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The Human Right to Water in the United States: Why So Dangerous?

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The Human Right to Water in the United States: Why So Dangerous?

Emily M. Thor*

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Water, like religion and ideology, has the power to move millions of people. Since the very birth of human civilization, people have moved to settle close to it. People move when there is too little of it. People move when there is too much of it. People journey down it. People write, sing and dance about it. People fight over it. And all people, everywhere and every day, need it.¹

I. INTRODUCTION

Water is a fundamental resource necessary for human survival and, as such, its sustainability is vital. Only 2.5 percent of Earth's water is fresh and less than

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1. Tim Gopeesingh, Trin. & Tobago Minister of Educ., Address by the Minister of Education at the launch of WASA's 2nd National Secondary Schools' Quiz Competition (Jan. 16, 2012) (transcript available at <http://www.news.gov.tt/index.php?news=10305>) (quoting Mikhail Gorbachev).

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one percent of the fresh water is readily accessible.² That means only .007 percent of water on earth is available for direct human use.³ Currently, there are 844 million people in the world that do not have access to a safe water supply.⁴ As a result, each year 3.575 million people die from water-related diseases.⁵ The United Nations (“U.N.”) has estimated that 2.8 billion people will face freshwater scarcity by 2025.⁶ In fact, Western Asia and Northern Africa have already effectively used up their sustainable water resources.⁷

Despite water being an essential resource, recognition of a human right to water was not articulated until recently. As noted by WaterAid, an international non-governmental organization (“NGO”) dedicated to water and sanitation,⁸ “water and sanitation infrastructure helps people take the first essential step out of the cycle of poverty and disease,”⁹ and yet none of the major human rights instruments—the Universal Declaration of Human Rights,¹⁰ the International Covenant on Economic, Social and Cultural Rights (“ICESC”),¹¹ and the International Covenant on Civil and Political Rights (“ICCPR”)¹²—make any explicit mention of a right to water.¹³ It was not until many years after the ICESC instrument was originally concluded that a right to water was recognized as being an inherent part of “an adequate standard of living,” as articulated in the

2. *Health in Water Resources Development*, WORLD HEALTH ORG., http://www.who.int/docstore/water_sanitation_health/vector/water_resources.htm (last visited Nov. 19, 2011).

3. *Id.*

4. *Water Facts*, WATER.ORG, <http://water.org/learn-about-the-water-crisis/facts/> (last visited Oct. 2, 2011); *Statistics*, WATERAID, http://www.wateraidamerica.org/what_we_do/statistics.aspx?gclid=CLLGhZjvr60CFaQbQgodiwFQnw (last visited Jan. 5, 2012).

5. *Water Facts*, *supra* note 4.

6. *Id.*; *Water Scarcity*, EUR. ENV'T AGENCY, <http://www.eea.europa.eu/themes/water/featured-articles/water-scarcity> (last modified Nov. 26, 2008) (“Water scarcity occurs where there are insufficient water resources to satisfy long-term average requirements. It refers to long-term water imbalances, combining low water availability with a level of water demand exceeding the supply capacity of the natural system.”).

7. U.N. Secretary-General, *The Millennium Development Goals Report 2011*, 52 (2011), available at http://www.un.org/millenniumgoals/11_MDG%20Report_EN.pdf.

8. *Statistics*, *supra* note 4.

9. *Id.*

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

11. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

12. International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

13. See G.A. Res. 217 (III) A, *supra* note 10; G.A. Res. 2200A (XXI), *supra* note 11.

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Covenant.¹⁴ The United States, meanwhile, has been much more hesitant to officially recognize this right.¹⁵

This Comment will analyze the United States' approach to water as a human right. In Part II, this Comment discusses United Nations' resolutions that have been adopted concerning water as a human right and the stance taken by the United States at the international level. Part III will discuss how the right to water has been viewed domestically in the United States, focusing on California legislation concerning the human right to water. Part IV will look at how South Africa and Nigeria have been approaching the right to water, as compared to the United States, and their struggles to ensure water sustainability. In Part V, this Comment will evaluate the United States' reluctance to recognize a legal right to water. Finally, Part VI will draw conclusions as to whether the United States should declare a human right to water.

II. THE INTERNATIONAL HUMAN RIGHT TO WATER

A. *Recognition of this Right by the United Nations*

On September 18, 2000, the U.N. General Assembly adopted the United Nations Millennium Declaration.¹⁶ This Declaration describes the goals of the United Nations towards building "a shared future."¹⁷ The Road map towards the implementation of the United Nations Millennium Declaration states that Target 10 of Goal 7, to "[e]nsure environmental sustainability," is to "halve by 2015 the proportion of people without sustainable access to safe drinking water."¹⁸ Two years later, the U.N. Committee on Economic, Social and Cultural Rights ("ESC Committee") adopted General Comment No. 15 on the right to water.¹⁹ In this General Comment, the ESC Committee reviewed the legal basis of the human right to water, specified obligations of Member States, and discussed

14. General Comment No. 15 (2002): The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Comm. on Econ., Soc. & Cultural Rts., ¶ 3, U.N. Doc. E/C.12/2002/11 (Nov. 29, 2002); G.A. Res. 2200A (XXI), *supra* note 11.

15. Mark J. Cassayre, *Webcast of Explanation of United States Vote on Resolution A/HRC/15/L.14*, U.N. HUM. RTS. COUNCIL (Sept. 30, 2010), <http://www.un.org/webcast/unhrc/archive.asp?go=100930>; *United States Abstains on General Assembly Resolution Proclaiming Human Right to Water and Sanitation*, 104 AM. J. INT'L L. 672, 672-73 (2010).

16. G.A. Res. 5/22, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

17. *Id.* § I(5).

18. U.N. Secretary-General, *Road Map Towards the Implementation of the United Nations Millennium Declaration*, 57, U.N. Doc. A/56/326 (Sept. 6, 2001). According to the 2011 Millennium Development Goals Report by the United Nations, "[t]he world is likely to surpass the drinking water target, though more than 1 in 10 people may still be without access in 2015." *The Millennium Development Goals Report 2011*, *supra* note 7, at 53.

19. U.N. Doc. E/C.12/2002/11, *supra* note 14.

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implementation of the right at the national level.²⁰ The General Comment declared that the right to water was inherent in “an adequate standard of living” guaranteed under Article 11 of the 1966 ICESCR.²¹ As articulated by the ESC Committee, “[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water.”²² This interpretation, while authoritative, is “not binding per se on parties to the Covenant, nor does it ‘create’ a previously nonexistent human right to water.”²³

While “not binding per se,” the General Comment does mean that the ESC Committee expects the parties to the Covenant to indicate their implementation status of the right to water in their reports to the ESC Committee.²⁴ According to the ESC Committee, by ratifying the ESC Covenant, a State “accepts a solemn responsibility to apply each of the obligations embodied therein and to ensure the compatibility of their national laws with their international duties, in a spirit of good faith.”²⁵ The ESC Committee further stated that, at a minimum, parties to the Covenant should see it as an interpretive aid to ensure consistency between domestic law and international human rights instruments, thereby giving actual effect to their international obligations under the Covenant.²⁶

It is the job of the ESC Committee to monitor the implementation of the Covenant by a State party.²⁷ Therefore, for this instrument to be effective State parties must take measures toward giving their international legal obligations legal effect.²⁸ The rights under the Covenant are therefore dependent on the laws and remedies at the national level.²⁹ Nonetheless, implementing the right to water at the national level can be difficult, as this right can require a large amount of capital to be expended; therefore, like all economic, social and cultural (“ESC”) rights, the right to water is to be achieved progressively.³⁰ In contrast, rights articulated in the ICCPR, such as “the right of peaceful assembly” and “freedom of association,” must immediately be guaranteed.³¹

20. *Id.*

21. *Id.* ¶ 3; G.A. Res. 2200A (XXI), *supra* note 11, at pt. III, art. 11

22. U.N. Doc. E/C.12/2002/11, *supra* note 14, ¶ 2.

23. 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, 682 (2009).

24. *Id.*; G.A. Res. 2200A (XXI), *supra* note 11, at pt. 5; U.N. Comm. on Econ., Soc. and Cultural Rights, *Fact Sheet No. 16 (Rev.1), The Committee on Economic, Social and Cultural Rights*, pt. 5 (July 1991), available at <http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf>.

25. U.N. Comm. on Econ., Soc. and Cultural Rights, *supra* note 24, at pt. 1.

26. *Id.*

27. *Id.* at pt. 6; McCaffrey & Neville, *supra* note 23, at 682.

28. U.N. Comm. on Econ., Soc. and Cultural Rights, *supra* note 24, at pt. 5.

29. *Id.*

30. G.A. Res. 2200A (XXI), *supra* note 11, at pt. II, art. 2; McCaffrey & Neville, *supra* note 23, at 683.

31. G.A. Res. 2200A (XXI), *supra* note 11, at pt. II, arts. 2, 21, 22; McCaffrey & Neville, *supra* note 23, at 683.

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The United Nations took further steps in promoting the right to water in July 2010, when the U.N. General Assembly, in Resolution 64/292, 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.”³² The United Nations also called upon Member States to provide the resources, in particular to developing countries, necessary to secure this right for all.³³ In September 2010, Resolution 64/292 was affirmed by the Human Rights Council Resolution 15/9.³⁴

Most recently, a U.N. report was issued containing initiatives for recognizing a right to water and sanitation.³⁵ This report asserts that having a national legal framework is critical to ensure this right because “without good policies and planning to ensure that these laws are implemented, the [right] cannot be realized.”³⁶ While some countries have already taken steps to create a national legal framework for the human right to water consistent with the United Nations,³⁷ other countries, such as the United States, have been more hesitant to do so.³⁸

B. The Perspective of the United States

The United States has traditionally taken a different approach to human rights than many other nations.³⁹ In the United States, individual states tend to take the lead when it comes to ESC policies, as these rights are not contained in the U.S. Constitution.⁴⁰ This absence has affected the approach the United States, as a whole, takes toward human rights, such as the right to water.⁴¹ Thus, while the actions of the United States imply that it supports access to water and sanitation for all, it has made it clear that it has reservations concerning a right to water as expressed by the United Nations.⁴²

According to a U.S. government spokesperson, the United States recognizes that the human right to water and sanitation is derived from the ICESCR, and has

32. G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (July 28, 2010).

33. *Id.*

34. Human Rights Council Res. 15/9, Human Rights and Access to Safe Drinking Water and Sanitation, 15th Sess., Sept. 13-Oct. 1, 2010, U.N. Doc. A/HRC/RES/15/9 (Sept. 30, 2010) [hereinafter H.R.C. Res. 15/9].

35. Special Rapporteur on the Right to Water, *The Human Right to Safe Drinking Water and Sanitation*, Human Rights Council, ¶ 7, U.N. Doc. A/HRC/18/33/Add.1 (June 29, 2011) (by Catarina de Albuquerque).

36. *Id.* ¶ 15.

37. S. AFR. CONST., 1996, ch. 2, §§ 27(1)(b), (2), available at <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#27>.

38. Cassayre, *supra* note 15.

39. Michael H. Posner, Assistant Sec’y, Bureau of Democracy, Human Rights, and Labor, Address before the American Society of International Law: The Four Freedoms Turn 70 (Mar. 24, 2011).

40. *Id.*

41. *See id.*

42. Cassayre, *supra* note 15; H.R.C. Res. 15/9, *supra* note 34.

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shown dedication to solving the world's water challenges.⁴³ In 2005, President George W. Bush signed the Senator Paul Simon Water for the Poor Act “to make access to safe water and sanitation for developing countries a specific policy objective of the United States foreign assistance programs.”⁴⁴ The United States has also donated to the World Bank, the African Development Bank, the Inter-American Development Bank, and to intergovernmental organizations, which contributed almost \$5 billion for water and sanitation activities in 2008.⁴⁵ Additionally, in 2009, the United States committed more than \$750 million for water and sanitation activities in developing countries.⁴⁶

Despite its global contributions, “the United States has had reservations about the international debate on economic, social, and cultural rights,” such as those debates which led the United Nations to adopt Resolution 15/9 affirming a right to water.⁴⁷ For instance, there is concern these debates would lead to obligations taking away U.S. sovereignty in these matters⁴⁸ by, for example, committing the United States to give more foreign assistance than it would give of its own volition or that new, enforceable, legal obligations would be created tying “the hands of Congress and the states.”⁴⁹ Such reservations are part of why the United States abstained from General Assembly Resolution 64/292 in July of 2010.⁵⁰ The U.S. delegation explained its abstention was due to the fact that the Resolution described the right in a way that was not reflective of international law.⁵¹ The delegation further stated that the abstention was also due to the belief that “the legal implications of a declared right to water have not yet been carefully and fully considered.”⁵² Thus, the United States’ primary concern with the Resolution itself was practicability.

Despite its reasons for abstaining from Resolution 64/292, the United States joined the consensus on the Human Rights Council’s Resolution 15/9, adopted in September 2010.⁵³ The United States affirmed its commitment to water sustainability and the “general substance of this resolution,” but continued to maintain that the Resolution could have been worded better, the negotiation process could not be condoned, and that there was a lack of consideration for

43. Cassayre, *supra* note 15.

44. H.R. 1973, 109th Cong. (2005); Cassayre, *supra* note 15. Legislation has been introduced in an attempt to strengthen this act without much success. S. 624, 111th Cong. (2010); S. 641, 112th Cong. (2011); H.R. 3658, 112th Cong. (2011).

45. Cassayre, *supra* note 15.

46. *Id.*

47. Posner, *supra* note 39; Cassayre, *supra* note 15; H.R.C. Res. 15/9, *supra* note 34.

48. Posner, *supra* note 39; Cassayre, *supra* note 15.

49. Posner, *supra* note 39

50. *United States Abstains on General Assembly Resolution Proclaiming Human Right to Water and Sanitation*, *supra* note 15.

51. *Id.*

52. *Id.*

53. Cassayre, *supra* note 15.

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other countries' textual proposals.⁵⁴ More specifically, the United States stated that the language of the Resolution suggested that human rights are above fundamental freedoms and expressed the view that the language concerning private actors needed improvement.⁵⁵ The United States, however, did not elaborate as to what exactly was wrong with the language concerning private actors, nor did it suggest how it could be improved.⁵⁶

Despite the above concerns, and even though the United States has yet to enact legislation declaring a human right to water, the United States has shown support for this right. It has done so not only by joining the general consensus for Resolution 15/9, but also through its financial contributions—such as those given through the World Bank, the Inter-American Development Bank, and the Global Environment Facility—toward water infrastructure in developing countries.⁵⁷ These contributions, in spite of the United States' reservations about the U.N. Resolutions,⁵⁸ only add to the enigma of why the United States is so hesitant to declare a human right to water.

C. Private Sector Involvement

As previously mentioned, one way the United States has shown support for water infrastructure in developing countries is through multinational organizations.⁵⁹ In addition to these organizational contributions, U.S. companies are also involved in developing water infrastructure in developing countries.⁶⁰ However, according to U.N. Human Rights Council Resolution 15/9, passed in September 2010, the involvement of third parties does not exempt States from fulfilling their human rights obligations to their own populations. Further, States have a duty to ensure “transparency, non-discrimination, and accountability” by these actors.⁶¹ States should also ensure that third parties realize “their human rights responsibilities throughout their work processes” and integrate those rights into their impact assessments, contribute to safe and accessible water and

54. *Id.*

55. *Id.*

56. Cassayre, *supra* note 15. Resolution 15/9 says that States may involve non-state actors in providing safe water and sanitation, however the involvement of third parties does not exempt the State itself from its human rights obligations and the State must oversee these third parties to ensure compliance. H.R.C. Res. 15/9, *supra* note 34.

57. Cassayre, *supra* note 15.

58. *Id.*

59. *Id.*

60. Nico Colombant, *US Companies Race to Provide Clean Water in Africa*, VOICE OF AM. (Aug. 2, 2011, 8:00 PM), <http://www.voanews.com/english/news/africa/US-Companies-Race-To-Provide-Clean-Water-in-Africa-126618848.html>.

61. Cassayre, *supra* note 15; H.R.C. Res. 15/9, *supra* note 34.

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sanitation, develop grievance mechanisms at the organizational level, and not impede use of state accountability mechanisms that may be available.⁶²

These claimed responsibilities under the Resolution mirror the Protect, Respect, Remedy framework, adopted by the United Nations in 2008, which describes the responsibilities of companies in relation to human rights.⁶³ In March 2011, John Ruggie, the Special Representative of the U.N. Secretary-General, presented the Guiding Principles on Business and Human Rights, explaining how the framework should be implemented.⁶⁴ These Guiding Principles “shed light on the duties of States and the responsibilities of business in relation to water and sanitation” by helping to define “the nature and extent of business responsibilities with regard to human rights.”⁶⁵ However, according to the Special Representative, this instrument is non-binding and therefore, merely provides suggestions for how businesses should conduct themselves.⁶⁶

Even though States have the primary responsibility of ensuring human rights, the private sector has its own role to play.⁶⁷ While businesses are not directly bound by international treaties, many realize they have a responsibility not to infringe upon the rights of others by their activities.⁶⁸ This is evidenced by corporate participation in creating and ensuring the workability of the U.N. Guiding Principles on Business and Human Rights.⁶⁹

Business participation is important because businesses can provide valuable contributions towards fulfilling the right to water and sanitation.⁷⁰ According to the Institute for Human Rights and Business, companies have a leadership role

62. H.R.C. Res. 15/9, *supra* note 34.

63. INST. FOR HUMAN RIGHTS AND BUS., MORE THAN A RESOURCE: WATER, BUSINESS AND HUMAN RIGHTS 1, 11 (2011), available at http://www.ihrb.org/pdf/More_than_a_resource_Water_business_and_human_rights.pdf; Special Representative of the Secretary-General, *Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie). The Protect, Respect, Remedy framework rests on three mutually supportive pillars:

The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; [t]he corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and [p]rovision of effective judicial and non-judicial remedies for victims.

INST. FOR HUMAN RIGHTS AND BUS., *supra*; Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (March 21, 2011).

64. *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 63.

65. INST. FOR HUMAN RIGHTS AND BUS., *supra* note 63.

66. U.N. Charter arts. 10, 13.

67. INST. FOR HUMAN RIGHTS AND BUS., *supra* note 63.

68. *Id.*

69. INST. FOR HUMAN RIGHTS AND BUS., *supra* note 63; *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 63.

70. INST. FOR HUMAN RIGHTS AND BUS., *supra* note 63.

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“vis a vis other business water users.”⁷¹ By demonstrating leadership, businesses send messages to decision-makers that can be extremely powerful.⁷² “Corporate lobbying, taxation, regional planning and a range of other engagements with national governments or local authorities can influence access to water and sanitation, or the quality of public services.”⁷³ For example, the International Federation of Private Water Operators (“AquaFed”), which has over 300 members, is actively lobbying for the support of the right to water and the roles business should take in order to support the realization of this right.⁷⁴ AquaFed has also called for increased investment from the private sector in support of this right.⁷⁵ This kind of corporate participation is likely to increase awareness and the promotion of a human right to water.

However, it is ultimately up to a company to determine how actively it wants to participate in fulfilling the right to water and sanitation, if at all, as they are not required to do so.⁷⁶ In other words, businesses *should* “refrain from denying or limiting the access of any person to” human rights but are not *required* to do so.⁷⁷ The U.N. resolutions that have been adopted do not create any direct obligations for businesses;⁷⁸ however, ensuring that business operations are consistent with U.N. human rights resolutions and recommendations is prudent.⁷⁹ This is because these instruments are recognized throughout the world as legitimate standards against which business performance may be evaluated.⁸⁰

There are also other more self-promoting motivations for a company’s participation in water policy. These motivations include: protecting against operational problems resulting from lack of water and sanitation; ensuring its license to operate, legally and socially; and gaining competitive advantage resulting from stakeholders, not only being attracted to a company’s responsible use of natural resources, but also feeling a sense of security because water risks are being addressed.⁸¹ Despite what role their self-interests may play in promoting a right to water, companies can have a significant impact on the right to water and as such, they should be utilized in the promotion of the right to water.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*; AquaFed connects international organizations with water and sanitation providers in the private sector. AQUAFED, (Sept. 1, 2011), <http://www.aquafed.org/>.

75. See INST. FOR HUMAN RIGHTS AND BUS., *supra* note 63.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. THE CEO WATER MANDATE, GUIDE TO RESPONSIBLE BUSINESS ENGAGEMENT WITH WATER POLICY 13 (2010), available at http://ceowatermandate.org/files/Guide_Responsible_Business_Engagement_Water_Policy.pdf.

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Hydros, a U.S. company, is a good example of the impact companies can have.⁸² Hydros is providing one dollar from every sale of its reusable filter bottle to a gravity-fed water storage system project in Gundom, which is located in Cameroon.⁸³ Hydros is also looking toward developing a filter system for tap water in developing countries.⁸⁴ Some critics and development experts think the technology is too expensive and does not solve the issue of water access, but also believe that “the current race to widen access to clean water is creating beneficial competition and new ideas for those who need it.”⁸⁵ As shown by Hydros, private sector participation is important; however, ultimately, the State has the primary responsibility in promoting and ensuring a human right to water, and it is the State which should develop tools and mechanisms to promote this right.⁸⁶

III. THE HUMAN RIGHT TO WATER IN THE UNITED STATES

The United States’ international approach to human rights is reflective of its domestic approach to human rights. In the words of Michael Posner, Assistant Secretary, Bureau of Democracy, Human Rights, and Labor, “the American Dream is predicated on the belief that allowing individuals to flourish is the best way for our nation to flourish.”⁸⁷ Traditionally, the United States has promoted citizens’ rights through political and civil rights such as free speech.⁸⁸ The United States fulfills human rights obligations through its domestic laws, resulting from the U.S. political system based on representative democracy; therefore, the United States approaches international human rights from the perspective of its civil and political rights beliefs.⁸⁹

From a global perspective, the United States recognizes that a human right to water and sanitation is derived from the ICESCR, and that as a result of the right, State parties to the Covenant are undertaking steps in order to implement it.⁹⁰ The United States, however, is not a party to the ICESCR, having yet to ratify it.⁹¹ Furthermore, a right to water is not protected by the U.S. Constitution nor, according to a U.S. Government spokesperson, is it justiciable in U.S. courts.⁹² While the spokesperson did not elaborate on the reasoning for this belief, there

82. Colombant, *supra* note 60.

83. *Id.*

84. *Id.*

85. *See id.*

86. *See* H.R.C. Res. 15/9, *supra* note 34; *see also* INST. FOR HUMAN RIGHTS AND BUS., *supra* note 63.

87. Posner, *supra* note 39.

88. *See id.*

89. *See id.*

90. Cassayre, *supra* note 15.

91. *International Covenant on Economic, Social, and Cultural Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited May 29, 2012) (listing the parties to the ICESCR).

92. Cassayre, *supra* note 15.

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are some regularly used arguments for why ESC rights are non-justiciable such as: ESC rights are too vague, it is not the place of courts since ESC rights involve resource allocation and public policy issues, and there are no effective remedies for breaches of these rights.⁹³ Also, considering the importance the United States places on civil and political rights versus economic, social, and cultural rights, it is not surprising that the United States generally views these rights as non-justiciable.⁹⁴

However, despite this claimed lack of constitutional and judicial support, the U.S. Government admits that there is a widespread public expectation in the country that all should have access to safe drinking water and sanitation.⁹⁵ There are also laws currently in place to protect citizens from contaminated water,⁹⁶ such as the Federal Water Pollution Control Act⁹⁷—better known as the Clean Water Act—which “establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters.”⁹⁸ The fact that there is a societal expectation of safe drinking water and sanitation, and that current laws provide citizens some protection in relation to this expectation, demonstrates that, to a certain extent, the United States supports the right to water and sanitation, and also gives a degree of credibility to the argument that the United States should proclaim a human right to water.⁹⁹

Support for the right to water has been demonstrated at the state level in the United States as well, albeit limitedly.¹⁰⁰ Domestically, according to a U.N. investigation, an estimated \$50 billion is spent on sanitation and water infrastructure in the United States every year.¹⁰¹ However, despite this large investment, Massachusetts and Pennsylvania are the only states whose constitutions even mention a right to water.¹⁰² The Massachusetts Constitution states, “people shall have a right to clean . . . water”;¹⁰³ Pennsylvania’s Constitution states, “people have a right to . . . pure water.”¹⁰⁴ California, on the

93. See generally Section 8: *Challenging Misconceptions around the OP-ICESCR*, ESCR-NET, <http://www.escr-net.org/docs/i/429173> (last visited Feb. 18, 2012).

94. See generally Cassayre, *supra* note 15; see also Posner, *supra* note 39.

95. Cassayre, *supra* note 15.

96. See *id.*

97. Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1972).

98. *Summary of the Clean Water Act*, EPA, <http://www.epa.gov/lawsregs/laws/cwa.html> (last visited Feb. 18, 2012).

99. Cassayre, *supra* note 15.

100. See Press Release, Office of the High Comm’r for Human Rights, Catarina de Albuquerque, UN Independent Expert on the Right to Water and Sanitation: Mission to the United States of America from 22 February to 4 March 2011 (Mar. 4, 2011), available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10807&LangID=E>.

101. See *id.*

102. See *id.*

103. Mass. Const. art. XLIX.

104. Pa. Const. art. I, § 27.

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other hand, has taken a different approach by attempting to address a human right to water legislatively.¹⁰⁵

Water is an integral part of the California economy¹⁰⁶ and the enactment of new legislation concerning the right to water within the state is an attempt to help solve some of the water problems California has been experiencing.¹⁰⁷ One of the problems, according to the Association of California Water Agencies, California is experiencing is that its “capacity for storing and delivering water supplies is falling far behind the needs of a growing population.”¹⁰⁸ Another contributing factor to California’s water issues is climate change.¹⁰⁹ It has resulted in a longer “warm dry season,” thus, creating a challenge for water resources used for drinking and agricultural purposes.¹¹⁰ California has also been struggling with groundwater pollution.¹¹¹ In 2007, water that did not meet drinking water standards may have affected an estimated 1.2 million Californians.¹¹² Moreover, “California has the highest number of schools . . . with unsafe drinking water.”¹¹³

As part of California’s response to its water problems, the legislature tried for several years to pass legislation declaring a human right to water,¹¹⁴ before finally being successful in 2012,¹¹⁵ thus becoming the first state to adopt this type of legislation.¹¹⁶ California’s first legislative attempt concerning a right to water was Assembly Bill 1242, which was introduced in 2009.¹¹⁷ Had it been enacted, AB 1242 would have recognized a human right “to clean, affordable, and accessible water”¹¹⁸ Under this bill, state agencies would have been required “to employ all reasonable means to implement this state policy.”¹¹⁹ The bill was

105. A.B. 1242, 2009-2010 Leg., Reg. Sess. (Cal. 2009); A.B. 685, 2011-2012 Leg., Reg. Sess. (Cal. 2011).

106. *About the Problem*, CALWATERCRISIS.ORG, <http://www.calwatercrisis.org/problem.htm> (last visited Jan. 1, 2012).

107. *See id.*

108. *Id.* (providing a link to a short water documentary concerning California’s water crisis). It is important to note that there is a conflicting belief that there is enough water to meet the needs of the population, as long as it is used efficiently. *See generally* HEATHER COOLEY ET AL., CALIFORNIA’ NEXT MILLION ACRE-FEET: SAVING WATER, ENERGY, AND MONEY (2010), *available at* http://www.pacinst.org/reports/next_million_acre_feet/next_million_acre_feet.pdf.

109. *About the Problem*, *supra* note 106.

110. *Id.*

111. *AB 685 Questions and Answers*, BROWN MILLER COMM., http://www.brownmillerpr.com/AB685/AB685_QandA.pdf (last visited Nov. 20, 2011).

112. *Id.*

113. *Id.*

114. A.B. 1242; A.B. 685.

115. CAL. WATER CODE § 106.3 (West 2012).

116. *New Human-Right-to-Water Bill Introduced as Part of U.N. Expert’s Visit to California*, UUSC (Mar. 1, 2011), <http://www.uusc.org/print/2560?>

117. A.B. 1242.

118. *Id.*

119. *Id.*

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approved in both houses¹²⁰ before being vetoed by Governor Arnold Schwarzenegger.¹²¹ Governor Schwarzenegger stated in his veto message that while he supported the sentiment of the bill, its language would open a floodgate of litigation.¹²² He also reasoned that the bill would not further current efforts toward achieving the goal of providing affordable and accessible water.¹²³ “Our most pressing barrier in achieving this goal is not desire, it is funding,” he said.¹²⁴ It has been suggested, however, that Governor Schwarzenegger was inclined to veto the bill because of his relationship with water associations and districts, which would have been impacted by the legislation.¹²⁵ On the other hand, it has also been suggested that Governor Schwarzenegger was merely focusing on other issues related to water, that he saw AB 1242 as “an annoyance,” and that his veto message merely reflected that attitude.¹²⁶ Nonetheless, the bill failed, leading the way for more proposed legislation.¹²⁷

In 2011, Assembly Bill 685 was introduced in a second attempt by the California legislature to recognize a right to water in the state.¹²⁸ This bill, as introduced, declared that “every human being has the right to clean, affordable, and accessible water for human consumption, cooking, and sanitary purposes,” and just like AB 1242, required state agencies to implement this policy.¹²⁹ A subsequent amendment to AB 685 would have also authorized a regional water management group to “prepare and adopt an integrated regional water management plan,” to address the protection and improvement of water resources, water quality, and supply reliability.¹³⁰ This bill, however, was placed on suspension in August 2011 to determine the attendant costs if passed.¹³¹ Then, in January 2012, AB 685 was amended removing the language concerning a regional water management group, before being re-referred to the appropriations

120. *Id.*

121. *California Governor Vetoes Human Right to Water Act*, UUSC (Oct. 21, 2009), http://www.uusc.org/content/california_governor_vetoes_human_right_water_act.

122. *Bill Analysis*, CAL. LEGIS. COUNCIL, http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1201-1250/ab_1242_cfa_20100917_162710_asm_floor.html (last visited Sept. 11, 2011) (analyzing AB 1242).

123. *Id.*

124. *Id.*

125. Telephone Interview with Garret Bazurto, Legislative Aide to Assembly Member Mike Eng (Dec. 20, 2011).

126. Email from Alf Brandt, Comm. on Water, Parks & Wildlife, California State Assembly, to Emily Thor, Staff Writer, Pacific McGeorge Global Business & Development Law Journal (Dec 20, 2011, 03:31 PST) (on file with author).

127. *California Governor Vetoes Human Right to Water Act*, *supra* note 20; A.B. 685.

128. A.B. 685.

129. *Id.* (Language as introduced on February 17, 2011.); A.B. 1242.

130. A.B. 685.

131. *AB 685 on Suspense*, BROWN MILLER COMM., *available at* www.brownmillerpr.com/AB685/AB685_on_Suspense.pdf (last visited Sept. 11, 2011); *Complete Bill History*, CAL. LEGISLATIVE COUNCIL,

http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0651-0700/ab_685_bill_20120925_history.html (last visited December 21, 2012).

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committee for a cost determination.¹³² There was some belief that the cost argument was merely a smoke screen for other, more political reasons for preventing the bill's passage.¹³³ It was also argued that while cost was a factor, the problem was "a lack of political will."¹³⁴

Proponents of AB 685 believed that it had a better chance than AB 1242 in being enacted.¹³⁵ They asserted that state agencies would be able to afford revising their regulations and policies because the bill "allows them to take steps to implement the policy as they otherwise update regulations and practices and also as they initiate new programs and legislative mandates in the future."¹³⁶

While proponents believed AB 685 had a better chance of being enacted,¹³⁷ there were those who believed that it did not, given California's financial condition.¹³⁸ There was also the belief that AB 685 had the same inherent ambiguity problems AB 1242 had, including vague language addressing who would enforce the policy, how they were going to enforce it, against whom it was to be enforced, and what kind of relief was available for violation of the policy.¹³⁹ According to this view, there was not enough clarity, which made people uncomfortable.¹⁴⁰

There was a lot of conflict surrounding passage of legislation guaranteeing a human right to water in California.¹⁴¹ The major issues were: what is meant by a human right to water and what is the cost implication of such a right.¹⁴² These issues are akin to some of the concerns the United States has with the U.N. resolutions related to such a right and with declaring an international human right to water.¹⁴³ However, despite the cost and ambiguity concerns,¹⁴⁴ on September

132. *Complete Bill History*, *supra* note 131.; A.B. 685; *Committee on Appropriations: Overview*, CAL. ST. ASSEMBLY, <http://apro.assembly.ca.gov/overview> (last visited Dec. 21, 2012).

133. *AB 685 on Suspense*, *supra* note 131.

134. *AB 685 Questions and Answers*, *supra* note 111.

135. Telephone Interview with Garret Bazarro, *supra* note 125.

136. *AB 685 Questions and Answers*, *supra* note 111.

137. Telephone Interview with Garret Bazarro Interview, *supra* note 125.

138. Email from Alf Brandt, *supra* note 126.

139. Telephone Interview with Tina Leahy, Water Policy Consultant at Assembly Water, Parks & Wildlife Committee (Dec. 20, 2011); Email from Alf Brandt, *supra* note 126.

140. Telephone Interview with Tina Leahy, *supra* note 139.

141. *See generally* Telephone Interview with Garret Bazarro, *supra* note 125; Email from Alf Brandt, *supra* note 126; Telephone Interview with Tina Leahy, *supra* note 139.; *AB 685 Questions and Answers*, *supra* note 111; *AB 685 on Suspense*, *supra* note 131; *Bill Analysis*, *supra* note 122.

142. Email from Alf Brandt, *supra* note 126; Telephone Interview with Tina Leahy, *supra* note 139; *Complete Bill History*, *supra* note 131.

143. Cassayre, *supra* note 15; H.R.C. Res. 15/9, *supra* note 34.

144. Telephone Interview with Tina Leahy, *supra* note 139; Email from Alf Brandt, *supra* note 126; *AB 685 Questions and Answers*, *supra* note 111; Telephone Interview with Garret Bazarro Interview, *supra* note 125.

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25, 2012, Governor Brown, after another round of amendments in August 2012, signed into law AB 685.¹⁴⁵

AB 685 will be added to the California Water Code as section 106.3, effective January 1, 2013, and reads as follows:

(a) It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.

(b) All relevant state agencies, including the department, the state board, and the State Department of Public Health, shall consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and criteria are pertinent to the uses of water described in this section.

(c) This section does not expand any obligation of the state to provide water or to require the expenditure of additional resources to develop water infrastructure beyond the obligations that may exist pursuant to subdivision (b).

(d) This section shall not apply to water supplies for new development.

(e) The implementation of this section shall not infringe on the rights or responsibilities of any public water system.¹⁴⁶

Cost and ambiguity also did not prevent Nigeria and South Africa from attempting to address a human right to water, though they do so in a different manner than the United States.¹⁴⁷

IV. THE HUMAN RIGHT TO WATER IN AFRICA

The United States was one of forty-one States to abstain from General Assembly Resolution 64/292, recognizing a human right to water, passed in July 2010. Other abstaining States included the United Kingdom, Japan, the Netherlands, Canada, Sweden, and Australia.¹⁴⁸ Like the United States, these countries cited concerns over procedure and substance.¹⁴⁹ In contrast to the hesitancy these developed countries have shown toward a right to water as

145. *Complete Bill History*, *supra* note 131; A.B. 685.

146. CAL. WATER CODE § 106.3 (West 2012).

147. *See infra* Part IV.

148. 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 Abstentions, U.N. Press Release GA/10967 (July 28, 2010).

149. *Id.*

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defined by the United Nations, developing countries like Nigeria and South Africa are being more proactive in endorsing a human right to water.¹⁵⁰

A. Nigeria

Unlike the United States, Nigeria voted in favor of General Assembly Resolution 64/292.¹⁵¹ However, despite Nigeria's support of the Resolution, implementing it has not been easy.¹⁵² Access to safe water and acceptable sanitation is an increasing challenge in Nigeria.¹⁵³ As of 2006, eleven of the thirty-six states that comprise Nigeria had a large enough water supply to provide more than twenty liters of water per capita per day.¹⁵⁴ However, a 2007 study revealed that the water supply in urban areas is only 5.8 liters.¹⁵⁵ In the developing world, the average water used per person per day is ten liters.¹⁵⁶ While Nigeria exceeds this number in some of its states,¹⁵⁷ this number is extremely low compared to the 100 liters per person per day determined to be the optimal level of access by the World Health Organization,¹⁵⁸ and even more miniscule compared to the 400 liters of water the average North American uses on a daily basis.¹⁵⁹

In an effort to provide adequate access to water and sanitation, Nigeria has several water and sanitation policies that govern the sector.¹⁶⁰ One of Nigeria's strategies to provide water is through water agencies.¹⁶¹ Each state government in Nigeria has a State Water Supply Agency ("SWA") that is responsible for providing potable water.¹⁶² Unfortunately, these SWA's have generally been seen as a failure¹⁶³ and are struggling to provide access to potable water.¹⁶⁴ The SWA's

150. *Id.*

151. *Making Access to Safe Water a Human Right*, NEXT.COM (Sept. 10, 2011), <http://234next.com/csp/cms/sites/Next/News/Metro/5708839-147/story.csp>; G.A. Res. 64/292, *supra* note 32; Press Release, General Assembly, *supra* note 148.

152. *Id.*

153. Tina A. Hassan, *Is Potable water for All by 2015 a Mirage?*, ALLAFRICA (Nov. 18, 2010), <http://allafrica.com/stories/201011180246.html>.

154. UZCHUKWU AMAKOM, NIGERIA: EFFECTIVE FINANCING OF LOCAL GOVERNMENTS TO PROVIDE WATER AND SANITATION SERVICES 4 (2008), *available at* https://www.wateraid.org/documents/plugin_documents/local_financing_nigeria.pdf.

155. *Id.*

156. *Statistics*, *supra* note 4.

157. AMAKOM, *supra* note 154.

158. ANNETTE PRÜSS-ÜSTÜN ET AL., SAFER WATER, BETTER HEALTH: COSTS, BENEFITS AND SUSTAINABILITY OF INTERVENTIONS TO PROTECT AND PROMOTE HEALTH 18 (2008), *available at* http://whqlibdoc.who.int/publications/2008/9789241596435_eng.pdf.

159. *Statistics*, *supra* note 4; PRÜSS-ÜSTÜN ET AL., *supra* note 158; AMAKOM, *supra* note 154.

160. AMAKOM, *supra* note 154.

161. Babalobi, *Water Sector Reform in Nigeria*, EWASH (June 16, 2010), <http://assemblyonline.info/?p=2402>.

162. *Id.*

163. *Urban Issues in the Nigerian Water and Sanitation Sector*, WATERAID, 1, <http://www.wateraid.org/>

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problems include: poor customer service, insufficient financing, and institutional challenges.¹⁶⁵ Most do not even bring in enough revenue to cover operating costs, leaving them dependent on external financing and the state governments to make up for the deficit.¹⁶⁶

As a result of its water sector problems, Nigeria will have trouble meeting “the Millennium Development Goal target of halving the proportion of people without access to water and sanitation by 2015.”¹⁶⁷ In order to meet this goal by 2015, Nigeria needs N215 billion annually¹⁶⁸ (which is about \$1,337,448,194.88 (U.S.) on an exchange rate of 160.75389 Nigerian Naira per one U.S. dollar).¹⁶⁹ According to Mr. Benson Ajisegiri, the National Project Coordinator of the World Bank-Assisted National Urban Water Sector Reform Project, at most, N82.5 billion is being invested in the Nigerian water sector.¹⁷⁰ In 2011, the Ministry of Finance allocated only N24 billion to the water sector.¹⁷¹ An official from the Nigerian Department of Water Supply is hopeful that the implementation of the Water Investment Mobilization and Application Guidelines (“WIMAG”) will help decrease this funding gap.¹⁷²

WIMAG, a cost-sharing device, was developed “as part of the World Bank assisted urban reform project”¹⁷³ in 2005, but has not been implemented.¹⁷⁴ It seeks to fix inadequacies in the water sector, such as the SWA’s performance and funding.¹⁷⁵ According to WIMAG, it is the job of the federal government to seek investment and assistance.¹⁷⁶ WIMAG’s aim is to ensure water and sanitation sustainability by promoting a “strategic partnership among Federal, State and Local governments in the areas of water supply investment planning, funds contribution and implementation of the necessary [water] sector reform including Public Private Partnership (PPP) that will ensure sustainable water supply and

documents/plugin_documents/urban_issues_in_the_nigerian_water_sector.pdf (last visited Nov. 12, 2012).

164. Babalobi, *supra* note 161.

165. *Urban Issues in the Nigerian Water and Sanitation Sector*, *supra* note 163.

166. *Id.*

167. *Id.*

168. *Nigeria Needs N215bn Annually to Develop water Infrastructure – Coordinator*, THE PUNCH (Mar. 28, 2011), <http://archive.punchontheweb.com/Articl.aspx?theartic=Art20110328235831>.

169. *Currency Converter*, MONEYCONVERTER.COM, <http://themoneyconverter.com/USD/NGN.aspx> (last visited July 7, 2012).

170. *Nigeria Needs N215bn Annually to Develop water Infrastructure – Coordinator*, *supra* note 168.

171. Emeka Ezekial, *Water Resources: FG Reduces Ministry’s Budget Proposal by N177bn*, THE PUNCH (Feb. 20, 2011), <http://www.punchontheweb.com/Articl.aspx?theartic=Art201102200495198>.

172. *Nigeria Needs N215bn Annually to Develop water Infrastructure—Coordinator*, *supra* note 168; *Urban Issues in the Nigerian Water and Sanitation Sector*, *supra* note 163.

173. *Urban Issues in the Nigerian Water and Sanitation Sector*, *supra* note 163, at 2.

174. *Nigeria Needs N215bn Annually to Develop water Infrastructure—ordinator*, *supra* note 168; *Brief on the 19th Meeting of the National Council on Water Resources*, NAT’L COUNCIL ON WATER RES. (July 24, 2008), http://mwri.gov.ng/userfiles/file/COUNCIL_ACTION_MEMO.pdf.

175. *Brief on the 19th Meeting of the National Council on Water Resources*, *supra* note 174.

176. *Id.*

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sanitation service delivery.”¹⁷⁷ According to the Nigerian National Council on Water Resources, WIMAG is “implementable and laudable for achieving the set national and international goals for water supply and sanitation.”¹⁷⁸ The Ministry of Water Resources has had difficulty actually implementing WIMAG, however, due to ministry instability.¹⁷⁹

Nigeria’s water sector could be benefited by a human right to water, as articulated by the United Nations, being adopted by countries economically similar to the United States.¹⁸⁰ Under the ICESCR, General Comment 15, and U.N. Resolution 15/9, Member States should develop tools and mechanisms to achieve access to water and sanitation.¹⁸¹ These instruments also stress the role of international cooperation and technical assistance in realizing a human right to water.¹⁸² Nigeria’s water sector is in desperate need of this assistance to meet its water goals.¹⁸³ Even though the United States has yet to declare a human right to water, it is already providing such assistance to struggling countries, such as Nigeria.¹⁸⁴ Not only is the United States already providing assistance, but based on the language of Resolution 15/9,¹⁸⁵ the United States would not necessarily be required to provide more assistance than it already is by declaring a human right to water as articulated by the United Nations.¹⁸⁶ While this would not help Nigeria in decreasing its funding gap, it means that arguments by the United States concerning a loss of sovereignty resulting from declaring a right to water are suspect.

However, this also demonstrates that declaring a human right to water is not a cure-all. Unlike the United States, Nigeria voted in favor of U.N. Resolution 64/292¹⁸⁷ and has created water and sanitation policies aimed at realizing a human right to water,¹⁸⁸ but it does not have the investment needed to meet its water and sanitation goals.¹⁸⁹ This is a problem, which may not be solved even if countries similar to the United States were to declare a human right to water.¹⁹⁰

177. *Id.*

178. *Id.*

179. *Nigeria Needs N215bn Annually to Develop water Infrastructure – Coordinator*, *supra* note 168.

180. U.N. Doc. E/C.12/2002/11, *supra* note 14.

181. G.A. Res. 2200A (XXI), *supra* note 11; U.N. Doc. E/C.12/2002/11, *supra* note 14; H.R.C. Res. 15/9, *supra* note 34.

182. H.R.C. Res. 15/9, *supra* note 34; G.A. Res. 2200A (XXI), *supra* note 11; U.N. Doc. E/C.12/2002/11, *supra* note 14.

183. *Nigeria Needs N215bn Annually to Develop water Infrastructure – Coordinator*, *supra* note 168; *Urban Issues in the Nigerian Water and Sanitation Sector*, *supra* note 163, at 2.

184. Cassayre, *supra* note 15; *Economic Growth and Development*, USAID NIGERIA, <http://nigeria.usaid.gov/program/1> (last visited Jan. 7, 2012).

185. H.R.C. Res. 15/9, *supra* note 34; *Economic Growth and Development*, *supra* note 184.

186. Posner, *supra* note 39.

187. *Making Access to Safe Water a Human Right*, *supra* note 151; G.A. Res. 64/292, *supra* note 32.

188. *See e.g.* AMAKOM, *supra* note 154.

189. *Nigeria Needs N215bn Annually to Develop water Infrastructure – Coordinator*, *supra* note 168.

190. *See* H.R.C. Res. 15/9, *supra* note 34; Posner, *supra* note 39.

*Global Business & Development Law Journal / Vol. 26**B. South Africa*

South Africa, like Nigeria, also voted in favor of General Assembly Resolution 64/292;¹⁹¹ however, at the time of the Resolution a human right to water was already part of South Africa's Constitution.¹⁹² Section 27 of South Africa's Constitution states, "[e]veryone has the right to have access to sufficient food and water" and "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."¹⁹³ While this has not solved all of South Africa's problems concerning access to water, it does provide the citizenry some judicial recourse against the State,¹⁹⁴ as evidenced by the *Mazibuko* case.¹⁹⁵ This case concerned what was meant by "access to sufficient water" under section 27(1)(b) of the South African Constitution.¹⁹⁶

In 2006, Lindiwe Mazibuko and four other Phiri residents brought an action against Johannesburg Water, the Minister of Water and Forestry Affairs, and the City of Johannesburg in the High Court, challenging "whether the City's policy of supplying 6 kilolitres [per month] of water free to every household in the City was in compliance with section 27 of the Constitution; and whether the installation of pre-paid meters was lawful."¹⁹⁷

The High Court determined that the introduction of pre-paid meters was an administrative action and their installation was therefore unlawful.¹⁹⁸ The High Court also held "the City should furnish the applicants and all similarly placed residents of Phiri with a free basic water supply of [fifty] liters per person per day."¹⁹⁹ Respondents appealed to the Supreme Court of Appeal which held that the City's water policy was a "material error of law" and that the installation of pre-paid water meters was unlawful, but reduced the quantity of water to be supplied to forty-two liters and gave the City two years to rectify the problem.²⁰⁰ The applicants then appealed to the South African Constitutional Court "seek[ing] reinstatement of the High Court order."²⁰¹

On October 8, 2009, the Constitutional Court held neither the City's water policy nor the pre-paid meters violated Section 27 of the Constitution and set

191. G.A. Res. 64/292, *supra* note 32; U.N. Press Release, General Assembly, *supra* note 148.

192. S. AFR. CONST., 1996, ch. 2 ss. 27(1)(b), (2).

193. *Id.*

194. McCaffrey & Neville, *supra* note 23, at 680.

195. *Mazibuko v. Johannesburg* 2010 (4) SA 1 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2009/28.pdf>; see generally McCaffrey & Neville, *supra* note 23.

196. *Mazibuko*, 2010 (4) SA 1 (CC) at para. 25.

197. *Id.* at paras. 6, 25.

198. *Id.* at para. 26.

199. *Id.*

200. *Id.* at para. 28.

201. *Id.* at para. 30.

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aside both the order from the Supreme Court of Appeal and the order from the High Court.²⁰² The Court rejected the applicant’s argument that fifty liters of water a day was necessary for a dignified life reasoning that section 27 of the Constitution “does not confer a right to claim ‘sufficient water’ from the state immediately,” as the State is only required to realize the right to sufficient water progressively via reasonable means.²⁰³ The Court further reasoned “it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps [the] government should take to ensure the progressive realisation of the right,” as this was the place of the legislature and executive.²⁰⁴

As noted in Part III, this reasoning—that it is not the place of the courts to determine the scope of the right²⁰⁵—is one of the regularly used arguments for why an ESC right is non-justiciable.²⁰⁶ This, however, did not stop the South African courts from hearing the case, interpreting the meaning of section 27 of the Constitution, or determining whether or not a violation of that section had occurred.²⁰⁷ Like Resolution 15/9,²⁰⁸ section 27 is stated in very general terms and does not provide any specifics for how a right to water must be realized.²⁰⁹ This vagueness—also an argument that is used for why ESC rights are not justiciable²¹⁰—did not prevent the Court from adjudicating the case.²¹¹ The fact that the courts in South Africa were able to adjudicate the case on the merits when the case involved an ESC right, namely, the human right to water, infers that ESC rights are justiciable.²¹² It should be taken into consideration though that since ESC rights, according to the ICESCR, are supposed to be realized progressively,²¹³ a court may have a difficult time determining whether or not they have been breached. It does follow, though, that the United States’ claim that ESC rights are non-justiciable is not an accurate statement.²¹⁴ This examination of the human right to water in South Africa, like Nigeria, discredits the arguments of the United States against declaring such a right and begs the question: what is the United States so afraid of?

202. *Id.* at para. 169.

203. *Id.* at paras. 56-60. This reasoning echoes the ICESCR in that, under the ICESCR, ESC rights are to be progressively realized. G.A. Res. 2200A (XXI), *supra* note 11, at pt. II, art. 2.

204. *Mazibuko*, 2010 (4) SA 1 (CC) at para. 61.

205. *Id.*

206. *Section 8: Challenging Misconceptions around the OP-ICESCR*, *supra* note 93.

207. *See generally Mazibuko*, 2010 (4) SA 1 (CC) at para. 169.

208. H.R.C. Res. 15/9, *supra* note 34.

209. S. AFR. CONST., 1996, ch. 2 ss. 27(1)(b), (2).

210. *Section 8: Challenging Misconceptions around the OP-ICESCR*, *supra* note 93.

211. *Mazibuko*, 2010 (4) SA 1 (CC) at para. 169.

212. *See id.*

213. G.A. Res. 2200A (XXI), *supra* note 11, at pt. II, art. 2.

214. Posner, *supra* note 39; *see Mazibuko* 2010 (4) SA 1 (CC) at para. 169.

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V. IS THE UNITED STATES' STANCE JUSTIFIED?

A. *Internationally*

Water sustainability and sanitation are increasing global concerns.²¹⁵ These concerns have led to the adoption of U.N. instruments recognizing a human right to water.²¹⁶ Nonetheless, the United States has been reluctant to declare a human right to water at both the international and domestic levels.²¹⁷ The right is not currently contained in the Constitution nor, according to government spokespersons, is it currently justiciable.²¹⁸

The U.S. Government has claimed that it is concerned about losing national sovereignty, the legal implications of such a right, and costs resulting from an international right to water.²¹⁹ These concerns are related to what the United States views as ambiguous language used by the United Nations in articulating this right.²²⁰ Michael Posner, The Assistant Secretary of the Bureau of Democracy, Human Rights, and Labor has stated, in relation to U.N. Resolutions on ESC rights, the United States will “reject resolutions that are disingenuous, at odds with our laws, or contravene our policy interests.”²²¹ He further explained that “[j]ust because a resolution is titled ‘a right to food’ doesn’t mean it is really about the right to food. Resolutions are not labeling exercises. Rather, they are about substance.”²²²

215. G.A. Res. 64/292, *supra* note 32; H.R.C. Res. 15/9, *supra* note 34; *Water Facts*, *supra* note 4.

216. U.N. Doc. E/C.12/2002/11, *supra* note 14, ¶ 3; G.A. Res. 2200A (XXI), *supra* note 11, at art. 11; G.A. Res. 64/292, *supra* note 32; H.R.C. Res. 15/9, *supra* note 34.

217. Cassayre, *supra* note 15; *AB 685 on Suspense*, *supra* note 131; *California Governor Vetoes Human Right to Water Act*, *supra* note 121; *Complete Bill History*, *supra* note 131.

218. Cassayre, *supra* note 15.

219. *See id.*; *See* Posner, *supra* note 39.

220. *See* Cassayre, *supra* note 15.

221. Posner, *supra* note 39.

222. *Id.* In this speech he provided the following five guidelines to take into consideration when negotiating U.N. Resolutions on ESC rights:

First, economic, social and cultural rights addressed in U.N. resolutions should be expressly set forth, or reasonably derived from, the Universal Declaration and the International Covenant on Economic, Social and Cultural Rights. While the United States is not a party to the Covenant, as a signatory, we are committed to not defeating the object and purpose of the treaty.

Second, we will only endorse language that reaffirms the “progressive realization” of these rights and prohibits discrimination.

Third, language about enforcement must be compatible with our domestic and constitutional framework.

Fourth, we will highlight the U.S. policy of providing food, housing, medicine and other basic requirements to people in need.

And fifth, we will emphasize the interdependence of all rights and recognize the need for accountability and transparency in their implementation, through the democratic participation of the people.

Id.

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U.N. Resolution 15/9 uses very general language in describing the duties States should adhere to concerning a human right to water.²²³ It apprises States of their duties under the Resolution, but gives no specifics on how to actually fulfill these duties.²²⁴ The sentiment is that interpretation of Resolution 15/9 and its lack of specifics could be used to take away more state sovereignty than a Member State is willing to give.²²⁵ This concern, however, has not prevented the United States from taking on other international obligations,²²⁶ not to mention the fact that all international obligations take away state sovereignty to some degree.²²⁷ If entering into a treaty, for example, did not, by its very nature, limit the ability of a State to terminate the agreement, no obligations would be binding and international relations and cooperation would break down.²²⁸ Nonetheless, the lack of specificity in the language could simply signify a determination by the United Nations that it is better for Member States to decide how best to implement this right and leave room for the State to determine the scope of a human right to water.²²⁹ The Report of the Special Rapporteur suggests that the United Nations is taking the latter approach,²³⁰ which makes sense given the different circumstances of each Member State.

Further clarification, along with more precise language, would lessen the danger of an interpretation that would negatively impact the United States. However, further clarification could also make it more difficult for the U.S. Government to argue that a right to water takes away sovereignty,²³¹ though this claimed justification is in itself weak, given the nature of international agreements and the United States' willingness to enter into these kinds of agreements.²³²

223. See H.R.C. Res. 15/9, *supra* note 34.

224. See *id.*

225. See *id.*; see Posner, *supra* note 39.

226. See generally *Treaties in Force*, U.S. DEP'T OF STATE, <http://www.state.gov/documents/organization/169274.pdf> (last visited June 3, 2012).

227. See STEPHEN MCCAFFREY ET AL., PUBLIC INTERNATIONAL LAW: CASES, PROBLEMS, AND TEXTS 8 (2010).

228. *Id.* at 23.

229. See generally H.R.C. Res. 15/9, *supra* note 34.

230. See Special Rapporteur on the Right to Water, *supra* note 35. A Special Rapporteur is an independent expert utilized by the U.N. on particular issues. Catarina de Albuquerque, who was appointed in March of 2008, is the Special Rapporteur on the right to water and sanitation. In her role as Special Rapporteur Ms. Albuquerque "carries out thematic research, undertakes country missions, collects good practices, and works with development practitioners on the implementation of the rights to water and sanitation." *Overview of the Mandate*, U.N. HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Overview.aspx> (last visited Jan. 8, 2012).

231. See Posner, *supra* note 39.

232. See generally MCCAFFREY ET AL., *supra* note 227, at 23 (discussing many international agreements of which the United States is a party); see generally *Treaties in Force*, *supra* note 226.

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Related to the United States' concern over loss of sovereignty is that "the language of human rights could create new domestic legal obligations,"²³³ such as justiciability of the right.²³⁴ The international instruments concerning a right to water do not tell Member States how they must fulfill the duties under the instruments.²³⁵ It is up to the Member States to determine,²³⁶ and the United States has always been careful to protect state and federal government prerogatives.²³⁷ If the United States were to declare an international human right to water, as currently described by the United Nations, this declaration would be on its own terms, through its own domestic political system, and therefore any resulting legal consequences would not "tie the hands of Congress and the states."²³⁸

As for the claim that a human right to water is not justiciable, the ability of South Africa to adjudicate the *Mazibuko* case proves otherwise.²³⁹ Whether or not one agrees with the outcome of the case is irrelevant. It shows that a court can hear and decide a case based on a human right to water, vague as that right may be in writing.²⁴⁰ For that matter, the duties surrounding a right to water articulated in Resolution 15/9²⁴¹ provide more guidance than section 27 of the South African Constitution,²⁴² which merely states that "[e]veryone has the right to have access to sufficient food and water" and "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."²⁴³ Therefore, the United States' claim that a human right to water is non-justiciable²⁴⁴ is not accurate and the U.S. courts could, in fact, adjudicate these kinds of cases.

An additional sovereignty-related concern involves the costs associated with declaring a human right to water.²⁴⁵ While this concern is justifiable given the state of the economy in recent years, it is not necessarily prohibitive,²⁴⁶ especially at the international level. Providing safe, potable water is expensive and, despite the United States' objection to a right to water based on costs,²⁴⁷ it is already

233. Posner, *supra* note 39.

234. See Cassayre, *supra* note 15.

235. H.R.C. Res. 15/9, *supra* note 34.

236. *Id.*

237. *Id.*; Posner, *supra* note 39.

238. Posner, *supra* note 39; H.R.C. Res. 15/9, *supra* note 34.

239. *Mazibuko v. Johannesburg* 2010 (4) SA 1 (CC) at para. 25-26 (S. Afr.).

240. *Id.*

241. H.R.C. Res. 15/9, *supra* note 34.

242. S. AFR. CONST., 1996, ch. 2 ss. 27(1)(b), (2).

243. *Id.*

244. Cassayre, *supra* note 15.

245. See generally Posner, *supra* note 39.

246. *AB 685 Questions and Answers*, *supra* note 111; Press Release, Office of the High Comm'r for Human Rights, *supra* note 100; Cassayre, *supra* note 15.

247. See generally Posner, *supra* note 39.

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spending large sums of money in support of this right.²⁴⁸ For instance, in 2009, the United States spent over \$750 million in developing countries for water and sanitation.²⁴⁹ As discussed above, the United States is unlikely to find itself obligated to provide more foreign assistance than it would choose to on its own, and therefore, the United States would not have to give more than it already is if it declared a right to water.²⁵⁰

While the United States has time to explore different policies to reduce this high cost due to its abundant water resources, countries like Nigeria do not.²⁵¹ Nigeria is not on track to meet its Millennium Development Goals by 2015²⁵² and is in desperate need of outside funding for its water sector.²⁵³ It is currently in need of over N200 billion,²⁵⁴ which is about \$1,244,137,855.70 (U.S.).²⁵⁵ According to the ICESC, General Comment 15, and U.N. Resolution 15/9, Member States that have adopted a human right to water, as defined by the United Nations, should develop tools and mechanisms for providing water and sanitation and provide assistance to countries, like Nigeria, toward achieving a human right to water.²⁵⁶ The United States has not ratified the ICESC,²⁵⁷ nor has it declared an international right to water due to sovereignty, justiciability, and cost concerns.²⁵⁸ Despite this, the United States has been fulfilling the duties laid out by the U.N. Resolution 15/9.²⁵⁹ Simply declaring a right to water will not cause the United States to give the additional assistance that Nigeria and other developing countries need.²⁶⁰ This is because “human rights law doesn’t create an obligation to any particular level of foreign assistance.”²⁶¹ The United States understands ESC rights in its own way and through its own political beliefs.²⁶² It

248. Press Release, Office of the High Comm’r for Human Rights, *supra* note 100; *see also* Cassayre, *supra* note 15.

249. Cassayre, *supra* note 15.

250. Posner, *supra* note 39.

251. *The Millennium Development Goals Report 2011*, *supra* note 7, at 52; *See Nigeria Needs N215bn Annually to Develop water Infrastructure – Coordinator*, *supra* note 168.

252. *Urban Issues in the Nigerian Water and Sanitation Sector*, *supra* note 163, at 1.

253. *Nigeria Needs N215bn Annually to Develop water Infrastructure – Coordinator*, *supra* note 168.

254. *Id.*

255. *Currency Converter*, *supra*, note 169.

256. G.A. Res. 2200A (XXI), *supra* note 11, at part II, art. 2; U.N. Doc. E/C.12/2002/11, *supra* note 14; H.R.C. Res. 15/9, *supra* note 34.

257. Status of International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. Doc. A/RES/2200 (XXI) (Dec. 16, 1966), available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en.

258. *See* Cassayre, *supra* note 15; *see also* Posner, *supra* note 39.

259. H.R.C. Res. 15/9, *supra* note 34; *Economic Growth and Development*, *supra*, note 184.

260. *See generally* Posner, *supra* note 39; Cassayre, *supra* note 15; *Economic Growth and Development*, *supra*, note 184.

261. Posner, *supra* note 39.

262. *Id.*

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works toward alleviating poverty and promoting development because it has an interest to do so, not because it has an obligation to do so.²⁶³

However, if the United States were to declare a human right to water, and create an obligation for itself to promote the right to water in accordance with the United Nations,²⁶⁴ it would not need to do more than it is already doing. There would likely be little loss of sovereignty; no additional costs, unless the United States chose to provide more aid; and the United States would be able to choose how to implement the right to water in accordance with its own political system.²⁶⁵ Therefore, the United States is not justified in not declaring an international human right to water as articulated by the United Nations.

B. Domestically

Some of the concerns of the United States in relation to the recognition of an international right to water coincide with the concerns that plagued California's legislature in enacting legislation declaring a human right to water within the state.²⁶⁶ As at the international level, the main concerns of enacting a human right to water in California were the legal implications and costs of such a right.²⁶⁷ These arguments are weak justifications for not declaring an international human right to water given the fact that California enacted AB 685²⁶⁸ despite these same arguments being put forth.

A large problem was that California had not been able to answer what impact AB 685²⁶⁹ would have socially and economically.²⁷⁰ Part of this has to do with the fact that a right to water, as addressed by AB 1242²⁷¹ and AB 685,²⁷² is ambiguous:²⁷³ what is a human right, who is going to enforce this right, how are they going to enforce it, against whom, and what remedy should there be for a violation of the right?²⁷⁴ This ambiguity could have prevented AB 685²⁷⁵ from

263. *Id.*

264. H.R.C. Res. 15/9, *supra* note 34; G.A. Res. 2200A (XXI), *supra* note 11; U.N. Doc. E/C.12/2002/11, *supra* note 14.

265. *See* Posner, *supra* note 39.

266. Telephone Interview with Tina Leahy, *supra* note 139; *AB 685 on Suspense*, *supra* note 131; *see* Posner, *supra* note 39.

267. Email from Alf Brandt, *supra* note 126; Telephone Interview with Tina Leahy, *supra* note 139; Cassayre, *supra* note 15; H.R.C. Res. 15/9, *supra* note 34; *United States Abstains on General Assembly Resolution Proclaiming Human Right to Water and Sanitation*, *supra* note 15.

268. CAL. WATER CODE § 106.3 (West 2012).

269. A.B. 685.

270. Telephone Interview with Tina Leahy, *supra* note 139.

271. A.B. 1242.

272. A.B. 685.

273. Telephone Interview with Tina Leahy, *supra* note 139; Email from Alf Brandt, *supra* note 126.

274. Telephone Interview with Tina Leahy, *supra* note 139; Email from Alf Brandt, *supra* note 126.

275. A.B. 685.

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being enacted because a lack of clarity makes people uncomfortable.²⁷⁶ Even so, AB 1242, despite the fact that it also suffered from ambiguity,²⁷⁷ was passed by both Houses before finally being vetoed by Governor Schwarzenegger.²⁷⁸ AB 685²⁷⁹ was enacted despite ambiguity concerns, though that was not the only issue to be put forth.²⁸⁰

Another difficulty in enacting legislation in California concerning a human right to water was increased funding concerns.²⁸¹ California has budgeted \$2.5 billion for water infrastructure during the 2012-2013 fiscal year,²⁸² and the U.S. Environmental Protection Agency (“EPA”) estimates that over the next twenty years, \$39 billion will be needed by the California public water system “to sustain and improve infrastructure.”²⁸³ This number does not include how much it will cost to ensure access to clean water to families that do not currently have it.²⁸⁴ Enacting a right to water in the state could potentially force water districts to raise rates to cover the costs.²⁸⁵ Moreover, California is in a precarious position with its economy.²⁸⁶ California’s budget analyst, Mac Taylor, says it will fall short of its budgetary needs for the 2011-2012 fiscal year by \$3.7 billion.²⁸⁷ This forecast may result in automatic budget cuts.²⁸⁸ Due to its economic troubles, it is understandable that the California legislature was hesitant to pass any new legislation without intense scrutiny of the resulting costs.²⁸⁹ As such, AB 685 was repeatedly amended and sent back to the Appropriations Committee due to worry over cost.²⁹⁰ Given California’s economy and budget concerns, it would have been reasonable to not enact new legislation without full knowledge of the costs implications.²⁹¹

276. Telephone Interview with Tina Leahy, *supra* note 139.

277. *Id.*; Email from Alf Brandt, *supra* note 126.

278. A.B. 1242.

279. A.B. 685.

280. *AB 685 on Suspense*, *supra* note 131; *Bill Analysis*, CAL. LEGIS. COUNCIL, http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0651-0700/ab_685_cfa_20110831_103521_sen_comm.html (last visited July 7, 2012) (analyzing AB 685).

281. *AB 685 on Suspense*, *supra* note 131; *Bill Analysis*, *supra* note 280.

282. GOVERNOR’S BUDGET SUMMARY 2012-2013, 2011-12 Sess., at 95 (Cal. 2012), *available at* <http://www.ebudget.ca.gov/pdf/BudgetSummary/FullBudgetSummary.pdf>.

283. *AB 685 Questions and Answers*, *supra* note 111.

284. *Id.*

285. Telephone Interview with Tina Leahy, *supra* note 139.

286. Kevin Yamamura, *Grim California Budget Forecast Means more Cuts to Schools, Social Services*, THE SACRAMENTO BEE (Nov. 30, 2011 10:30AM), <http://www.sacbee.com/2011/11/17/4060870/grim-california-budget-forecast.html>.

287. *Id.*

288. *Id.*

289. *See AB 685 on Suspense*, *supra* note 131; *see also Bill Analysis*, *supra* note 280 (analyzing AB 685); *see generally Complete Bill History*, *supra* note 131.

290. *Complete Bill History*, *supra* note 131; *AB 685 on Suspense*, *supra* note 131.

291. *See generally Yamamura*, *supra* note 286.

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Despite the above challenges, however, Governor Brown signed AB 685 into law on September 25, 2012.²⁹² This further weakens the arguments of the United States against declaring an international right to water because California did so despite the same concerns the United States has put forth to defend its hesitancy.²⁹³

VI. CONCLUSION

There is no justification for the United States to not declare a human right to water. It is a mystery why the United States is so hesitant to declare such a right in the first place, considering how essential water is to life.²⁹⁴ Also, not only are the United States' arguments against declaring an international human right to water weak, especially given the fact that California has enacted a human right to water despite similar challenges,²⁹⁵ the United States is already supporting the right.²⁹⁶ Declaring an international right to water will not change how the United States is already behaving in relation to that right.²⁹⁷ Therefore, the United States should declare an international human right to water, as articulated by the United Nations.²⁹⁸

292. *Complete Bill History*, *supra* note 131; CAL. WATER CODE § 106.3 (West 2012).

293. Telephone Interview with Tina Leahy, *supra* note 139; *AB 685 on Suspense*, *supra* note 131; *see Posner*, *supra* note 39.

294. *See generally Health in Water Resources Development*, *supra* note 2.

295. WATER § 106.3; Telephone Interview with Tina Leahy, *supra* note 139; *AB 685 on Suspense*, *supra* note 131; *see Posner*, *supra* note 39.

296. Cassayre, *supra* note 15.

297. *See Posner*, *supra* note 39; H.R.C. Res. 15/9, *supra* note 34.

298. H.R.C. Res. 15/9, *supra* note 34.