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The Human Right to Water: A False Promise?

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The Human Right to Water: A False Promise?

Stephen C. McCaffrey*

TABLE OF CONTENTS

I. INTRODUCTION.....	221
II. FRESH WATER: THE INCREASINGLY SCARCE AND CONTENTIOUS SOURCE OF LIFE.....	221
III. WATER RIGHTS AS PROPERTY RIGHTS.....	223
IV. THE HUMAN RIGHT TO WATER.....	224
V. REALIZATION OF THE RIGHT.....	228
A. <i>Progressive vs. Immediate Implementation</i>	228
B. <i>Mismatches</i>	230
VI. CONCLUSION.....	232

I. INTRODUCTION

I would first like to pay tribute to my colleague John Sprankling, whose ability to identify fascinating topics to research and to produce original and significant scholarship is unparalleled in my experience. This ability has led John to contribute immeasurably to our knowledge-base in the field of property law, in particular, filling gaps that no one else seems to have realized existed. His exploration of the International Law of Property, which had not before been comprehensively examined—in fact, the expression “international law of property” had not been part of the legal vernacular—is such a contribution. It is against this background that I venture to make a very small contribution with regard to fresh water, the extent to which humans have an inherent right to it, and to the extent that they do, what the chances are of such a right actually being realized.

II. FRESH WATER: THE INCREASINGLY SCARCE AND CONTENTIOUS SOURCE OF LIFE

Humans need water to live. We can live considerably longer without food than water. Yet the perverse impacts of climate change, as predicted by the Intergovernmental Panel on Climate Change (IPCC), the most authoritative scientific body on the subject, mean that areas that are already arid will probably

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become drier.¹ More fundamentally, the IPCC reports that “[i]n many regions, changing precipitation or melting snow and ice are altering hydrological systems, affecting water resources in terms of quantity and quality.”² If this were not enough, the growing human population means that per capita water supplies are shrinking globally.³ While significant progress has been made on achieving the Millennium Development Goal (MDG) of reducing by half “the proportion of the population without sustainable access to safe drinking water and basic sanitation” by 2015,⁴ as of 2012, there were still some 700 million people without access to safe drinking water and a billion without basic sanitation.⁵ This is a recipe for human hardship and lays bare the magnitude of the challenge of guaranteeing a human right to water. It is also a recipe for conflict, especially where freshwater resources are shared internationally, which is in fact the case for much of the world’s fresh water.

More than 260 of Earth’s drainage basins are international, meaning that two or more nations share this number of river and lake systems, along with their associated groundwater.⁶ In Africa alone, every country shares fresh water with another country. Eighty-five percent of the fresh water in Africa “comes from international rivers.”⁷ Globally, international basins cover nearly half of Earth’s land area and include territory of some 145 countries—a number that may well increase as more aquifers are mapped.⁸ Around forty percent of the world’s population lives in these shared catchments.⁹

Any perturbation in one of these basins holds the potential for conflict with other states in the basin. Such a change of conditions may be caused by natural phenomena such as climate change, by human actions such as the construction of a dam, or a combination, as when climate change results in lower river flows and leads riparian states to divert a higher proportion of water from rivers than they had in the past. Such conflicts would raise issues in the field of the law of

1. See generally Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2014: Synthesis Report* (Core Writing Team et al., eds. 2014).

2. *Id.* at 6.

3. The medium scenario of the U.N. World Population Division predicts that the global population will top out at some 9 billion people around 2050. U.N. DEP’T OF ECON. & SOC. AFFAIRS/POPULATION DIV., *WORLD POPULATION TO 2300* 12 (2004).

4. U.N. ECON. COMM. FOR EUROPE [UNECE], *Millennium Development Goals, Target 7.C*, available at <http://www.un.org/millenniumgoals/environ.shtml> (last visited Oct. 7, 2015) (on file with *The University of the Pacific Law Review*).

5. WORLD HEALTH ORG. & UNICEF, *PROGRESS ON DRINKING WATER AND SANITATION 2014 UPDATE* (2014).

6. RICHARD KYLE PAISLEY, *FAO TRAINING MANUAL FOR INTERNATIONAL WATERCOURSES/RIVER BASINS INCLUDING LAW, NEGOTIATION, CONFLICT RESOLUTION AND SIMULATION TRAINING EXERCISES 1* (2007).

7. TAKELE SOBOKA BULTO, *THE EXTRATERRITORIAL APPLICATION OF THE HUMAN RIGHT TO WATER IN AFRICA* 255 (2014).

8. PAISLEY, *supra* note 6, at 1.

9. *Id.* at 9.

international watercourses, a branch of public international law. This short paper does not address those conflicts, but focuses on the human consequences of changes in the availability of fresh water. It will be useful to consider first whether these consequences are affected by the extent to which there are property rights in water.

III. WATER RIGHTS AS PROPERTY RIGHTS

While water was a public good that no one could own under Roman and Islamic Law, the water rights systems in the Western United States effectively gives those who have made a prior appropriation of fresh water for a beneficial use a right in that water that is superior to any claims of others. The water need not be used on riparian land, with return flows augmenting quantities in the stream from which the water was taken, unlike the system of riparian rights in force in the eastern United States. The appropriator may convey the water into a wholly different watershed, so long as this is done in connection with beneficial uses, such as those for domestic, agricultural, mining, and municipal purposes.¹⁰ Originally, an appropriative right was generally established simply by diverting water and applying it to a beneficial use. The date on which this was done was the date when the right was established and made the appropriator “senior” to all those who came after. The latter “junior” right holders only have a right to quantities of water that exceed the amount appropriated by the senior right holder. Modern prior-appropriation systems normally require the appropriator to obtain a license or similar permit from the competent governmental entity, simplifying the determination of the priority date, but otherwise, the legal regime has stayed essentially the same.

Thus under the system of prior appropriation, one could be said to have a property right in the water appropriated. This was thought necessary in the arid western part of the United States where there was often not sufficient water for all claimants. If there was no property right in the water, the thinking went, there would be little incentive to make the investment required for the development of land or mineral resources; the seminal case in the field arose out of competing claims of miners during California’s 1849 gold rush.¹¹ For the same reasons, the doctrine was not needed in the well-watered eastern parts of the country where there was plenty of water to go around. But at least in the western United States, it may be said that individuals may have property rights in water—not only to use water, but in the water itself.

Yet on reflection the expression “property right” appears to be a misnomer when applied to water. Water itself is not “property” as that term is generally

10. See the seminal case establishing the doctrine of prior appropriation, *Irwin v. Phillips*, 5 Cal. 140 (1855).

11. *Id.*

understood. This is because of water's unique qualities. It bears no resemblance to Blackacre, real property, or to a Cadillac, personal property. It is certainly not intangible, like certain other forms of property. While not intangible, however, it is evanescent, in that its molecules are in constant motion, whether through evaporation from the surface of a glass of ice-water, or through its movement in streams and aquifers. In these and so many other ways, water resists capture and is thus unlike the fox in *Pierson v. Post* that was held to be the property of the first taker.¹² Rights *in* water, yes. Rights to *use* water, yes. But ownership of the water itself? Much more doubtful. This is revealed when one considers the human right to water. How could this right be guaranteed if not public authorities but private actors controlled, owned, the water? Life cannot exist without water, and it would be a strangely Orwellian society that entrusted the lives and well-being of its citizens to private owners of such a vital resource.

Nevertheless, the notion of water rights presents intriguing possibilities for the challenge of ensuring that humans the world over have access to adequate quantities of safe, fresh water, or, as the Committee on Economic, Social and Cultural Rights has put it, that everyone have "sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses."¹³

IV. THE HUMAN RIGHT TO WATER

When International Human Rights Law was born in the aftermath of the Holocaust and the Second World War, the immediate focus was understandably on preventing governments from taking things away from their citizens, including their lives, not requiring them to provide things. But, in part because of the insistence of the Soviet Union and other socialist countries, affirmative duties in the economic, social, and cultural sphere were added to the duties of abstention regarding civil and political matters. The result was the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948.¹⁴ The rights that this non-binding instrument¹⁵ recognized were eventually codified in two treaties adopted in 1966: The International Covenant on Civil and Political Rights (CP Covenant), and the International Covenant on

12. *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805).

13. Comm. on Econ., Social & Cultural Rights, (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, E/C.12/2002/11 (Jan. 20, 2003) [hereinafter General Comment 15].

14. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

15. As a resolution of the United Nations General Assembly, which is empowered by the U.N. Charter only to make "recommendations," the Universal Declaration itself is non-binding. U.N. Charter art. 10. However, it has been argued that the Universal Declaration has come to reflect customary international law. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1987).

Economic, Social and Cultural Rights (ESC Covenant).¹⁶ While the obligation to “respect and to ensure” rights in the civil and political domain were of immediate effect, those in the economic, social, and cultural field were to be implemented progressively.¹⁷ Specifically, Article 2, paragraph 1 of the ESC Covenant provides as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹⁸

This differential treatment of the two categories of human rights makes sense: a country should not be permitted to implement progressively fundamental obligations such as the one to refrain from extrajudicial killing,¹⁹ whereas many states would need time to implement the right to “an adequate standard of living . . . including adequate food, clothing and housing.”²⁰

Enter the human right to water. Which covenant establishes this right? It might be thought that since water is essential to life, the right to it would be of immediate effect, and thus be established by the Civil and Political Covenant.²¹ On the other hand, since many developing countries lack the capacity to implement such an obligation immediately, a case might be made for the human right to water to be subject only to progressive implementation under the Economic, Social, and Cultural Covenant.²² But when the two covenants are searched for any mention of the human right to water, perhaps surprisingly, one comes up empty. Neither covenant refers even obliquely to such a right. In fact, one can search literature, U.N. documents, opinions of human rights courts and other bodies in vain for any reference to a general human right to water until the early 1990s. How can this be?

In fairness, two treaties, concluded in the 1970s and 1980s, seem to contemplate a right to water. The 1979 Convention on the Elimination of All Forms of Discrimination Against Women requires that States ensure that women

16. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter CP Covenant]; International Covenant on Economic, Social and Cultural Rights, 16 Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ESC Covenant].

17. CP Covenant, *supra* note 16, at art. 2(1).

18. ESC Covenant, *supra* note 16, at art. 2(1).

19. CP Covenant, *supra* note 16, at art. 6.

20. ESC Covenant, *supra* note 16, at art. 11(1).

21. CP Covenant, *supra* note 16.

22. ESC Covenant, *supra* note 16.

“enjoy adequate living conditions, particularly in relation to . . . water supply.”²³ And the 1989 Convention on the Rights of the Child requires that States combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking-water.”²⁴ But neither expressly calls access to water a human right.²⁵

The right to water began to make its way into the literature in the 1990s.²⁶ And then in 2002, the U.N. Committee on Economic, Social and Cultural Rights (ESC Committee) adopted a document entitled “General Comment No. 15 (2002), The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights).”²⁷ As the body overseeing the implementation of the Covenant on Economic, Social and Cultural Rights, the ESC Committee adopts “general comments” concerning the way in which it will interpret provisions of that agreement. As indicated by its title, General Comment 15 serves as notice that the committee will interpret Articles 11 and 12 of the ESC Covenant as including a right to water. Article 11, paragraph 1, provides as follows: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”²⁸

The Committee explained:

The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. Moreover, the Committee has previously recognized that water is a human right contained in Article 11(1) (see General Comment No. 6). The right to water is also inextricably related to the right to the highest attainable standard of health (Art. 12(1)) and the rights to adequate housing and adequate food (Art. 11(1)).²⁹

This may seem a rather roundabout way of finding a right to a substance without which all other human rights would be pointless. On the other hand, it is virtually incontestable that because water, like air, is essential to life, a right to it

23. Convention on the Elimination of all Forms of Discrimination against Women art. 14(2), Dec. 18, 1979, 1249 U.N.T.S. 13.

24. Convention on the Rights of the Child art. 24(2), Nov. 20, 1989, 1577 U.N.T.S. 3.

25. *See id.*; *see also* Convention on the Elimination of all Forms of Discrimination against Women, *supra* note 23.

26. *See* Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT’L ENVTL. L. REV. 1 (1992); Peter H. Gleick, *The Human Right To Water*, 1 WATER POL’Y 487, 488 (1999).

27. General Comment 15, *supra* note 13.

28. ESC Covenant, *supra* note 16, at art. 11(1).

29. General Comment 15, *supra* note 13, at ¶ 3.

must be regarded as a necessary predicate to all other human rights. One must assume that if water was given any thought at all, Eleanor Roosevelt, chair of the committee that drafted the 1948 Universal Declaration, together with her committee, simply took for granted that everyone would have access to water of sufficient quantity and quality to sustain life. With governmental programs of deprivation and extermination recently posing the most serious threats to human security, water was probably simply not on the Committee's radar screen.

In 2010, both the U.N. General Assembly and the U.N. Human Rights Council adopted resolutions recognizing the human right to water.³⁰ This would appear on its face to signal the coming of age of the right. But the votes on these proposals were not unanimous; abstaining from the General Assembly resolution, for example, were such important donor countries as Canada, Denmark, Japan, the Netherlands, Sweden, the United Kingdom, and the United States.³¹ And statements made by delegations in explanation of their votes in the General Assembly made clear that several rich countries, including the United States, did not accept the idea of a human right to water.³² Whether this was merely a bump in the road of the right's evolution or an impassible obstacle, only time will tell. But more fundamentally, the failure of a number of important rich countries to accept the right when given a clear opportunity to do so is facially puzzling: is this a matter of principle—e.g., that the process of formation of a norm of customary international law has not matured sufficiently—or is it borne of a concern that these countries' practices will be held up to a scrutiny that they fear, or that they are concerned that, morally if not legally, recognition of the right would cause them to feel pressure to direct large sums of foreign assistance to the alleviation of problems of clean water supply? Regardless of the explanation, the failure of universal acceptance of the right is at least a bump in the road of the right's evolution. The bottom line, then, is that the existence of a human right to water, even though acknowledged in United Nations documents, cannot yet be taken for granted.

30. G.A. Res. A/64/292, ¶ 1, U.N. Doc. A/RES/64/292 (July 29, 2010); H.R.C Res. 15, U.N. Doc. A/HRC/15/L.14. (Sept. 24, 2010).

31. Stephen C. McCaffrey, *International Water Cooperation in the 21st Century: Recent Developments in the Law of International Watercourses*, 23 *RECIEL* 4, 9 (2014) [hereinafter McCaffrey *RECIEL*] ("Unless a vote is called for, a resolution of this kind would ordinarily be adopted by consensus, without a vote. However, the United States called for a vote on the resolution, which led to its adoption by a vote of 122 in favour, none against and 41 abstentions. Abstaining were a number of significant developed countries, many of which are major donors in the water sector, including Australia, Austria, Canada, Denmark, Greece, Iceland, Ireland, Japan, the Netherlands, New Zealand, Sweden, the United Kingdom and the United States"). The expression "donor countries" is used to refer to countries providing development assistance to countries in need, including assistance with respect to water projects.

32. Press Release, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None against, 41 Abstentions, U.N. Press Release GA/10967 (July 28, 2010) available at: <http://www.un.org/press/en/2010/ga10967.doc.htm> (on file with *The University of the Pacific Law Review*) [hereinafter U.N. Press Release] (containing excerpts from the explanations of vote by Australia, Canada, the United Kingdom, and the United States).

V. REALIZATION OF THE RIGHT

A. *Progressive vs. Immediate Implementation*

Despite the uncertainties just discussed, it will be assumed for the purposes of the present discussion that a human right to water is generally accepted, and that the content of the right corresponds with that described in General Comment 15: namely, that everyone is entitled to “sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”³³ We may now return to the earlier discussion of whether the right must be implemented immediately, or whether progressive implementation, in accordance with a country’s capabilities, is sufficient. It seems clear that General Comment 15 sees the right to water as falling within the economic, social, and cultural rights category, since it was derived from Articles 11 and 12 of the ESC Covenant.³⁴ This would make it subject to progressive implementation “to the maximum of [a state’s] available resources.”³⁵

But in General Comment 15, the ESC Committee identified a number of “core obligations” relating to the right to water, which were effective immediately. The Committee explains as follows:

In General Comment No. 3, the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. In the Committee’s view, at least a number of core obligations in relation to the right to water can be identified, which are of immediate effect.³⁶

The Committee proceeds to identify no less than nine core obligations, which seem to make up the essence of the right. The first three, for purposes of illustration, are the following:

- a. To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;
- b. To ensure the right of access to water, and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;

33. General Comment 15, *supra* note 13, at ¶ 3.

34. *Id.* at ¶ 1.

35. ESC Covenant, *supra* note 16, at art. 2(1).

36. General Comment 15, *supra* note 13, at ¶ 37.

- c. To ensure physical access to water facilities or services that provide sufficient, safe and regular water; have a sufficient number of water outlets to avoid prohibitive waiting times; are at a reasonable distance from the household.³⁷

One may wonder whether the concept of core obligations is not being used here as a way of converting ESC obligations into CP obligations that are subject to immediate implementation. In any event, it is clear that merely calling them “core obligations” will not make it any easier for developing countries, in particular, to implement them. In an apparent attempt to address this problem, the ESC Committee, in effect, shifts the burden onto donor countries and institutions:

For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties and other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical which enables developing countries to fulfill their core obligations.³⁸

There is no question that the international donor community and certain countries, in particular, wish to assist developing countries in ensuring that everyone has access to sufficient water to meet their needs.³⁹ A number of such programs have been in progress since long before the ESC Committee adopted General Comment 15.⁴⁰ These efforts will no doubt continue regardless of the legal nature of the Committee’s statements, and, indeed, of General Comment 15 itself. But it seems equally clear that the ESC Committee does not have the authority to adopt binding comments or, *a fortiori*, to impose immediate obligations on states parties to the ESC Covenant, whether developed or developing, much less on states that are not parties to this agreement.⁴¹ Instead, the Committee has the capacity to issue authoritative, though non-binding, interpretations of the covenant, and will presumably draw on these concepts in evaluating reports submitted by states parties on their implementation of the obligations under the ESC Covenant.⁴²

37. *Id.*

38. *Id.* at ¶ 38.

39. See Stephen C. McCaffrey & Kate J. Neville, *Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries*, 21 GEO. INT’L ENVTL. L. REV. 679, 685 (2009).

40. *Id.*

41. See discussion *supra* Part IV.

42. See General Comment 15, *supra* note 13, at art. 21.

B. Mismatches

As discussed elsewhere, the emergence of the human right to water has brought out some rather striking mismatches.⁴³ There are two in particular that will be noted here. The first is the mismatch between capacity and responsibilities: actually implementing a human right to water for everyone within a state's borders is a tall order, indeed—and, as discussed below, not only for developing countries. And the second is the mismatch between many of the countries that have accepted the right, and their level of development.

Little needs to be added to what has already been said concerning the first mismatch. It seems clear that the obligation to guarantee a human right to water must be one that is implemented progressively, within the limits of a country's available resources. Unfortunately, there is no light switch that can be flipped to suddenly make water available to those who lack access to it. Research has confirmed, on the basis of a large database, the unsurprising proposition that a country's "acceptance of HRW [the human right to water] 'by itself may not help the poor to gain access to water and thus is not a magic bullet.'"⁴⁴ Yet this seems to be an assumption that is implicit in the idea of core obligations as indicated above.

While significant progress has been made on achieving the MDG of reducing the number of people without access to safe drinking water by half, as noted earlier, some 700 million people remain without such access; and related to this problem, is that around a billion people still lack basic sanitation.⁴⁵ It seems likely that the progress made thus far on water and sanitation concerns cases of what might be called low-hanging fruit—i.e., those issues that are less challenging to address. If this is true, progress on the remaining cases will inevitably be slower. But regardless of the difficulty of making progress on the provision of water and sanitation, the extent to which it is achieved will necessarily depend to a large degree on the resources the international donor community is able to bring to bear. The irony here, to be discussed next, is that even some of the world's richest countries have problems of their own concerning the provision of access to safe drinking water. The U.N. Special Rapporteur on the human right to safe drinking water and sanitation is reported to have found on a visit to California, whose economy is in the top ten globally, that over 250,000 residents, most of whom were poor, lacked access to safe water and had to purchase bottled water.⁴⁶

43. See McCaffrey & Neville, *supra* note 39, at 680; McCaffrey RECIEL, *supra* note 31, at 9–11.

44. Norbert Brunner et al., *The Human Right to Water in Law and Implementation*, 4 LAWS 417, 427 (2015) (quoting P.B. Anand, *Right to Water and Access to Water*, 19 J. INT'L DEV. 511–26 (2007)).

45. WORLD HEALTH ORG. & UNICEF, *supra* note 5, at 6.

46. See Dan Bacher, *Governor Brown Signs Human Right to Water Bill*, INDYBAY (Sept. 26, 2012), <http://www.indybay.org/newsitems/2012/09/26/18722446.php> (on file with *The University of the Pacific Law Review*).

Turning to the second mismatch, it has already been noted that some of the world's richest countries—first and foremost the United States—have yet to accept the existence of a human right to water.⁴⁷ This position is to be contrasted with the acceptance of the right by many countries in the developing world. A recent comprehensive study found that fifty-two countries, with a total population of some four and a half billion people, have accepted the human right to water and sanitation in their constitutions, laws, or policies.⁴⁸ What is striking about this finding is not so much the number of states, or even their aggregate population, but rather the fact that nearly all of these states are developing: they comprise almost all of Central and South America and South Asia, and much of Africa. In Europe, the U.K., France, Hungary and Sweden seem to be the only accepting states.⁴⁹ In North America, the state of California stands out as the only political unit that has accepted the right.⁵⁰

This is striking, especially since the extensive data compiled in the study indicates that the right is treated in practice as being subject to progressive realization, meaning that even developed countries would not have to implement it immediately, as long as they were pursuing its implementation in good faith. Moreover, “case-law confirmed that the progressive realization of HRW is meant, without giving individuals a specific right for the delivery of water services with certain characteristics as to quantum, quality, or costs.”⁵¹ It seems odd that even with this flexibility, a number of leading rich countries have yet to embrace the human right to water.⁵² In the case of the United States, at least part of the explanation may have to do with the relative litigiousness of its society. California's governor cited possible lawsuits based on the right as a reason for his veto of earlier HRW legislation.⁵³

But in general, some states will continue to insist on strict compliance with the requirements for the establishment of a new norm of customary international law—i.e., a general practice, accepted as law—in order to recognize the human right to water as a customary norm.⁵⁴ After all, its genesis lies entirely in non-binding instruments—resolutions of the General Assembly and the Human Rights Council, and General Comment 15, adopted by the Committee on

47. U.N. Press Release, *supra* note 32.

48. Brunner et al., *supra* note 44, at 414.

49. *See id.* at 415.

50. McCaffrey RECIEL, *supra* note 31, at 10.

51. Brunner et al., *supra* note 47, at 438, 448; *see, e.g., Lindiwe Mazibuko v. City of Johannesburg* 2009 Case CCT 39/09, ZACC 28, at 9 para. 19 (S. Afr.)

52. *See supra* notes 31 and 32 and accompanying text.

53. Arnold Schwarzenegger, Gov. of the State of Cal., Governor's Veto Message to AB 1242, 2009–2010 Leg. Sess., (Oct. 12, 2009), *available at* <http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?Billid=200920100AB1242> (on file with *The University of the Pacific Law Review*) (“[T]he language of this bill will undoubtedly lead to potentially costly and constant litigation. This moves our limited state resources away from the day to day operations of achieving our clean water goals and puts them in the courtroom”).

54. *See* Statute of the International Court of Justice, art. 38, ¶ 1(c) (1946).

Economic, Social, and Cultural Rights. For all the attention the right has received in U.N. documents, scholarly literature, and domestic case law, it still must be recognized as a new, universally binding human right, either by an authoritative and generally recognized source, such as the International Court of Justice, or by states generally. Since the former has not occurred, and some states that play important roles in the international system have yet to accept the existence of the right, the conclusion must be that it has not yet emerged as a norm of customary international law.

VI. CONCLUSION

This short paper has considered the relatively recent emergence of the concept of a human right to water against the background of the decreasing per capita availability of fresh water and the little assistance afforded by the notion of water as property. It has shown that the notion of a right to water emerged largely from non-binding documents adopted within the context of the United Nations, and that there does not yet appear to be a consensus among states on the existence of the right as a matter of customary international law. Finally, the paper has examined issues relating to the implementation of the right, concluding that to the extent that it exists, the right to water need only be implemented progressively, and is thus not of immediate effect, as suggested by the Committee on Economic, Social, and Cultural Rights.