⁴ See *id.* at 18-19.

³⁰⁵ See Gleick, *Basic Water Requirements*, *supra* note 292, at 85-86. Seventy percent of all water resources are used for agriculture. WHO, *supra* note 3, at 18.

³⁰⁶ Gleick, *Basic Water Requirements*, *supra* note 292, at 86. Additional water required to grow food is estimated at 2700 liters to provide for individual daily needs. *Id.* at 14.

³⁰⁷ SCANLON ET AL., *supra* note 18, at 29-30.

allocation and could reduce self-sufficiency in food production. However, the importance of human life has been well established in international law and must take precedence.³⁰⁸

Other water needs not included in the “basic” category deserve recognition. Basic water needs generally do not include environmental requirements such as minimum stream flow.³⁰⁹ Although environmental needs may appear secondary, significant impacts can occur to fish populations which ultimately affect human survival.³¹⁰ Industrial and commercial uses of water, such as in electric and power plants, can be distinguished from basic needs for water.³¹¹ Although these economic needs are secondary to survival needs, they may be considered as part of a governmental obligation if sufficient quantities of water meet higher priority uses first.³¹² This tiered approach prioritizes use and provides governments with structure to create a water supply strategy for their citizens. In this scheme, sufficient drinking and cooking water is the first goal, water for sanitation and hygiene is the second, and agricultural, industrial, and environmental water is the final obligation, provided prior goals are met.³¹³

A state’s obligation is to ensure the sustainability of water for its people.³¹⁴ The uses for which a government must provide water are contingent on the human right that creates the obligation. Under the right to life, it could be argued that only drinking water is required. However, water for hygiene is closely related, as it protects against disease. Hygienic and sanitation water would certainly be included in the right to health. The uses of an independent right to water are arranged by priority and depend on local conditions.³¹⁵ This prioritization of use is an important step in implementation, but more guidance is needed to fully define the human right to water.

C. *Quantity v. Quality*

Establishing the uses of water to be included in the human right to water is an important step in the right’s development, but the water must be quantified to be most useful to states. Prior discussions illustrate that a lack of a water supply is a violation of the human right to water. However, an expectation of unlimited access is unrealistic.³¹⁶ Therefore, the requirement must be a compromise between these two theories, although this provides little guidance for states. Comment 15 indicates that quantity is dependent on minimum daily needs and must be sufficient for continuous and regular use.³¹⁷ The

³⁰⁸ See Universal Declaration of Human Rights, *supra* note 13. The newly drafted International Law Commission (ILC) rules for transboundary aquifers include a hierarchy of uses to be considered in determining groundwater allocation which places human needs above all others. Int’l Law Comm’n [ILC], *Second report on shared natural resources: transboundary groundwaters*, U.N. Doc. A/CN.4/539 (Mar. 9, 2004) (prepared by Mr. Chusei Yamada, Special Rapporteur).

³⁰⁹ Gleick, *Basic Water Requirements*, *supra* note 292, at 86.

³¹⁰ See *id.* at 87.

³¹¹ Howard & Bartram, *supra* note 270, at 23; Gleick, *Basic Water Requirements*, *supra* note 292, at 87.

³¹² Gleick, *Basic Water Requirements*, *supra* note 292, at 87.

³¹³ See Howard & Bartram, *supra* note 270, at 23.

³¹⁴ McCaffrey, *supra* note 7, at 15.

³¹⁵ See Comment 15, *supra* note 113, ¶ 12(a) & nn.12, 14. International concepts such as equitable and reasonable utilization of water can be applied using a set of factors to assess how water should be allocated. See G.A. Res. 51/229, at art. 6(1), U.N. Doc. A/RES/51/229 (Jul. 8, 1997).

³¹⁶ See Gleick, *Human Right to Water*, *supra* note 5, at 8.

³¹⁷ See Comment 15, *supra* note 113, ¶ 12(a) & nn.12 & 14 (recommending the exact amount be based

Comment's use of the phrase "an adequate amount" provides little clarification for the amount of water a government must provide for each of its citizens.³¹⁸ Recommendations of what should be included in the human right to water must be read together with scientific research: this approach quantifies the right in a way that is most useful for guidance and enforcement.

As the minimum requirement of any right to water, drinking water is the first quantity that must be established. A minimum requirement needed to avoid dehydration varies according to climate.³¹⁹ The WHO estimates an average male in average conditions requires a minimum of 2.9 liters of drinking water per day and up to 4.5 liters in hot areas.³²⁰ These numbers vary depending on personal needs.³²¹ For example, a lactating or pregnant woman needs more water to maintain hydration.³²²

In addition to drinking water, the daily amount of water required per person depends on the uses included in the right to water. Water needs also vary depending on climate and the state's level of development.³²³ Due to the inclusion of different variables, several estimates for minimum daily water requirements have been made.

Applying the different theories of what the human right to water includes yields a range of total daily water needs. The survival analysis estimates average daily needs at 50 liters per person per day.³²⁴ In contrast, South Africa's compulsory national standard is only 25 liters per person per day.³²⁵ It is unclear which uses are included in that amount. However, if the amount is based on the Bill of Rights' water obligation, it includes drinking water and basic sanitation.³²⁶ The WHO's domestic-use projection is even lower, estimating 5 to 7.5 liters per capita per day depending on the user.³²⁷ This basic access estimate is significantly lower because it only includes essential hydration and cooking needs.³²⁸ Including hygiene would increase this number from 5 to 100 liters per capita per day depending on the location of the water source and the goals of usage.³²⁹ Although hygiene is not part of minimum human needs, due to its importance to health, a minimum allowance for sanitation should be included in the human right to water.³³⁰

on World Health Organization need estimates).

³¹⁸ See *id.* at ¶ 2.

³¹⁹ Gleick, *Basic Water Requirements*, *supra* note 292, at 84.

³²⁰ Howard & Bartram, *supra* note 270, at 7.

³²¹ *Id.*

³²² *Id.*

³²³ Gleick, *Basic Water Requirements*, *supra* note 292, at 89-90.

³²⁴ *Id.* at 83. This figure includes five liters for drinking, twenty liters for sanitation and hygiene, fifteen liters for bathing, and ten liters for cooking per day. *Id.*

³²⁵ Kidd, *supra* note 226, at 122.

³²⁶ See S. AFR. CONST. ch. 2 § 27. This number has received criticism as inadequate for sanitation needs. Kidd, *supra* note 226, at 134.

³²⁷ Howard & Bartram, *supra* note 270, at 23. This estimate only reserves two liters for cooking and the remaining water is for drinking. *Id.* The higher estimate compensates for the increased water required by lactating mothers. *Id.*

³²⁸ *Id.* The cooking estimate is much lower because it is based on the minimum amount of water used to cook rice, whereas the survival estimate is an average of cooking needs in developed and developing countries. *Id.* See also Gleick, *Basic Water Requirements*, *supra* note 292, at 85.

³²⁹ Howard & Bartram, *supra* note 270, at 22.

³³⁰ Gleick, *Human Right to Water*, *supra* note 5, at 9.

Any quantity of water is meaningless if its quality causes it to be unfit for use or consumption. Contaminated water can increase health risks, causing illness and death.³³¹ Providing low quality water would vitiate the intent behind the right to water. Therefore, “[t]he water required for each personal or domestic use must be safe . . . free from micro-organisms, chemical substances and radiological *hazards* that constitute a threat to a person’s health.”³³² Quality also extends to aesthetics, such as odor and color, to encourage consumption of a healthy source over less healthy alternatives.³³³ The WHO recognized that a “zero-risk” scenario is not realistic. Therefore the goal is “tolerable risks.” Minimum contaminant levels can be defined by local drinking water quality standards or, if none exist, states can adopt the WHO guidelines.³³⁴ The state bears the responsibility of implementing these standards as part of the human right to water.³³⁵

The minimum requirement the human right to water imposes on states is a “sufficient supply of safe drinking water to sustain life.”³³⁶ For greatest protection, states should use liberal estimates of their climate to ensure basic needs are being met.³³⁷ The total amount of water required per capita per day depends on local conditions and priority of usage.³³⁸ All water supplied or accessed must be of acceptable quality to protect public health.³³⁹ As the obligations created by the right to water are further understood, the right will be clarified until its consistent and absolute nature raises it to the level of customary international law, empowering citizens to demand their survival needs.

V. CONCLUSION

Water is critical to the survival of all living things, yet a large portion of the world does not have access to sufficient quantities of clean water.³⁴⁰ Lack of water has severe health consequences including dehydration and hygiene-related disease.³⁴¹ One method proposed to assist people in gaining access to water is to establish water as a human right.³⁴²

Human rights law is an appropriate avenue to establish this right for many reasons. First, the necessity of water and humans’ dependence on it for basic health and hygiene is similar to existing human rights such as the right to life. Second, human rights are rights held by citizens and are enforceable against the state.³⁴³ A government can be bound by a right if it is included in local law, if the state signs or ratifies a treaty including the right, or if the right rises to the level of customary international law.³⁴⁴ Some human rights,

³³¹ WHO, *supra* note 3, at 16.

³³² Comment 15, *supra* note 113 at n.15.

³³³ *Id.*; WHO, *supra* note 3, at 15.

³³⁴ Comment 15, *supra* note 113, ¶ 3.

³³⁵ *Id.* at ¶ 12(b); WHO, *supra* note 3, at 15.

³³⁶ McCaffrey, *supra* note 7, at 12.

³³⁷ See Howard & Bartram, *supra* note 270, at 22.

³³⁸ See *id.*

³³⁹ Comment 15, *supra* note 113, at FN 15.

³⁴⁰ See WHO, *supra* note 3, at 7.

³⁴¹ See *id.*

³⁴² See Gleick, *Human Right to Water*, *supra* note 5.

³⁴³ WHO, *supra* note 3, at 31.

³⁴⁴ BROWNLIE, *supra* note 40, at 6-12.

such as the right to life, have reached the status of *jus cogens*, making them obligatory.³⁴⁵ Thus, establishing water as a human right will actually satisfy human needs as opposed to simply encouraging the passage of local law.

Although it was originally argued that water was to be included in the right to life or health, recent debates have illustrated the importance of establishing water as an independent right.³⁴⁶ It can be argued that water is implicit in existing rights. However, the absence of water in these documents creates problems of enforcement.³⁴⁷ As an explicitly defined right, accountability and a structure of enforcement will be placed on states, and citizens will be afforded more rights.³⁴⁸

Assuming that a human right to water is established, determining its inclusions is an evolving process with few constants. However, a few rules can be discerned. For example, the extent of the right is dependent on local conditions and it should be read as broadly as circumstances will allow.³⁴⁹ At the very least, citizens should have the right to access enough water to survive.³⁵⁰ This water should meet existing quality standards.³⁵¹ Access to water should be protected and can be extended depending on availability.

The human right to water is ineffective in a vacuum. To function properly, someone must be entitled to demand water and some entity must be obliged to provide it, once the right to water is established and defined. If the world shares a finite amount of water that is constantly recycled through the hydrologic cycle, then perhaps all countries share responsibility for the distribution and maintenance of water resources.³⁵² In a general sense, governments are obliged to protect the rights of the citizens within their jurisdiction.³⁵³ This would include the provision of water if water becomes a human right.

Of the many relationships states may have, a simple one between a government and its citizens is rare. For example, a belligerent occupier still has obligations toward citizens within their control. In more complex situations, such as the presence of international shared water or economic disparities between neighboring states, governments may also have duties towards citizens of other countries. This duty increases when the parent government cannot provide the necessary resources.³⁵⁴ International law and human rights precedent provide some direction in this area, but upon examination of global situations, such as conditions along the United States-Mexico border, it is apparent that no current international precedent is available to establish responsibilities for water between sovereigns.

While not considered customary international law, the increased recognition of the right to water in the international community and water's importance to life and health indicate that citizens are closer to empowerment to demand this critical resource. To achieve that goal, there should be a binding document that encompasses the ideas of

³⁴⁵ *Id.* at 488-90; see, e.g., *Universal Declaration of Human Rights*, *supra* note 13.

³⁴⁶ See Gleick, *Human Right to Water*, *supra* note 5.

³⁴⁷ See *id.*

³⁴⁸ See Comment 15, *supra* note 113.

³⁴⁹ See *id.*

³⁵⁰ See *id.*

³⁵¹ See *id.*

³⁵² R. ALLAN FREEZE & JOHN A. CHERRY, *GROUNDWATER* 3-5 (1979).

³⁵³ See discussion *supra* Part IV.A.

³⁵⁴ See discussion *supra* Part IV.B.1.

Comment 15. Comment 15 is an excellent guideline for what should be included in the human right to water, but its non-binding nature is problematic. NGOs must continue to promote Comment 15's concept through their publications and to generate public pressure so states agree to be bound when a treaty is drafted. Once this right is codified in a global instrument or is the practice of a significant number of states, it will finally reach the status of customary international law that it deserves.³⁵⁵

³⁵⁵ See BROWNLIE, *supra* note 41, at 6-15.