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Some Critical Thinking About a Human Right to Water

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SOME CRITICAL THINKING ABOUT A HUMAN RIGHT TO WATER

Doug Donoho[*]

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I. THE CRITICAL IMPORTANCE OF WATER

Last year student members of the Inter-American Center for Human Rights organized a symposium focused on the incipient "international right to water." When asked if I thought this would be a good topic I replied, and not without some enthusiasm, "not really." I wasn't being hard-hearted or disinterested; the importance of water and its role in basic human dignity is manifest. Rather, I was expressing a sense of cynical skepticism about the prospects of meaningfully addressing the problem of clean water and sanitation by creating another empty international promise dressed up as an individual right. This skepticism was grounded in misgivings about the legal and practical implications of creating an individual right to water on the international level,[1] and on doubts about its potential for affecting meaningful change. Thankfully, the students ignored me. The symposium was a timely and terrific two-day event full of insight and information. My skepticism about creating a meaningful international individual human right

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1. The right to water could be variously defined but reasonably would include, at minimum, reasonable physical access to water of sufficient quantity and quality for basic human functions. A somewhat distinct but related claim would involve adequate sanitation without which access to water would obviously be compromised. Throughout this essay the right to water is meant to cover all of these related interests.

to water, although tempered, remains. The reasons for this skepticism and some critical thinking about the prospects for a right to water are set out in this essay.

No one doubts that water is essential to human life. Historically, access to water has been a source of enduring conflict governed by force of arms, power, and economic imperatives.[2] Even in political debate, one encounters virtually no disagreement about these simultaneously trite and profound facts. In the modern West, technology and the relative abundance of water has generally dulled public appreciation of the essential connection between clean water and human life.[3] Water in the industrialized world is primarily treated as a commodity; essential to industry and agriculture both, controlled primarily through market forces.[4] Water and sanitation adequate for personal needs is widely and almost universally available in developed countries. Indeed, it is probably safe to say, despite increasing awareness of pollution, depletion, and looming shortages, most people in industrialized societies largely take access to clean water and sanitation for granted.

In most parts of the world and for vast numbers of people, however, clean water is far from a given. The United Nations (U.N.) estimates that "700 million people in 43 countries suffer today from water scarcity" and that "by 2025, 1.8 billion people will be living in countries or regions with absolute water scarcity."[5] The U.N. further asserts, "[a]nother 1.6 billion people, or almost one quarter of the world's population, face economic water shortage (where countries lack the necessary infrastructure to take water from rivers and aquifers)."[6]

In addition to scarcity, the World Health Organization (WHO) has reported that 780 million people lacked safe drinking water in 2010.[7] More than 2.5 billion people lack adequate sanitation, and 1.5 billion of them are

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2. *See, e.g.*, Pacific Institute, Water Conflict Chronology, *available at* http://www.worldwater.org/conflict.html (last visited Sept. 9, 2012); *see also*, Rachel Nuwer, *The Power Politics of Water Struggles, Science Blog*, N.Y. TIMES MAG., Nov. 28, 2011, *available at* http://green.blogs.nytimes.com/2011/11/28/the-power-politics-of-water-struggles/ (last visited Sept. 9, 2012).

3. *See* University of Kentucky, *Water Usage*, *available at* http://www.ca.uky.edu/enri/pubs/usage.pdf.

4. *Id.*

5. UN International Decade for Action 'WATER FOR LIFE' 2005-2015, *Water Scarcity*, *available at* http://www.un.org/waterforlifedecade/scarcity.shtml (last visited Sept. 9, 2012).

6. *Id.*

7. World Health Organization, *Global analysis and assessment of sanitation and drinking-water*, *available at* http://www.who.int/water_sanitation_health/en/ (last visited Sept. 9, 2012).

forced to practice open defecation.[8] As many as thirty thousand people die each day from diseases that are preventable with clean water and basic sanitation facilities.[9] Among these needless deaths are 3000 children under age five who die every day from diarrhea (more than 1 million per year).[10]

Surprisingly, these statistical indicators have actually improved substantially over the last two decades through the concerted effort of the U.N. and others.[11] Nevertheless, without significant international effort and reforms, these problems will inevitably continue and are likely to become more acute over time. The demands for fresh water, a finite and indispensable resource, have grown tremendously with world population growth and the corresponding need to grow more food. Increasing industrial development will put further burdens on the water supply. As recently stated in a special report in *The Economist*, "For Want of a Drink:"

> The number of people on Earth rose to 6 billion in 2000, nearly 7 billion today, and is heading for 9 billion in 2050. The area under irrigation has doubled and the amount of water drawn for farming has tripled. The proportion of people living in countries chronically short of water, which stood at 8% (500m) at the turn of the 21st century, is set to rise to 45% (4 billion) by 2050. And already 1 billion people go to bed hungry each night, partly for lack of water to grow food.[12]

These harsh realities, and events like the ongoing cholera epidemic in Haiti,[13] make it vital to realize that clean water and sanitation are critical in the fight against poverty and disease prevention. For the billion people who

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8. *See* World Health Organization, *Fast facts*, *available at* http://www.who.int/water_sanitation_health/monitoring/jmp2012/fast_facts/en/index.html (last visited Sept. 9, 2012).

9. *Id.*

10. *See* World Health Organization Report, *Why Are Children Still Dying And What Can Be Done*, *available at* http://whqlibdoc.who.int/publications/2009/9789241598415_eng.pdf; *see also* U.N. Development Program, *Water Supply and Sanitation, available at* http://www.undp.org/content/undp/en/home/ourwork/environmentandenergy/focus_areas/water_and_ocean_governance/water-supply-and-sanitation/ (last visited Sept. 9, 2012).

11. *See* World Health Organization Report, *Progress on Drinking Water and Sanitation 2012 Update (UNICEF/WHO)*, *available at* http://www.wssinfo.org/fileadmin/user_upload/resources/JMP-report-2012-en.pdf.

12. The Economist, *For Want of a Drink*, THE ECONOMIST MAG., May 20, 2010, *available at* http://www.economist.com/node/16136302 (last visited Sept. 9, 2012) [hereinafter *Drink*].

13. Editorial, *Haiti's Cholera Crisis*, N.Y. TIMES MAG., May 12, 2012, *available at* http://www.nytimes.com/2012/05/13/opinion/sunday/haitis-cholera-crisis.html (last visited Sept. 9, 2012).

lack it, clean water is essential to their very survival.[14] Seen in these terms, access to adequate clean water and sanitation is unquestionably one of the most pressing social and economic issues of our time. Indeed, there appears to be almost universal agreement among governments that universal access to clean water and sanitation should be a priority of the international community.[15] What to do about it is an entirely different question. Is there an international human right to water? Should there be? Can a rights-based approach to water issues be effective and meaningful?

II. CURRENT STATUS OF THE RIGHT TO WATER

Given its essential character, it is not at all surprising that there is an international movement directed toward recognition of a right to water and sanitation. As described below, this includes numerous declarations by significant international organizations that "recognize" the right to water. The latest of these declarations, found in the agenda of the just completed Rio+20 U.N. Conference on Sustainable Development, is typical.[16] Article 67 of the "Zero Draft" document on "The Future We Want," declares: "We underline the importance of the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all other human rights."[17] Such declarations make it easy to confuse the laudatory and timely effort to promote universal access to adequate water with more technical but critical legal questions about whether binding international obligations have in fact been created, should be created, and what they might mean.

There is an endemic feature of the international human rights system that should be kept in mind when considering claims about international obligations, particularly regarding affirmative obligations such as an

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14. *See, e.g.*, Kate Kelland, *Better Sanitation Could Save 2 Million Lives a Year*, (Reuters) Nov. 15, 2010, *available at* http://www.reuters.com/article/2010/11/15/us-sanitation-idUSTRE6AE4EY20101115 (last visited Sept. 9, 2012).

15. *See* Zero Draft Rio+20, *infra* note 16; *see also infra* notes 16–17 and accompanying text.

16. The Rio+20 Conference was held June 20–22, 2012. More than 130 world leaders, including U.S. Secretary of State Hilary Clinton, attended talks at the conference which is focused on developing a cooperative global agenda for achieving sustainable development. *See* Rio+20 U.N. Conference on Sustainable Development, *available at* http://www.uncsd2012.org/ (last visited Sept. 9, 2012); *See also* Rory Carroll, *Clinton to attend Rio+20 conference*, (Reuters), June 13, 2012, *available at* http://www.reuters.com/article/2012/06/13/us-rio-us-idUSBRE85C0CO20120613 (last visited Sept. 9, 2012); *See also* Rio+20 U.N. Conference on Sustainable Development, *7 Critical Issues at Rio+20, available at* http://www.uncsd2012.org/7issues.html (last visited Sept. 9, 2012).

17. Rio+20 UN Conference on Sustainable Development, *The Future We Want, Outcome Document, Zero Draft, available at* http://www.uncsd2012.org/rio20/mgzerodraft.html (last visited Sept. 9, 2012).

international right to water. This is the pronounced tendency of human rights' advocates and institutions to gloss over the very real, legal requirements and implications of establishing binding and effective international rights. On one level, this is entirely understandable. There is a natural tendency to confuse political or moral acknowledgement of human needs with the existence of legal obligations that conflate our aspirations with meaningful, binding legal standards. It feels good and, I agree, it is how the world ought to be. Similarly, a declaration by international organizations that some human need or interest is a "right" is often best understood as primarily a claim about its importance rather than a concrete legal claim. Consider this rather elegant but equally inaccurate statement of Kofi Annan about the right to water: "[a]ccess to safe water is a fundamental human need and therefore a basic human right."[18] The sentiment is golden but the cold reality is that recognition of a human need, no matter how essential, does not in itself establish a legally enforceable right to it.

Speaking in very general terms, there are at least two key qualifiers in establishing a binding international human right (a question distinct, as described below, from enforcement and effectiveness). The first prerequisite, acknowledgement of a universal interest or need which is essential to human dignity, is uncontestable and obvious with regard to water. Water is essential to life itself, and, arguably indispensable to all other human rights. Like food and shelter, clean water is one of the first things we think of when identifying universal human needs. It should, like food, shelter, and health, be a priority for both domestic governments and the international community

But what about the prospects of meeting the second qualification, recognition by states of the right as a binding and meaningful international legal obligation? The hard and inconvenient fact is that no state is bound absent its consent.[19] Moreover, even when such consent is established on a general level, serious questions inevitably arise about precisely what kind of obligation the state has consented to and what it means. As described later, this is particularly true of affirmative human rights obligations, which are typically adopted in very general and often ambiguous terms, lacking elements essential to enforceability. A "rights obligation" is created, but it hardly means anything in practice.

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18. The Right to Water and Sanitation, *available at* http://www.righttowater.info/ (last visited Oct. 5, 2012).

19. *See Preamble*, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, *available at* http://www.un.org/en/documents/udhr/index.shtml (last visited Oct. 5, 2012).

Whether international obligations ever really mean anything is, in turn, a function of the choices each state makes about whether to incorporate those obligations into binding domestic law. Ultimately, declarations of rights have little legal or practical consequences absent the political will to implement them, something that depends on genuine state consent and commitment. These legal realities have important practical implications for the prospects of ensuring adequate water through individual rights.

A. The Right to Water Under Existing Conventional Law

Thus far, the recent movement towards recognition of a right to water has fallen somewhat short of the mark in garnering actual state consent to binding, unambiguous international obligations applicable to all. In terms of existing conventional law, there are currently three global human rights treaties[20] that create explicit state obligations regarding water. Each is directed at protecting particularly vulnerable populations in specific ways rather than demanding a universal, general right to water applicable to all.

The most significant of these references to water rights appears in the Convention on the Rights of the Child (Child's Convention). Article 24(2) of the Child's Convention demands, as part of the "right to health," that its 193 state parties[21] " . . . take appropriate measures: . . . (c) [t]o combat disease and malnutrition, including within the framework of primary health care, through, inter alia . . . the provision of adequate nutritious foods and clean drinking water . . . ."[22] As discussed below, these rights are subject to significant limiting language regarding actual state party obligations.[23] Nevertheless, even though subsumed within the more general right to health and cast in terms of disease prevention, this expression of a child's right to "clean drinking water" would seem an important first step toward progressive recognition of a more universal right to water. Thus, the Child's Convention presents perhaps the clearest recognition of a right to water with wide potential application created to date.

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20. The Geneva Conventions on Armed Conflict also make a number of references to water and forbid its denial of water to civilian populations and prisoners during armed conflicts. *See generally* Ameur Zemmali, *The Protection of Water in Times of Armed Conflict, International Review of the Red Cross, No. 308, 31-10-1995, available at* http://www.icrc.org/eng/resources/documents/misc/57jmra.htm (last visited Sept. 9, 2012).

21. *See* Convention on the Rights of the Child, Feb. 16, 1995, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Sept. 9, 2012) (The United States is not a party to the Child's Convention).

22. *See infra* notes 26–28, 50, and accompanying text.

23. *See infra* notes 24–26, 40, and accompanying text.

The Convention on the Elimination of All Forms of Discrimination Against Woman (CEDAW) contains a more obscure and limited reference to a right to water. In Article 14, styled as a prohibition against discrimination aimed at "rural women," CEDAW demands that its 187 state parties:[24]

> Take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right . . . (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.[25]

By its terms, this provision is even more limited than Article 24 of the Child's Convention, explicitly applicable to only a defined and limited population and focusing on discrimination. On the positive side, this provision is directed at a population disproportionately affected by a shortage of clean, accessible water.[26]

Finally, the 2006 Convention on the Protection of Persons with Disabilities creates an obligation to ensure "equal access" to "clean water services" as a part of a more general obligation to protect a disabled person's right to "an adequate standard of living and social protection."[27]

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24. United Nations Convention on the Elimination of All Forms of Discrimination Against Women, art. 27(7), Dec. 18, 1979, 1248 U.N.T.S. 13 (*entered into force* on Sept. 3, 1981).

25. *Id.*

26. According to the WHO, 7 out of 10 people lacking adequate sanitation are rural dwellers with approximately 653 million rural dwellers lacking access to improved sources of drinking water. *See also Progress on Drinking Water and Sanitation 2012 Update*, UNICEF WORLD HEALTH ORGANIZATION, *available at* http://www.wssinfo.org/fileadmin/user_upload/resources/JMP-report-2012-en.pdf; *See also* United Nations Department of Economic and Social Affairs, *The Human Right to Water and Sanitation*, http://www.un.org/waterforlifedecade/human_right_to_water.shtml (last visited Sept. 12, 2012). (As to the specific issues affecting women, including physical access).

27. Article 28 of the Convention on the Rights of Persons with Disabilities provides:

> 1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability. 2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures: a) To ensure equal access by persons with disabilities to clean water

Each of the above treaties give some recognition to the idea that water access is a human right, at least for those covered by these conventions in the nations that are parties. It is also clear, however, that they provide only limited support for the claim that water is a universal individual right. Each treaty is focused on a specific vulnerable population and created as a general corollary to more general and amorphous rights, such as a "right to health," non-discriminatory access to "rural development," "social protection," and an "adequate standard of living." At best, it can be said that for some important vulnerable groups, there is some form of undefined international obligation relating to water.

Perhaps more importantly, like other well-intended social and economic rights, the water right recognized in these treaties is expressly qualified, so much so that it is easy to doubt the significance of the obligation. Like virtually all social and economic rights, for example, the child's right to clean water is qualified by Article 4's general proviso that a state's obligation is to implement such economic and social rights "to the maximum extent of their available resources."[28] Article 14 of CEDAW is similarly qualified by waffle words such as "appropriate measures to ensure" that rural women "participate in and benefit" from "rural development" in order to enjoy "adequate living conditions."[29] Needless to say, such qualifying language casts doubt on precisely what obligation the state has agreed to and whether it could ever be enforceable.

Nor is it at all clear whether these expressions of a right to water were intended to create an enforceable individual right in the first place, or what such a right might mean in practice. Given the paucity of authoritative international enforcement and interpretive processes, these questions are essentially left to each state party to decide for itself, subject to weak

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> services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs.

Article 28—Adequate Standard of Living and Social Programs, UNITED NATIONS ENABLE, *available at* http://www.un.org/disabilities/default.asp?id=288 (last visited Sept. 10, 2012); *See also Convention and Optional Protocol Signatures and Ratifications*, UNITED NATIONS ENABLE, *available at* http://www.un.org/disabilities/countries.asp?navid=17&pid=166 (last visited Sept. 10, 2012).

28. Article 4 States:

> Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Office of the United Nations High Commissioner for Human Rights, Convention on the Rights of the Child, art. 4, Nov. 20, 1989 (*entered into force* on Sept. 2, 1990) *available at* http://www2.ohchr.org/english/law/crc.htm#art4.

29. *See supra* note 25, and accompanying text.

international monitoring. Enforceability and other practical implications are discussed further below in Section C.

In general, the only plausible argument that existing conventional law creates such a right is grounded on the idea that water is a "derivative right" necessary to other expressly declared rights.[30] While emotionally appealing, this argument once again ignores the essential factor of actual state intent in ratifying such agreements. The reality is that states will not acknowledge and cannot be meaningfully bound to international obligations in such an indirect "bootstrap" fashion.

B. Soft Law on the Right to Water

In the absence of concrete, explicit treaty obligations, a number of international human rights institutions have nevertheless proclaimed an international human right to water. Such claims are ubiquitous at the U.N.[31] However cast, such proclamations are, in essence, non-binding efforts to promote the creation of water rights by intergovernmental human rights institutions. Such efforts may well be beneficial to the political aspect of securing water for all. They may perhaps even lead, as "soft law,"[32] to the eventual establishment of legally binding norms. They do not, however, create a binding international right to water.

The first and most concrete endorsement of a right to water was issued by the Committee on the Economic, Social and Cultural Rights Convention (ESCRC). The ESCRC is a treaty-based institution of eighteen "independent experts" charged with monitoring the implementation of the Convention.[33] In 2002, the ESCRC adopted General Comment 15, a form of guidance to state parties concerning their treaty obligations, declaring that water is implicitly guaranteed as part of rights to an "adequate standard

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30. *See, e.g.*, United Nations Department of Economic and Social Affairs, *The Human Right to Water and Sanitation*, http://www.un.org/waterforlifedecade/human_right_to_water.shtml.

31. *Id.*

32. The term "soft law" is often used to describe the status of non-binding international instruments of ambiguous legal authority that may influence state behavior and form "quasi-binding" state obligations. The term might also be applied to the non-binding output of international organizations purporting to interpret state obligations. For a recent critique of the concept, see Anthony D'Amato, *International Soft Law, Hard Law, and Coherence*, Northwestern Public Law Research Paper No. 08-01 (Mar. 1, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103915&rec=1&srcabs=1113537.

33. *See* Office of the United Nations High Commissioner for Human Rights, *Committee on Economic, Social and Cultural Rights—Members*, *available at* http://www2.ohchr.org/english/bodies/cescr/members.htm (last visited Oct. 5, 2012).

of living" (Art. 11) and to "health" (Art. 12).[34] In addition to relying upon the fundamental human need for adequate water, the Committee reasoned that water was a prerequisite for attainment of other rights explicitly recognized in the Convention, which utilizes a "catalogue of rights . . . not intended to be exhaustive."[35] General Comment 15 directly suggests that the right to water is legally binding for the 160 state parties to the Convention.[36] It also describes the Committee's view of what such a right requires in detail that would undoubtedly cause consternation among national governments and those who prefer democratically driven policy making.[37]

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34. *See* Committee on Economic Social and Cultural Rights, General Comment 15, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter General Comment 15] General Comment 15 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.

35. *Id.*

36. *Id.* at 17–34.

37. *See* General Comment 15, *supra* note 34, at. 4. The General Comment includes, for example, the following assertions of state obligations:

> [D]isadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology . . . [w]ater should be treated as a social and cultural good, and not primarily as an economic good . . . water should be of an acceptable colour, odour and taste for each personal or domestic use . . . [a]ll water facilities and services must be of sufficient quality, culturally appropriate and sensitive to gender, life-cycle and privacy requirements . . . even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes . . . investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population . . . States 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 . . . [t]o ensure that water is affordable, States parties must adopt the necessary measures that may include, *inter alia*: (a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low-cost water; and (c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.

General Comment 15 was followed by a series of non-binding resolutions of the UN Human Rights Council endorsing the concept of an international right to water. The latest of these resolutions, in 2011:

> Reaffirms that States have the primary responsibility to ensure the full realization of all human rights, and must take steps, nationally and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realization of the right to safe drinking water and sanitation by all appropriate means, including particularly the adoption of legislative measures in the implementation of their human rights obligations.[38]

The U.N. General Assembly has also periodically added its non-binding support for an incipient right to water. In 2000, for example, the Assembly endorsed "promotion" of a "fundamental right" to "clean water" as a "moral imperative" in achieving the "full realization of the right to development."[39] In 2010, the General Assembly explicitly recognized ". . . the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights . . . ."[40] There were no negative votes, but forty-one nations abstained, primary among them industrialized nations and water rich countries[41] including the United States, Canada, and most of the European Union.[42] As noted above,

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While many may agree that these are excellent ideas, it is equally true that each reflects basic policy judgments about priorities more properly assigned to domestic, democratic processes.

38. Resolution of Human Rights Council, Oct. 12, 2011, A/HRC/RES18/1, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/RES/18/1 (last visited Oct. 5, 2012).

39. The Right to Development, G.A. Res. 54/175, U.N. Doc. A/RES/54/175 (Feb. 15, 2000).

40. The Human Right to Water and Sanitation, G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (Aug. 3, 2010).

41. *See Drink, supra* note 12. According to The Economist special report: Water is not evenly distributed—just nine countries account for 60% of all available fresh supplies—and among them only Brazil, Canada, Colombia, Congo, Indonesia, and Russia have an abundance. America is relatively well off, but China and India, with over a third of the world's population between them, have less than 10% of its water.

42. Abstaining states complained that the declaration of a right to water was premature, uncertain in meaning and disruptive of international efforts to improve water access. *See* Press Release, General Assembly, General Assembly adopts resolution recognizing access to clean water, sanitation as human right, by recorded vote of 122 in favor, none against, 41 absentations, U.N. Doc. GA/10967 (Jul. 28, 2010).

a right to water also appears on the agenda documents for the Rio+20 Conference on Sustainable Development, which took place in June, 2012.[43]

All of these various sources are, in essence, non-binding interpretations of pre-existing treaties or statements of aspiration. It seems clear that they lend support for the argument in favor of creating state obligations regarding water. They are not, however, law. They should also be viewed with skepticism regarding their practical significance. Governments and international bodies, especially at the U.N., are famous for high rhetoric while endorsing non-binding, empty promises. The General Assembly in particular tends to classify all human needs and interests under the rubric of rights, typically in meaningless resolutions designed primarily as feel good statements.

The reality is that virtually no state treats such interpretations and declarations as legally binding. Thus, suggestions at the U.N. and other international fora that a generally applicable right to adequate water and sanitation has been established are unconvincing at best. Although there is clearly some promising movement towards recognition of the concept of a right to water, the ultimate limitation remains securing state consent to meaningful and clear obligations.

Ultimately, the important question is whether there is something real to be gained from a rights-based approach to water on the international level. A corresponding question is whether there are potential downsides to a rights-based approach. In other words, is the creation of an international human right to water consistent with, and does it effectively address, the real threats to the availability of clean water: pollution, depletion, inequitable distribution, lack of international cooperation, and mismanagement? The answers are not terribly clear. Arguably, treating water as an enforceable individual right has at best a very indirect, and perhaps even a disruptive effect on these very real impediments to securing safe water for all.

III. PROSPECTS FOR A *MEANINGFUL* INTERNATIONAL HUMAN RIGHT TO WATER

Although it is fairly clear that a generally applicable international human right to water has yet to reach the status of binding international law, the concept has been enthusiastically embraced by the U.N. and assorted human rights institutions. These efforts raise a number of basic and interrelated questions:

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43. *See generally* notes 16–17, *supra* and accompanying text.

1) Will the international community eventually recognize water as a legally enforceable individual human right?
2) Should it?
3) What are the practical implications of recognizing such rights?
4) Is there something real to be gained by addressing the essential human need for adequate water through the mechanisms of international human rights law?

A. Prospects for State Consent

As to the first predictive question, whether an enforceable legal right to water will be recognized as a binding international obligation, the prospects appear somewhat mixed. On the one hand, it seems inevitable that a right to water in some form will become part of the normative fabric of international human rights law. Indeed, taking a casual approach, some may argue that it has already attained that status, at least as soft law. International organizations, particularly at the U.N., have enthusiastically adopted the mantle of water rights, in typical fashion viewing declarations of rights more in aspirational terms than legal.[44] Even so, doubts remain about what the international community really means when it endorses a right to water. Would such a declared right be meaningful? History is not inspiring in this regard.

A great many governments will readily endorse such a right, as they have many other rights, simply because they do not take human rights obligations seriously in the first place. Most governments have a long history of treating international human rights as window dressing; the right to water will be the latest fashionable addition to the list of unenforceable and ignored rights. Many of these same governments with pressing needs for material assistance of every kind will also view the right to water as part of their general argument for assistance from the developed world.[45] Indeed, the right to water already has taken on the flavor of North-South political wrangling over the obligations of wealthier nations.[46] Thus, even

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44. *See generally* Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, *available at* http://www.law.northwestern.edu/journals/jihr/v2/5/5.pdf.

45. *See generally* United Nations Human Rights Office of the High Commissioner, *California: New Law on the Human Right to Water and Sanitation Sets "Inspiring Example for Others"—UN Expert*, *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12605&LangID=E (last visited Oct. 5, 2012); *see also* Glendon, *supra* note 44.

46. *See generally* Felicia Fonseca, *Arizona high court settles water rights query*, Sept. 20, 2012, *available at* http://www.capitalpress.com/print/AP-AZ-Water-rights-091212 (last visited Oct. 5, 2012).

formal recognition of a right within the international system would not suggest that such interests will be enforceable, meaningful, or clear as to content. As described below, using the ESCRC as an illustration, this is particularly true historically with regard to affirmative social or economic rights such as the proposed right to water.

It seems equally clear, that many industrialized and water rich states will resist recognition of an international, individual human right to water and eventually refuse consent to such obligations, at least in the form of justiciable individual rights. It seems highly unlikely, for example, that countries like the United States, Canada, or the United Kingdom will consent to a binding international human right to water.[47] To explain why this is true, one need only consider the Western perspective on what rights mean and the practical implications of an individual right to water.

First, at least from the Western legal perspective, there is a fundamental difference between acknowledging the importance of a particular individual interest and establishing that interest as a legal entitlement. This distinction is typically ignored at the U.N. and in international parlance where the term "right" is instead a synonym for important needs. For the lawyer and for practical purposes, however, the distinctions between "ought" and "is," "need" and "legal entitlement" are critical. For the legal system, a right is an enforceable entitlement; a mechanism by which a particular individual interest may be enforced against the government.[48] It is not simply an expression of high aspiration.[49]

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47. Even with regard to the non-binding agenda document for the Rio+20 Conference these states initially resisted inclusion of language describing an international right to water. *See* WASH NEWS INTERNATIONAL, *Rio+20: Canada Finally Recongises Human Right to Water and Sanitation*, June 3, 2012, *available at* http://washinternational.wordpress.com/2012/06/03/rio20-canada-finally-recognises-human-right-to-water-and-sanitation/ (last visited Oct. 6, 2012).

48. *See generally* thefreedictionary.com, *available at* http://legal-dictionary.thefreedictionary.com/p/right (last visited Oct. 5, 2012).

49. The ESCRC clearly does not view the right to water as merely aspirational. General Comment 15 sets out a great number of specific policy directives—an astonishing display of hubris for an unelected, unaccountable advisory body with no binding power and questionable degree of authoritativeness. It also provides in Articles 55 & 56 that specific justiciable remedies must be provided in the form of "adequate reparations, including restitution, compensation, satisfaction or guarantees of non-repetition . . ." as well as "legal assistance for obtaining remedies." The Committee apparently views itself as the ultimate safeguard for its own policy directives regarding the right to water, directing states to set "benchmarks" for the adequacy of water quantities, qualities, and access based on international standards which the Committee will then supervise. General Comment 15, *supra* note 34, at Art. 53.

1. Philosophical Resistance

On some level, such distinctions reflect well-known and enduring philosophical differences among various societies and governments over the appropriate relationship and obligations of governments to individuals. From a Western liberal perspective, rights are generally viewed primarily as limitations on negative government action against individuals.[50] Rights are a legal mechanism that respond to government interference with personal liberty and protect against governmental abuse.[51] Classic illustrations would include freedom of speech and the prohibition against torture. This view contrasts with the idea, often attributed to non-Western or socialist societies, that rights also involve affirmative obligations on governments to provide for essential human needs.[52] Rights may be used to demand that governments organize and allocate public resources to ensure that everyone has adequate food, shelter, education, and absolutely yes, clean water and sanitation. Western societies similarly aspire to satisfy these basic needs, but often dispute whether justiciable individual rights are the appropriate means to those ends.[53]

Distinctions between rights as negative limitations on government versus affirmative obligations to promote human dignity, while often exaggerated, are not simply a theoretical, pointy-headed professor concern. First, they likely reflect philosophically-based political resistance to water rights among some Western nations. Second, such distinctions also reflect some important practical implications that are likely to create real obstacles to the establishment of a meaningful, enforceable, individual international right to water. As discussed below, the emphasis here is on the language "meaningful, enforceable individual right".

Western resistance to a right to water is likely to be first grounded on the argument that the problem of water should not be addressed via justiciable individual rights, that is, as a claim that can be adjudicated and enforced by individuals against their government and society. Many governments that take rights seriously have persistently resisted creating enforceable rights that involve affirmative obligations to individuals because they necessitate reallocation of resources through the wrong

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50. *See generally Liberalism*, ENCYCLOPEDIA.COM, *available at* http://www.encylopedia.com/topic/liberalism .aspx (last visited Oct. 6, 2012).

51. *See id.*

52. *See generally* Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates* 4 NW. U. J. INT'L HUM. RTS. 331 (2005).

53. *See* Martin Scheinin, *Economic, Social and Cultural Rights: Models of Enforcement, available at* http://web.abo.fi/instut/imr/research/martin/ESCMartinScheinin.doc (last visited Oct. 5, 2012).

means.[54] Rights to food, shelter, health care, clean environment, and water all suggest that governments must utilize both public funds and power to achieve certain distributions of resources at the behest of individual claimants. Even governments that support fulfilling such essential needs with extensive social services and comprehensive "safety nets," such as the United States, tend to reject the idea that such needs should be addressed through justiciable rights.[55] Rather, these vital needs must be negotiated through accountable political institutions weighing competing claims and priorities. Whether for right or wrong, such philosophical resistance to meaningful affirmative rights obligations—like clean water—remains real.

Of course, this philosophical resistance is neither universal nor insurmountable. Indeed, one might ask why the widespread adoption of the U.N. Economic and Social Rights Covenant, which recognizes many rights similar in nature to water access, is not evidence to the contrary. At minimum, widespread adoption of the Covenant should indicate a commitment by a great number of states to address such essential human needs through rights. While there is a grain of truth to this claim, it is an uncritical and overly optimistic perspective on the actual and practical meaning of the Covenant's obligations. It is a view that fails to accurately account for what rights in the context of the Convention actually mean. For a variety of reasons, the interests recognized under the Covenant as rights are unlikely to ever take the form of justiciable entitlements that are enforceable by individual claimants.

The first reason for this is tied to an endemic characteristic of the current human rights system, which is particularly true of economic and social rights; rights are typically cast in general and malleable terms with plenty of wiggle room, allowing states the pretense of compliance. This textual flexibility is particularly problematic within the institutionally weak international system, since history tells us that most governments also do not mean or practice what they say.

The ESCRC is a good example. The treaty text itself generally only creates hortatory goals for state parties to achieve progressively its laudatory ends to the extent national resources allow.[56] There is no serious

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54. *See* Gary D. Libecap, *"Chinatown" Owens Valley and Western Water Reallocation: Getting the Record Straight and What It Means for Water Markets*, *available at* http://www.u.arizona.edu/~libecapg/downloads/published/LibecapUTAustinE3.pdf.

55. *See generally* Michael J. Dennis and David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, July 01, 2004, *available at* http://www.escr-net.org/docs/i/431329 (last visited Oct. 5, 2012).

56. *See CESCR General Comment: The nature of State parties obligations (Art. 2, Par.1)*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, Dec. 14, 1990, *available*

enforcement mechanism associated with the treaty and the state parties have not directly incorporated the ESCRC's list of rights into national law in the form of binding legal obligations enforceable by domestic institutions. A cynic might describe the ESCRC as the wouldn't-it-be-nice or if-we-only-could treaty. It is painless to agree to a vague, unenforceable obligation to do your best to someday achieve general social ends with which no one disagrees. This is not to say that the rights based approach of the ESCRC is useless. The rhetorical power of rights discourse certainly serves to promote and educate. The ESCRC does not, however, create effective justiciable rights for either groups or individuals.

Likely resistance to water rights is not merely philosophical. An international human right to water also raises important practical issues that have developed, which water-rich nations are likely to view as deeply problematic. The most important of these problematic practical implications circle back to the fact that international human rights are, at least in the Western view, a legal institution with legal prerequisites and implications. There can be, of course, legitimate disagreement over the legal attributes of human rights. At least in the West, most legal systems would agree over three basic characteristics that define a right from a legal perspective. First, human rights are a legal construct, an entitlement allowing individuals to demand certain treatment by their government as a matter of enforceable law. Second, to be meaningful, rights must be related to subjects that can be acted upon by courts or other bodies, interests that can be enforced by threat of sanction, a justiciable claim, instead of an empty promise of future behavior. Third, international human rights are not

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at http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument (last visited Sept. 9, 2012). Article 2 of the Covenant casts the state parties' obligation in terms of progressively achieving rights to the maximum extent of available resources. The Human Rights Council reiterated this formulation when articulating its view of the proposed international right to water:

> Reaffirms that States have the primary responsibility to ensure the full realization of all human rights, and must take steps, nationally and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realization of the right to safe drinking water and sanitation by all appropriate means, including particularly the adoption of legislative measures in the implementation of their human rights obligations. Reaffirms that States have the primary responsibility to ensure the full realization of all human rights, and must take steps, nationally and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realization of the right to safe drinking water and sanitation by all appropriate means, including particularly the adoption of legislative measures in the implementation of their human rights obligations . . . .

only claims against one's own government, but also potentially against the entire world community; it is an obligation from all, to all.

2. Practical Implications: Domestic Redistribution

What do these characteristics mean regarding the practical implications of the prospective international right to clean water and sanitation? Water is not only an essential need, it is also both a commodity and a scarce resource. A legally recognized right to water, if taken seriously, would necessarily suggest a transfer of resources and redistribution, both domestically and internationally. Take, for instance, the real cost of clean water and sanitation under developing international standards. [57] Currently, most people do not pay anywhere near the actual cost of water if one includes externalities, pollution control, and

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57. General Assembly Resolution, A/RES/58/217, December 2003, proclaimed the period 2005-2015 "International Decade for Action 'Water for Life'." The U.N. Department of Economic and Social Affairs, maintains a website promoting the program which relies on standards set by the WHO. Among other things, these standards would require that water must be:

Sufficient. The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal, and household hygiene. According to the WHO, between 50 and 100 litres of water per person per day are needed to ensure that most basic needs are met and few health concerns arise.

Safe. The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health. Measures of drinking-water safety are usually defined by national and/or local standards for drinking-water quality. The WHO Guidelines for drinking-water quality provide a basis for the development of national standards that, if properly implemented, will ensure the safety of drinking-water.

Acceptable. Water should be of an acceptable colour, odour and taste for each personal or domestic use [. . .] [a]ll water facilities and services must be culturally appropriate and sensitive to gender, lifecycle, and privacy requirements.

Physically accessible. Everyone has the right to a water and sanitation service that is physically accessible within, or in the immediate vicinity of the household, educational institution, workplace, or health institution. According to WHO, the water source has to be within 1000 metres of the home and collection time should not exceed 30 minutes.

Affordable. Water, and water facilities and services, must be affordable for all. The United Nations Development Programme (UNDP) suggests that water costs should not exceed 3 percent of household income.

International Decade for Action 'Water For Life' 2005-2015, UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *available at* http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument (last visited Sept. 9, 2012).

infrastructure.[58] More critically, it seems clear that vast numbers of people will never be able to pay even the nominal cost of adequate clean water as measured by developing international standards. According to *The Economist*, at a cost of $10 per month for basic water needs: "in the continent's poorer countries, such as Honduras, Nicaragua and Bolivia, 30-50% of urban households could not stretch that far. And in India and sub-Saharan Africa, more than half of households would struggle to pay."[59] According to the U.N. Water for Life Decade program:

> People living in the slums of Jakarta, Manila and Nairobi pay 5 to 10 times more for water than those living in high-income areas in those same cities and more than consumers in London or New York. In Manila, the cost of connecting to the utility represents about three months' income for the poorest 20% of households, rising to six months' in urban Kenya.[60]

The daunting reality is that water and sanitation that would meet international standards is currently not affordable for much of the world's population, and its true costs will dramatically rise over time. This reality is reflected in pronouncements about water rights by international organizations that stress distributive goals. General Comment 15, for example, describes state obligations regarding water in this way:

> To ensure that water is affordable, States parties must adopt the necessary measures that may include, *inter alia*: (*a*) use of a

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58. *Special Report on Water, Trade and Conserve: How to make tight supplies go further*, THE ECONOMIST, May 20, 2010, *available at* http://www.economist.com/node/16136292 (last visited Sept. 9, 2012). The Economist special report on water describes actual cost of water this way:

> Dr Perry, the irrigation economist, says water is typically priced at 10-50% of the costs of operating and maintaining the system, and that in turn is only 10-50% of what water is worth in terms of agricultural productivity. So to bring supply and demand into equilibrium the price would have to rise by 4-100 times.

Clean water is a right: But it also needs to have a price, THE ECONOMIST, Nov. 9, 2006, *available at* http://www.economist.com/node/8142904 (last visited Sept. 9, 2012). In another article in the series titled, "Clean Water is a Right," the author also cites the UN Development Fund for his observation that:

> If the poor cannot pay, someone else must. Taxpayers already bear some of the costs of water, shoveling money into loss-making public utilities. Ms. Foster and Mr. Yepes reckon that almost 90% of water utilities in low-income countries do not charge their retail customers enough to cover the costs of operating and maintaining their pipes, let alone investing in them.

59. *Id.*

60. *International Decade for Action 'Water For Life' 2005-2015*, UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *available at* http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument (last visited Sept. 9, 2012).

> range of appropriate low-cost techniques and technologies; (*b*) appropriate pricing policies such as free or low-cost water; and (*c*) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.[61]

There are, of course, far more flexible and reasonable governments than the United States regarding affirmative rights.[62] Nevertheless, imagining the reaction of Congress to a proposed individual right to water illustrates that reluctance is not simply a matter of ideological intransigence. "Obamacare" might become "Obamawater" along with moronic, ill-informed cries of socialism, but the underlying issues would involve legitimate concerns over taxes and resource allocation. An enforceable individual right to water would imply that taxes must be used to provide free or subsidized water to those who cannot afford its true cost. While this may be an entirely reasonable and laudable result, it will spur significant resistance by governments, particularly those which are market oriented, and especially if it is driven by international obligations.

3. International Supervision of Domestic Priorities

Part of this resistance will rest on the implication that such redistributions must be accompanied by international supervision over domestic decisions on uses and priorities. If taken seriously, an international, individual right to water clearly suggests national reallocations and controls over water usage. Limitations on lawn watering and swimming pools might be easy, but what about the wide variety of agricultural and industrial uses that are directly tied to both jobs and capital investments? Most critically, such reallocations could conceivably be driven by the claims of individuals enforcing their rights subject to international supervision rather than via negotiated domestic social policy. In the United States, it would also probably require federalization of water allocation to achieve international obligations. Each of these results is clearly contemplated by the ESCRC's General Comment 15, which

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61. General Comment 15, *supra* note 34, at ¶ 27.

62. *See generally* Andrew Moravcsik, *Why Is U.S. Human Rights Policy So Unilateralist?*, *available at* http://www.princeton.edu/~amoravcs/library/unilateralism.pdf.

specifically addresses allocation of water resources, water usage priorities, nationalization, and detailed international supervision.[63]

An international obligation on governments, to paraphrase language from the ESCRC, to "progressively achieve" adequate clean water for all, to the "extent of available resources, without discrimination," raises other troublesome questions.[64] For example, water is traditionally a locally accessed resource (concentrated in basins and aquifers) because it is very heavy and both expensive and difficult to move. In a significant number of places water is supplied by localized private industry.[65] Is nationalization of water resources required to ameliorate the vagaries and harsh realities of the market? At minimum, an enforceable right to water implies either governmental control or intervention beyond what many societies would deem proper standards to apply to the conduct of private actors. Once again, the ESCRC's General Comment 15 suggests these results:

> The obligation to protect requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, *inter alia*, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.[66]
>
> Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, state parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses, an effective regulatory system must be established in conformity with the Covenant and

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63. *See id.* at ¶ 14, 16, 21–28, 44 (further illustrations regarding resource priorities). The General Comment insists of the creation of "national" plans for water allocation. General Comment 15, *supra* note 34, at ¶ 47. It lists pollution, "inequitable extraction," "unaffordable price increases," "insufficient expenditure or misallocation of public resources," and failure to "reduce the inequitable distribution of water facilities and services "as potential violations of the right to the implied right to water, it also provides for detailed international supervision. *Id.* at ¶ 53–56.

64. General Comment 15, *supra* note 34 at ¶ 11–12.

65. Wikipedia, citing studies by the World Bank and others, provides an adequate summary of the "privatization" of water globally at: http://en.wikipedia.org/wiki/Water_privatization. The estimates vary between 270–900 million people whose water needs are met by private companies.

66. General Comment 15, *supra* note 34 at ¶ 23.

> this General Comment, which includes independent monitoring, genuine public participation, and the imposition of penalties for non-compliance.[67]

May industrial and agricultural usages, which arguably produce society-wide economic benefits, be favored over individual domestic usage? Do international individual rights here trump property interests and pre-existing water allocation law (only 10% of water currently goes to domestic uses)?[68] If polluting uses are prohibited or limited in favor of individual domestic needs, would such priorities be imposed on the underdeveloped world economies? Could thirsty Texans force Michigan to distribute its water to Texas, vindicating individual international rights?

An individual right to water is problematic in this sense: water is a vital resource not simply for individuals but also for entire societies, nations, and the global economy. Individual needs will sometimes conflict with, and yet must inevitably coexist with, these competing concerns, not the least of which involve water's role in the environment, economic development, and international affairs. Given the content and tenor of General Comment 15, it is not surprising that some governments believe that the existence of an international human right to water suggests international supervision and international assessments regarding the legitimacy of domestic spending and use priorities set by domestic law.

4. Internationalization of Water Distribution and Access

Apart from the potential domestic legal complications of treating water access as an individual right, many governments will also resist the internationalization of water allocation that it implies. That is, apart from creating international supervision over domestic allocation and use, an international right to water suggests that water is a shared global resource. All governments owe an obligation to all people to achieve the basic human right to adequate water wherever they may reside. Does creation of an international human right to water raise the prospect of overarching international supervision over the international allocation of water? A legitimate concern of some governments, particularly those which are developed and water-rich, is that an international human right to water suggests further internationalization of water resources.[69] If we

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67. *Id.* at 24.

68. *See Use of water in food and agriculture*, LENNTECH, *available at* http://www.lenntech.com/water-food-agriculture.htm (last visited Oct. 5, 2012).

69. *See Special Report: Water; to the Last Drop, How to Avoid Water Wars*, THE ECONOMIST, May 20, 2010, *available at* http://www.economist.com/node/16136292 (last visited Sept. 9, 2012).

internationalize water access as an individual human right, who is to set the appropriate priorities over access and distribution? Consider the following statement in General Comment 15:

> Depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required. In disaster relief and emergency assistance, including assistance to refugees and displaced persons, priority should be given to Covenant rights, including the provision of adequate water. International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards, and sustainable and culturally appropriate. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.[70]
>
> 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 indicated above in paragraph 37.[71]

Taking these concerns to the extreme, some opponents to water rights may suggest that such rights will eventually necessitate international redistribution of water resources. If water access is an international human rights obligation, *erga omnes*, shouldn't Michigan supply water not only to Texas but also to Mexico? Are wealthy or water-rich nations required to supply water to poor ones? Note this language in the General Assembly Resolution endorsing a right to water:

Although access to water tends to be local, many major water sources are shared by multiple nations. According to The Economist:

> International river basins extend across the borders of 145 countries, and some rivers flow through several countries. The Congo, Niger, Nile, Rhine and Zambezi are each shared among 9-11 countries, and 19 share the Danube basin. Adding to the complications is the fact that some countries, especially in Africa, rely on several rivers; 22, for instance, rise in Guinea. And about 280 aquifers also cross borders. Yet a multiplicity of countries, though it makes river management complicated, does not necessarily add to the intractability of a dispute.

70. General Comment 15, *supra* note 34, at ¶ 34.

71. *Id.* at ¶ 38.

> Calls upon States and international organizations to provide financial resources, capacity building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all.[72]

5. Priorities, Effectiveness & Legitimacy

All of these concerns, real and fanciful, raise crucial questions of legitimacy and efficacy. As world population and industrialization increases, critical conflicts over water access and use will also inevitably increase. The question is whether those issues, involving difficult decisions about priorities, are best resolved within the democratic legal structure of the nation along with international negotiation, or under the mantle of international human rights adjudicated at the behest of individuals.

Reallocation of resources designed to ensure that all people have access to clean water and sanitation is undoubtedly an appealing idea for many (including this author). Some might reasonably argue that, even if driven by litigation and individual claims, the ultimate result would surely be preferable to the alternative world, in which some lack something essential to life itself. Yet, reallocation and subsidization for the poor may be problematic for other reasons as well. Free and subsidized water will almost inevitably mean less conservation and far more waste. How do we address environmental necessities and the pressing need for conservation under the rubric of individual rights? What are the appropriate standards and mechanisms for addressing individual access and usage in an era of increasing shortage and environmental pressures? Can a justiciable right to water accommodate the complicated economics of water?

However resolved, such issues will inevitably involve a weighing of competing priorities and societal objectives. This fact underlies one of the chief objections of many governments to the creation of an international human right to water. Many governments, especially in the industrialized West, will reject the idea that such priorities and allocations should be made in the context of individual rights as opposed to other processes, including legislative action and international negotiation. In fact, most Western governments already strongly support using extensive resources to ensure water access and sanitation throughout the world.[73] What they resist is

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72. *Land, Energy, and Water*, STWR, *available at* http://www.stwr.org/land-energy-water/un-declares-access-to-clean-water-a-basic-human-right.html (last visited Oct. 4, 2012).

73. *See* UN International Decade for Action 'WATER FOR LIFE' 2005-2015, *Water quality, available at* http://www.un.org/waterforlifedecade/quality.shtml (last visited Oct. 4, 2012).

further complicating an already complicated issue by creating an enforceable individual right.

IV. THE BRIGHT SIDE

My observations in this essay are meant to bring a critical and hopefully realistic viewpoint on recognizing an international human right to water. This seems cynical and depressing even to me. There is, however, also a strong positive side to casting water as a human right that should be acknowledged. Despite obstacles, definitional problems, and likely state resistance to acceptance of a meaningful and enforceable right to water, it is important to remember that international rights also serve important political and aspirational purposes. The claim that there should be a recognized right to water might best be viewed not strictly by legal principles, but rather by its potential role in advocating for human dignity. The power of international rights is not always about their efficacy in courtrooms but rather about their rhetorical power and influence on how we, and our governments, think. Perhaps most importantly, even if not technically binding or adopted in an enforceable form, the push for international recognition of the right to water may lead to the eventual acknowledgement of the need for better water policy within national legal systems and corresponding international cooperation. The rhetorical power of rights may help promote safe water for all through other means, confirming our collective moral obligations.

Although adoption of a meaningful and enforceable right to water is unlikely in my view, there might also be some real benefits if the right were to become a reality. An enforceable individual right to water might conceivably serve as a legal counterweight to the more politically and economically powerful segments of a society that will inevitably demand a dominant share of this scarce and vital resource. Water rights might be seen then as a form of an equalizer, insisting that governments set priorities in distribution that fulfill the minimum requirements for a dignified life.