

The Human Right to Water: Challenges of Implementation

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I. INTRODUCTION

No one can question that water is absolutely critical to life.¹ But according to a 2017 comprehensive global assessment by the World Health Organization/ UNICEF Joint Monitoring Program for Water Supply, Sanitation and Hygiene, the sharp reality is that in 2015, 2.1 billion people lacked access to safely managed drinking water services, while 844 million people lacked even a basic drinking water service, 263 million spent over 30 minutes per round trip to collect water from an improved source, and 159 million people still collected drinking water directly from surface water sources.² The other 5.2 billion had access to safely

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1. Water has been described as the petroleum of the future, over which the world will face international conflicts. These potential conflicts will not be addressed here. See generally Michael E. Webber, *Energy versus Water: Solving Both Crises Together*, SCI. AM. (Sept. 1, 2008), <https://www.scientificamerican.com/article/the-future-of-fuel/> (on file with *The University of the Pacific Law Review*).

2. WORLD HEALTH ORG. & UNITED NATIONS CHILDREN'S FUND, PROGRESS ON DRINKING WATER, SANITATION AND HYGIENE 3 (2017), available at <http://apps.who.int/iris/bitstream/10665/258617/1/9789241512893-eng.pdf?ua=1> (on file with *The University of the Pacific Law Review*). Water and sanitation are closely interrelated, and reference to water usually covers both water and sanitation. However, but for occasional distinct references to sanitation, the focus in this paper is on water.

managed drinking water services, which means they used improved water from a source that is located on the premises, is free from contamination, and is available when needed.³

Water scarcity, driven by population growth, urbanization, and climate change, further exacerbates the problem.⁴ As the United Nations Food and Agriculture Organization notes:

[A]n increasing number of regions are reaching the limit at which water services can be sustainably delivered. . . . By 2025, 1,800 million people are expected to be living in countries or regions with “absolute” water scarcity . . . and two-thirds of the world population could be under “stress” conditions⁵

Implementing the rights-based approach to recognize the human right to water—the focus of this paper—is among several international approaches addressing the challenge of providing life’s most basic element. However, before delving into the concept of the right to water, it seems appropriate to note that there are several major recent international efforts to ensure that the essential needs of everyone for water and sanitation are met, and a few are noted here for illustrative purposes.

First, the stand-alone water goal, Goal 6 of the Sustainable Development Goals (SDGs)—“Ensure availability and sustainable management of water and sanitation for all”—was adopted by member states of the United Nations on September 25, 2015, as part of a comprehensive and ambitious package, the *2030 Agenda for Sustainable Development*.⁶ This set of 17 goals and 169 targets addressing social, economic, and environmental aspects of development is aimed at ending poverty, reducing inequalities, and protecting the environment, and came into force on January 21, 2016.⁷

The targets of Goal 6 on water are designed to achieve by 2030 “universal and equitable access to safe and affordable drinking water for all,”⁸ and “improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally.”⁹

Also by 2030, the targets are to “substantially increase water-use efficiency across all sectors and ensure sustainable withdrawals and supply of fresh water to

3. *Id.*

4. *Id.*

5. *Water Scarcity*, FOOD & AGRIC. ORG. UNITED NATIONS, <http://www.fao.org/land-water/water/water-scarcity/en/> (last visited Apr. 8, 2018) (on file with *The University of the Pacific Law Review*).

6. G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development* (Oct. 21, 2015).

7. *Id.*

8. *Id.* at Goal 6.1.

9. *Id.* at Goal 6.3.

address water scarcity and substantially reduce the number of people suffering from water scarcity,”¹⁰ to “implement integrated water resources management at all levels including through transboundary cooperation as appropriate,”¹¹ and to “expand international cooperation and capacity building support to developing countries in water- and sanitation-related activities and programmes, including water-harvesting, desalination, water efficiency, wastewater treatment, recycling and reuse technologies.”¹² By 2020, the target is to “protect and restore water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers, and lakes,”¹³ and the general target is to “[s]upport and strengthen the participation of local communities in improving water and sanitation management.”¹⁴

Specific indicators for monitoring the progress and measuring the outcomes are now in place.¹⁵ In 2017, the UN Secretary General reported on the progress of Goal 6 that over two billion people worldwide “are living in countries with excess water stress, defined as the ratio of total freshwater withdrawn to total renewable freshwater resources above a threshold of 25[%]. Northern Africa and Western Asia experience water stress levels above 60[%], which indicates the strong probability of future water scarcity,” and that official development aid in the water sector increased 67[%] in real terms since 2005 and totaled about \$8.6 billion.¹⁶

The SDGs replace the Millennium Development Goals (MDGs), which were set for the period 2000–2015.¹⁷ In 2015, for target 7c of the MDGs—aimed to halve the proportion of the population without access to water and sanitation by 2015—147 countries met the drinking water target, 95 countries met the sanitation target, and 77 countries met both, which increases the rate of global population using an improved drinking water source from 76% to 91%.¹⁸

The United Nations General Assembly (UNGA) adopted its International Decade for Action, “Water for Life,” 2005–2015,¹⁹ which was aimed at providing

10. *Id.* at Goal 6.4.

11. *Id.* at Goal 6.5.

12. *Id.* at Goal 6.a.

13. *Id.* at Goal 6.6.

14. *Id.* at Goal 6.b.

15. *Sustainable Development Goal 6*, SUSTAINABLE DEV. KNOWLEDGE PLATFORM, <https://sustainabledevelopment.un.org/sdg6> (last visited Apr. 8, 2018) (on file with *The University of the Pacific Law Review*).

16. U.N. Secretary-General, *Progress Towards the Sustainable Development Goals*, ¶ 10, U.N. Doc. E/2017/66 (May 11, 2017), <https://unstats.un.org/sdgs/files/report/2017/secretary-general-sdg-report-2017-EN.pdf> (on file with *The University of the Pacific Law Review*).

17. G.A. Res. 55/2, U.N. Millennium Declaration (Sept. 8, 2000). World leaders came together at the United Nations Headquarters in New York to adopt the United Nations Millennium Declaration, in which they committed to a new global partnership to reduce extreme poverty, and set out a series of eight time-bound targets, with a deadline of 2015, known as the Millennium Development Goals (MDGs).

18. U.N. DEV. PROGRAM, *THE MILLENNIUM DEVELOPMENT GOALS REPORT 2015 7* (2015), available at http://www.undp.org/content/dam/undp/library/MDG/english/UNDP_MDG_Report_2015.pdf (on file with *The University of the Pacific Law Review*).

19. G.A. Res. 58/217, International Decade for Action, “Water for Life, 2005-2015,” (Dec. 23, 2003), <http://www.un-documents.net/a58r217.htm> [hereinafter *Water for Life*] (on file with *The University of the Pacific*

“a greater focus on water-related issues at all levels and on the implementation of water-related programmes and projects, while striving to ensure the participation and involvement of women in water-related development efforts, and the furtherance of cooperation at all levels, in order to help to achieve internationally agreed water-related goals” contained in a number of prior UN instruments, including Agenda 21, the UN Millennium Declaration, and the Johannesburg Plan of Implementation.²⁰

As a successor to the International Decade for Water, the General Assembly proclaimed the period from 2018 to 2028 the International Decade for Action, “Water for Sustainable Development.”²¹ The General Assembly emphasized that:

[W]ater is critical for sustainable development and the eradication of poverty and hunger, that water, energy, food security and nutrition are linked and that water is indispensable for human development, health and well-being and a vital element of achieving the Sustainable Development Goals and other relevant goals in the social, environmental and economic fields.²²

The General Assembly decided that the decade’s objectives:

[s]hould be a greater focus on the sustainable development and integrated management of water resources for the achievement of social, economic and environmental objectives and on the implementation and promotion of related programmes and projects, as well as on the furtherance of cooperation and partnership at all levels in order to help to achieve internationally agreed water-related goals and targets²³

The General Assembly decided further to pursue these objectives:

[b]y approving knowledge generation and dissemination, facilitating access to knowledge and exchange of good practices, generating new information relevant to the water-related Sustainable Development Goals, pursuing advocacy, networking and promoting partnership and action by different actors to implement the water-related Goals and targets in coordination with existing initiatives and strengthening communication

Law Review). For the report on the accomplishments of the decade, see *International Decade for Action “Water For Life” 2005–2015*, UNITED NATIONS DEPT. ECON. & SOC. AFF. (UNDESA), <http://www.un.org/waterforlifedecade/> (last visited Apr. 8, 2018) (on file with *The University of the Pacific Law Review*).

20. *Water for Life*, *supra* note 19, ¶ 2.

21. G.A. Res. 71/222, International Decade for Action, “Water for Sustainable Development”, 2018–2028 (Feb. 7, 2017), https://digitallibrary.un.org/record/859143/files/A_RES_71_222-EN.pdf (on file with *The University of the Pacific Law Review*).

22. *Id.* at 1.

23. *Id.* ¶ 4.

action at various levels for the implementation for the water-related Goals.²⁴

Finally, it is worth noting the valuable contribution of the Human Rights Council (HRC). In 2008, the HRC appointed an Independent Expert to serve for a three-year period (subsequently the title was changed to Special Rapporteur and the mandate was expanded) on the human rights obligations related to access to safe drinking water and sanitation, with the following tasks: prepare a compendium of best practices, study the content of human rights obligations in relation to access to safe drinking water and sanitation, and make recommendations toward the realization of the Millennium Develop Goals, especially Goal 7.²⁵ A few selected reports will be noted here.

In 2011, the Special Rapporteur, Catarina de Albuquerque, found problems of discrimination in drinking water and sanitation services in the U.S., and offered recommendations that included developing a national water policy and plan of action to ensure that policies and programs reach the poorest populations, and to shift to a holistic system approach such as integrated management of all water uses.²⁶

In 2013, she focused on sustainability as an essential human rights principle for realizing human rights to water and sanitation, which requires that “services be available and accessible to everyone on an almost permanent basis, without discrimination, while ensuring beneficial change through quality services and sustained behavior change.”²⁷ She recommended that states undertake holistic planning, strengthen national capacity, and “[t]arget resources so as to prioritize essential levels of access for everyone.”²⁸ She also recommends states provide for accountability mechanisms, continuous and independent monitoring of the progress toward realizing the right to water, ensure meaningful participation, and put in place independent regulation of the water and sanitation sectors.²⁹

In 2016, the successor to Catarina de Albuquerque, Special Rapporteur Leo Heller, discussed in his report to the General Assembly the role of development cooperation between states and multilateral funding agencies for realizing human

24. *Id.* ¶ 6.

25. HRC Res. 7/22, Human Rights and Access to Safe Drinking Water and Sanitation (Mar. 28, 2008), http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_22.pdf (on file with *The University of the Pacific Law Review*).

26. Human Rights Council, Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, HRC Res. A/HRC/18/33/Add.4 (Aug. 2, 2011), http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4_en.pdf (on file with *The University of the Pacific Law Review*).

27. Human Rights Council, Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, ¶ 85, HRC Res. A/HRC/24/44 (July 11, 2013).

28. *Id.* ¶ 86.

29. *Id.*

rights to water and sanitation.³⁰ The same year he reported to the Human Rights Council the need for a transformative approach to ensure gender equality in the enjoyment of human rights to water and sanitation.³¹

In his complementary report of July 13, 2017,³² Special Rapporteur Heller provided six case studies to examine how funders contribute to the realization of this right and respond to gaps and challenges.³³ He proposed the concept of a “human rights development cycle” for funders to implement this right in their development cooperation agreements.³⁴

What follows this introductory material is a brief look in Part II at selected international instruments recognizing the human right to water. Next, Part III discusses challenges of implementation, which is followed by concluding remarks in Part IV.

II. SELECTED INTERNATIONAL LEGAL INSTRUMENTS RECOGNIZING THE HUMAN RIGHT TO WATER

The fundamental human rights documents—the Universal Declaration of Human Rights (UDHR)³⁵ and the two Covenants codifying the rights enumerated in the UDHR—do not explicitly recognize the right to water. However, as will be discussed later, in both the International Covenant on Civil and Political Rights³⁶ and the International Covenant on Social and Cultural Rights,³⁷ there is an implicit recognition of this right as a derivative right.

The right to water was explicitly recognized in 1977 at the United Nations Water Conference in Mar del Plata, Argentina, which proclaimed in a resolution: “All peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”³⁸ It further stated: “It is universally recognized that the availability to man of that resource is essential both for life and his full

30. G.A. Res. A/71/302, Human Rights to Safe Drinking Water and Sanitation (Aug. 5, 2016).

31. Human Rights Council, Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Note by the Secretariat, A/HRC/33/49 (July 27, 2016), <https://digitallibrary.un.org/record/847923?ln=en> (on file with *The University of the Pacific Law Review*).

32. U.N. Secretary-General, *Human Rights to Safe Drinking Water and Sanitation: Note by the Secretary-General*, U.N. Doc. A/72/127 (July 13, 2017), available at undocs.org/A/72/127 (on file with *The University of the Pacific Law Review*).

33. *Id.*

34. *Id.*

35. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); UNITED NATIONS, UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), www.un.org/en/documents/udhr/index.shtml (last visited Apr. 8, 2018) (on file with *The University of the Pacific Law Review*).

36. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

37. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, pt. II, ¶ 1 (Dec. 16, 1966).

38. United Nations Water Conference, *Mar Del Plata Action Plan*, Resolution II(a) (Mar. 14–25, 1977), <http://www.ielrc.org/content/e7701.pdf> (on file with *The University of the Pacific Law Review*).

development, both as an individual and as an integral part of society.”³⁹ Since that time, several conventions, treaty monitoring bodies, declarations, and resolutions have recognized the right to water.⁴⁰ A few selected documents are noted here for illustrative purposes.

In December 1979, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁴¹ ensured the right of water supply to women as it called upon States parties to:

[t]ake 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.⁴²

The Committee on the Elimination of Discrimination Against Women confirmed the obligation of States parties to provide adequate water supply in its General Recommendation No. 24,⁴³ because women and girls are often most affected by the lack of water accessibility, availability, and safety. This is often the case in rural areas, poor countries, and traditional communities, and also because several states have failed to recognize women’s rights concerning access to water.⁴⁴

Ten years later, in November 1989, the Convention on the Rights of the Child⁴⁵ explicitly mentioned water as it stated:

[S]tates parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: . . .

(c) to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and

39. *Id.* Resolution II(b).

40. *See, e.g.*, G.A. Res. 34/180, U.N. Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979), <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (on file with *The University of the Pacific Law Review*).

41. *Id.*

42. *Id.* art. 14(2)(h).

43. Comm. on the Elimination of Discrimination Against Women, Rep. of Comm. on Its Twentieth & Twenty-First Sessions, ch. I, ¶ 28, U.N. Doc. A/54/38/Rev. 1 (May 2, 1999).

44. *See* Marsha A. Freeman, *The Human Rights of Women under the CEDAW Convention: Complexities and Opportunities of Compliance*, 91 AM. SOC’Y INT’L L. PROC. 378, 379–80 (1997).

45. U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11&chapter=4&lang=en (on file with *The University of the Pacific Law Review*).

clean drinking water, . . .⁴⁶

The Committee on the Rights of the Child stated in its General Comment No. 7 that considering Article 24, states have a responsibility to “ensure access to clean drinking water and adequate sanitation.”⁴⁷

Subsequently, in January 1992, the International Conference on Water and the Environment in Dublin, Ireland, adopted the Dublin Statement on Water and the Environment, which stated among its guiding principles that “it is vital to recognize first the basic rights of all human beings to have access to clean water and sanitation at an affordable price.”⁴⁸

In 1999, the United Nations General Assembly affirmed that “[t]he rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community.”⁴⁹ And in 2000, the former Sub-Commission on the Promotion and Protection of Human Rights recognized the right to drinking water and sanitation.⁵⁰

In 2002, the Johannesburg Declaration of the World Summit on Sustainable Development stated:

[W]e welcome the focus of the Johannesburg Summit on the indivisibility of human dignity and are resolved, through decisions on targets, timetables and partnerships, to speedily increase access to such basic requirements as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity.⁵¹

Also in 2002, a landmark event occurred when the treaty monitoring body of the 1966 International Covenant for Economic, Social and Cultural Rights (ICESCR), the Committee on Economic, Social and Cultural Rights interpreted

46. *Id.* art. 24(2)(c).

47. Comm. on the Rights of the Child, General Comment No. 7, ¶ 27(a), U.N. Doc. CRC/C/GC/7 Rev. 1 (Sept. 20, 2006).

48. International Conference on Water and the Environment, *The Dublin Statement on Water and the Environment*, Princ. 4, U.N. Doc. A/Conf.151/PC/112 (Jan. 31, 1992), www.wmo.int/pages/prog/hwrp/documents/english/icwedeece.html (on file with *The University of the Pacific Law Review*).

49. G.A. Res. 54/175, ¶ 12, U.N. Doc. A/RES/54/175 (Dec. 17, 1999), <https://undocs.org/A/RES/54/175> (on file with *The University of the Pacific Law Review*).

50. Sub-Comm’n on Human Rights, Rep. of the Sub-Commission on the Promotion and Protection of Human Rights on Its Fifty-Second Session, at 31, U.N. Doc. E/CN.4/Sub.2/2000/46 (Nov. 23, 2000), <http://undocs.org/en/E/CN.4/Sub.2/2000/46> (on file with *The University of the Pacific Law Review*) (“Reaffirming the fundamental principles of equality, human dignity and social justice, and the right to drinking water supply and sanitation for every woman, man and child, Convinced of the urgent and persistent need for increased attention and commitment by all decision-makers to the right of everyone to drinking water supply and sanitation[.]”).

51. World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, U.N. Doc. A/CONF.199/20, annex (Sept. 4, 2002), <http://www.un-documents.net/jburgdec.htm> (on file with *The University of the Pacific Law Review*).

the Covenant as confirming the right to water in international law in General Comment 15.⁵² The Comment provided guidelines for interpreting the right to water, framing it within ICESCR articles 11 and 12—the former on the right to an adequate standard of living and the latter on the right to the highest attainable standard of health.⁵³

The General Comment explicitly outlined core obligations of states parties to the right, while defining what actions would constitute a violation. The General Comment also provides a roadmap for states as they formulate policies to progressively realize access to safe water. It referred to international documents including treaties, declarations, and standards where the right to water has been recognized. It specifically referred to CEDAW, the Convention on the Rights of the Child, the UN Convention on the Law of Non-Navigational Uses of Watercourses, Geneva Conventions Relative to the Treatment of Prisoners of War and Treatment of Civilian Persons in Time of War, and the two Additional Protocols thereto.⁵⁴ The Comment was instrumental in furthering the understanding, appreciation, and hence the relevance of the Human Right to Water. A few highlights of the Comment follow.

General Comment 15 states that “[t]he human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.”⁵⁵ The General Comment describes the scope and content of the right:

[T]he 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.⁵⁶

The Comment explains that water is required to satisfy several related ICESCR human rights, such as the right to adequate food, the right to health, the right to work, and the right to take part in cultural life.⁵⁷ It clarifies the meaning of the human right to water by addressing the issues of availability, quality, and accessibility.⁵⁸ Regarding quantity, it advocates adherence to World Health Organization (WHO) standards, while on quality it states the requirement that it be

52. Comm. on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15 (2002), U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003), http://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf [hereinafter General Comment 15] (on file with *The University of the Pacific Law Review*).

53. *Id.* ¶ 3.

54. *Id.* ¶ 4.

55. *Id.* ¶ 1.1.

56. *Id.* ¶ 2.

57. *Id.* ¶ 6.

58. *Id.* ¶ 12.

of acceptable color, odor, and taste and not pose a threat to human health.⁵⁹ On access, the Comment takes a broad view, analyzing it in terms of physical accessibility, economic accessibility, non-discrimination, and information accessibility.⁶⁰

General Comment 15 outlines States parties' legal obligations by reference to ICESCR:

[W]hile the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to water, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2, para. 2) and the obligation to take steps (art. 2, para. 1), towards the full realization of articles 11, paragraph 1, and 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to water.⁶¹

The Comment lists three types of specific legal obligations which the right to water imposes on states:⁶² (1) the obligation to respect, which requires States parties to “refrain from interfering directly or indirectly with the enjoyment of the right to water”; (2) the obligation to protect, which “requires States parties to prevent third parties from interfering in any way with the enjoyment of the right to water”;⁶³ and (3) the obligation to fulfill, which “can be disaggregated into the obligation to facilitate, promote and provide.”⁶⁴ It also “requires States parties to adopt the necessary measures directed towards the full realization of the right to water.”⁶⁵

In December 2006, the Convention on the Rights of Persons with Disabilities⁶⁶ defined an adequate standard of living for such persons to include water, explaining:

[S]tates 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

59. *Id.* ¶¶ 12(a), (b).

60. *Id.* ¶ 12 (c).

61. *Id.* ¶ 17.

62. *Id.* ¶¶ 20–26.

63. *Id.* ¶ 23.

64. *Id.* ¶ 25.

65. *Id.* ¶ 26.

66. G.A. Res. 61/106, United Nations Convention on the Rights of Persons with Disabilities and Optional Protocol (Dec. 13, 2006), http://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf (on file with *The University of the Pacific Law Review*).

equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs.⁶⁷

In 2006 the Human Rights Council requested that the United Nations High Commissioner for Human Rights conduct “a detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments . . . ” to further elaborate on the necessary specific requirements regarding states’ legal obligations under the human rights to water and sanitation.⁶⁸ In response to this request, the High Commissioner submitted a report in 2007 discussing the meaning and scope of safe drinking water, sanitation, and access.⁶⁹ He suggested two primary components regarding “safe drinking water”: sufficient quantity and water quality, and that the publications of the World Health Organization might serve as an international reference point to both water quantity and water quality.⁷⁰

On determining the meaning and scope of access, the report discussed equitable access, physical access, and financial access.⁷¹ Regarding equitable access, the report states the requirement is that “no population group is excluded and that priority in allocating limited public resources is given to those who do not have access or who face discrimination in accessing safe drinking water and sanitation.”⁷² Regarding physical access, it was suggested that in order to satisfy the right to water, individuals must have secure access to sanitation facilities so that their physical security is not in jeopardy when accessing the facilities.⁷³ And there must be availability of a sufficient quantity in “reasonable distance.”⁷⁴ Finally, the requirement to ensure access was that water must be affordable to all: “The human rights framework does not imply, therefore, a right to free water and sanitation but highlights the fact that nobody should be deprived of access because of an inability to pay.”⁷⁵

Finally, in July 2010, for the first time, the United Nations General Assembly in a resolution formally recognizing the rights to water and sanitation,

67. *Id.* art. 28(2)(a).

68. Human Rights Council Dec. 2/104, U.N. Doc. A/HRC/DEC/2/104 (Nov. 27, 2006), available at http://www2.ohchr.org/english/issues/water/docs/HRC_decision2-104.pdf (on file with *The University of the Pacific Law Review*) (Human Rights and Access to Water).

69. U.N. High Comm’r for Human Rights, Rep. of the United Nations High Commissioner for Human Rights and the Office of the United Nations High Commissioner for Human Rights and the Secretary-General, U.N. Doc. A/HRC/6/3 (Aug. 16, 2007), available at http://www2.ohchr.org/english/issues/water/ixpert/docs/A-CHR-6-3_August07.pdf (on file with *The University of the Pacific Law Review*).

70. *Id.* ¶¶ 5(c), (d).

71. *Id.*

72. *Id.* ¶ 24.

73. *Id.* ¶¶ 25, 26.

74. *Id.* ¶ 26.

75. *Id.* ¶ 28.

acknowledged that clean drinking water and sanitation are essential to the realization of all human rights.⁷⁶ The resolution called 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.”⁷⁷ The resolution passed with 122 states voting in favor, the United States and 40 others abstaining, and no votes against.⁷⁸

This General Assembly action was followed by the Human Rights Council’s adoption of Resolution 15/9⁷⁹ in September 2010, which affirmed the decision of the General Assembly and confirmed that the human right to water and sanitation is binding as part of existing international human rights law as a derivative right of “the right to an adequate standard of living and . . . the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.”⁸⁰

The HRC called upon states to “achieve progressively the full realization of human rights obligations related to access to safe drinking water and sanitation . . .”⁸¹ It listed state responsibilities regarding the human right to water and sanitation.⁸² These responsibilities include: ensuring transparency in planning and implementing water and sanitation services,⁸³ respecting principles of equality and nondiscrimination,⁸⁴ integrating human rights into service provision impact assessments,⁸⁵ adopting public regulatory frameworks to ensure that service provision satisfies State human rights obligations,⁸⁶ providing accountability mechanisms that may effectively remedy human rights violations, and ensuring

76. G.A. Res. 64/292, *The Human Right to Water and Sanitation*, ¶ 1 (July 28, 2010), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/292 (on file with *The University of the Pacific Law Review*).

77. *Id.* ¶ 2.

78. U.N. Press Release, United Nations Meetings Coverage, General Assembly Adopts Resolution Recognizing Access to Clean Water as a Human Right by Recorded Vote of 122 in Favor, None Against, 41 Abstentions (July 28, 2010), <https://www.un.org/press/en/2010/ga10967.doc.htm> [hereinafter *GA Adopts Resolution*] (on file with *The University of the Pacific Law Review*).

79. Human Rights Council Res. 15/9, U.N. Doc. A/HRC/RES/15/9 (Oct. 6, 2010) [hereinafter *HRC Res. 15/9*].

80. *Id.* ¶ 3.

81. *Id.* ¶ 8(a).

82. *Id.* ¶ 8.

83. *Id.* ¶ 8(b).

84. *Id.* ¶ 8(c).

85. *Id.* ¶ 8(d).

86. *Id.* ¶ 8(e).

that non-State service providers also fulfill their human rights obligations.⁸⁷ Thus the resolution obligates states to take specific positive actions to implement the human right to water and sanitation.⁸⁸

According to a UN press release, although “the Assembly’s resolution recognized the fundamental right to clean water and sanitation, [it] did not specify that the right entailed legally binding obligations.”⁸⁹ Thus, “[t]he Council closed this gap by clarifying the foundation for recognition of the right and the legal standards which apply.”⁹⁰ In the words of Catarina de Albuquerque: “The right to water and sanitation is a human right, equal to all other human rights, which implies that it is justiciable and enforceable.”⁹¹

Since these 2010 developments, the right to water has been often reiterated. For example, the UN General Assembly in 2016 adopted a resolution affirming “that the human rights to safe drinking water and sanitation as components of the right to an adequate standard of living are essential for the full enjoyment of the right to life and all human rights.”⁹² The UN General Assembly also recognized:

[t]hat the human rights to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use, . . . [as a component] of the human right to an adequate standard of living.⁹³

While several regional instruments recognize the human right to water and the right has been enshrined in several national constitutions, with courts in several nations having ruled in favor of this right, the study of these complementary means for the realization of water as a human right is beyond the scope of this article.

III. IMPLEMENTATION OF THE HUMAN RIGHT TO WATER AND CHALLENGES OF IMPLEMENTATION

A. *Requirements to Ensure Implementation of the Human Right to Water*

The journey that began with the 1977 resolution adopted by the UN Water Conference in Mar del Plata culminated with the adoption of the General Assembly Resolution in 2010 and the Human Rights Council’s decision the same year,

87. *Id.* ¶¶ 9(a)–(d).

88. *Id.* ¶ 8.

89. U.N. Press Release, Right to Water and Sanitation is Legally Binding, Affirms Key UN Body, (Oct. 1, 2010), <http://www.un.org/apps/news/story.asp?NewsID=36308&CR=water&Cr1> [hereinafter Legally Binding] (on file with *The University of the Pacific Law Review*).

90. *Id.*

91. *Id.*

92. G.A. Res. 70/169, The Human Rights to Safe Drinking Water and Sanitation, ¶ 1 (Dec. 17, 2015), <https://undocs.org/A/RES/70/169> (on file with *The University of the Pacific Law Review*).

93. *Id.* ¶ 2.

proclaiming the right to water as a distinct human right.⁹⁴ No longer was this merely a political aspiration based on non-binding legal instruments, but rather it was to be recognized as a distinct human right with legal obligations that must be implemented and enforced.⁹⁵ Special Rapporteur de Albuquerque stated, “Hence from today onwards we have an even greater responsibility to concentrate all our efforts in the implementation and full realization of this essential right.”⁹⁶

As with all human rights, States hold the primary responsibility for implementing the human right to water. The UN General Assembly in a resolution it adopted in December 2015 on the human right to safe drinking water and sanitation, reaffirmed “the responsibility of States to ensure the promotion and protection of all human rights, which are universal, indivisible, interdependent and interrelated and must be treated globally, in a fair and equal manner, on the same footing and with the same emphasis.”⁹⁷

However, effective implementation requires global cooperation and coordination, bringing states and international organizations together. General Comment 15 outlines the responsibilities of pertinent international actors:

[U]nited Nations agencies and other international organizations concerned with water, such as WHO, FAO, UNICEF, UNEP, UN-Habitat, ILO, UNDP, the International Food for Agricultural Development (IFAD), as well as international organizations concerned with trade such as the World Trade Organization (WTO), should cooperate effectively with States parties, building on their respective expertise, in relation to the implementation of the right to water at the national level. The international financial institutions, notably the International Monetary Fund and the World Bank, should take into account the right to water in their lending policies, credit agreements, structural adjustment programmes and other development projects . . . so that the enjoyment of the right to water is promoted.⁹⁸

In order to fulfill the responsibility to ensure that the right to water is fully realized, that is, that everyone enjoys the right to safe water as soon as possible, states must formulate appropriate policies, strategies, and plans of action, and provide a sound legal framework under which accountability and access to justice are guaranteed. This requires appropriate legislation and the necessary measures the state must undertake to realize the goal of achieving access to safe water. The state must set appropriate standards for the delivery of services to meet the goals it has set and, as the Special Rapporteur has recommended, “[n]ational plans

94. Legally Binding, *supra* note 89.

95. *Id.*

96. *Id.*

97. G.A. Res. 70/169, *supra* note 92, pmb1.

98. General Comment 15, *supra* note 52, ¶ 60.

should set targets for progress in achieving access to water and sanitation, and monitor the progress by setting indicators to measure progress as they provide the basis for accountability.⁹⁹ This assumes the state has accurate data and, if it lacks the capacity to collect objective and disaggregated data, it should deploy appropriate resources to increase the capacity to do so. Clearly, national priorities and the available human and financial resources will guide states in setting their targets.

The monitoring process to measure outcomes is an essential element of evaluating states' progress in achieving the targets, and hence is an important tool for implementation. Thus, national strategies and plans must identify indicators and benchmarks for monitoring purposes. General Comment 15 suggests:

[I]ndicators should address the different components of adequate water (such as sufficiency, safety and acceptability, affordability and physical accessibility), be disaggregated by the prohibited grounds of discrimination, and cover all persons residing in the State party's territorial jurisdiction or under their control.¹⁰⁰

General Comment 15 identifies several international organizations which could provide guidance for states on appropriate indicators.¹⁰¹

The Special Rapporteur further clarifies the nature of indicators the state should identify:

[T]o enable monitoring, States should develop indicators reflecting the human rights criteria of the availability, quality, acceptability, accessibility and affordability of water and sanitation. Such indicators should be designed not only to measure the outcome in terms of access figures, but also capture the progress made and Government efforts. States should make better use of existing data and, where lack of relevant and reliable data provides a constraint, States should strengthen their capacity.¹⁰²

Several other reports of the Special Rapporteur also provide guidance for nation states. For example, the Special Rapporteur discussed the funding issue in a report presented to the General Assembly on August 3, 2011, which reviewed the issue of resources available for the realization of the right to water and

99. Human Rights Council, Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, ¶ 28, U.N. Doc. A/HRC/18/33 (July 4, 2011), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33_en.pdf [hereinafter July 4 Report] (on file with *The University of the Pacific Law Review*).

100. General Comment 15, *supra* note 52, ¶ 53.

101. *Id.*

102. July 4 Report, *supra* note 99, ¶ 83(g).

sanitation.¹⁰³ The report suggests the ways to augment the existing sources of financing within these sectors and to target such resources effectively.¹⁰⁴ The report “demonstrates how a deeper commitment on the part of State and international donors to incorporate human rights principles into sector financing can aid States in mobilizing, spending and tracking resources,”¹⁰⁵ and “encourages donor States, non-governmental organizations and international organizations to ensure that their policies, programmes and projects support efforts towards more coordinated and transparent funding of the water and sanitation sectors.”¹⁰⁶

In June 2011, the Special Rapporteur issued a compilation of good practices for the implementation of the rights to water and sanitation, which covered a range of stake-holders including states, international agencies, NGOs, and civil society, service providers, and includes several approaches to realizing these rights, such as legislation, planning, service delivery, advocacy and capacity building, monitoring and litigation.¹⁰⁷

In June 2014, the Special Rapporteur focused on violations of the human rights to water and sanitation, recommending that states identify such violations as a prerequisite to preventing further violations, and ensuring that concerted action is taken to remedy them.¹⁰⁸

In the July 2014 Report to the General Assembly, the Special Rapporteur focused on the right to participation as a human right and the states’ obligations to ensure participation and to embed this right into their political culture.¹⁰⁹ The report provides guidance on the requirements for this right and the elements essential for ensuring active, free, and meaningful participation.¹¹⁰

The Organization for Economic Cooperation and Development (OECD) has identified seven categories of “governance gaps” faced by states in water implementation: (1) Administrative, (2) Policy, (3) Information, (4) Capacity, (5)

103. U.N. Secretary-General, *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, U.N. Doc. A/66/255, (Aug. 3, 2011), available at undocs.org/A/66/255 (on file with *The University of the Pacific Law Review*).

104. *See generally id.*

105. *Id.* ¶ 8.

106. *Id.* ¶ 76.

107. Human Rights Council, Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Compilation of Good Practices, Addendum*, U.N. Doc. A/HRC/18/33/Add.1 (June 29, 2011), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add1_en.pdf (on file with *The University of the Pacific Law Review*).

108. Human Rights Council, Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque: *Common Violations of the Human Rights to Water and Sanitation*, U.N. Doc. A/HRC/27/55 (June 30, 2014), available at <http://undocs.org/A/HRC/27/55> (on file with *The University of the Pacific Law Review*).

109. U.N. Secretary General, *Human Right to Safe Drinking Water and Sanitation: Note by the Secretary-General*, U.N. Doc. A/69/213 (July 31, 2014), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/490/08/PDF/N1449008.pdf> (on file with *The University of the Pacific Law Review*).

110. *Id.*

Funding, (6) Objective, and (7) Accountability.¹¹¹ It suggests that to overcome these governance gaps, states must take action on several fronts: capacity building; developing more integrated approaches to water resources management; fostering “nexus approaches,” such as between water and energy and water and food; strengthening safety regulation addressing water-related risks; systematic approach for coping with risks; and stakeholder engagement and effective partnerships.¹¹²

In the Human Rights Council, the matter of human rights and drinking water has been considered several times following the 2010 resolution referred to above.¹¹³ In 2011, it adopted Resolution 18/1,¹¹⁴ which especially stressed the importance and the “primary responsibility” of States, pursuant to their obligation under the Vienna Declaration and Programme of Action,¹¹⁵ adopted by the World Conference on Human Rights in 1993, to implement all human rights, which include the right to safe drinking water and sanitation.¹¹⁶

The State responsibilities under the resolution include the following: monitoring of the status of providing water, assessing the current status, and developing comprehensive plans;¹¹⁷ working to improve the legislative and policy framework for water under a human rights standard;¹¹⁸ ensuring full transparency in the monitoring and assessment of implementation plans, projects and programs and ensuring “the free, effective, meaningful and non-discriminatory participation of all people and communities concerned, particularly people living in disadvantaged, marginalized and vulnerable situations.”¹¹⁹ Other responsibilities include setting targets and indicators, and ensuring appropriate financing;¹²⁰ and providing frameworks for regulation and accountability, namely a system of mechanisms and legal remedies, including ensuring access to justice, so that the human rights aspect of the access to water is protected and promoted.¹²¹

Following issuance of the Special Rapporteur’s report of July 2, 2012, which placed special emphasis on stigma in the delivery of safe drinking water and

111. ORG. FOR ECON. COOPERATION AND DEV., WATER AND SUSTAINABLE DEVELOPMENT—FROM VISION TO ACTION: GOVERNANCE CHALLENGES AND SUGGESTED TOOLS FOR THE IMPLEMENTATION OF THE WATER-RELATED SUSTAINABLE DEVELOPMENT GOALS 1–3 (2015), available at http://www.un.org/waterforlifedecade/waterandsustainabledevelopment2015/pdf/Governance_OECD_Tool_paper_final.pdf (on file with *The University of the Pacific Law Review*).

112. *Id.* at 3 (needed actions on Governance in relation to each theme).

113. H.R.C. Res. 15/9, *supra* note 79.

114. Human Rights Council Res. 18/1, U.N. Doc. A/HRC Res. 18/1 (Oct. 12, 2011).

115. G.A. Res. 49/208, Comprehensive Implementation of and Follow-Up to the Vienna Declaration and Programme of Action (Dec. 23, 1994).

116. *Id.*

117. H.R.C. Res. 18/1, *supra* note 114, ¶ 7(a), (b).

118. *Id.* ¶ 7(d).

119. *Id.* ¶ 7(e).

120. *Id.* ¶¶ 7(f), (g), (h).

121. *Id.* ¶¶ 7(i), (j).

sanitation,¹²² HRC Resolution 21/2¹²³ focused on the effects of discrimination, marginalization, and stigmatization. The Resolution broadened the scope, calling on states to:

[i]dentify the most marginalized, excluded and disadvantaged persons in terms of access to safe drinking water and sanitation . . . and develop the capacity of decision makers and practitioners for implementing strategies and concepts specifically focusing on the sustainable provision of safe drinking water and sanitation to the unserved poor, and to develop specific initiatives that are more likely to reach the most marginalized and disadvantaged and improve their situation.¹²⁴

Resolution 27/7, adopted in September 2014, voiced the Council's concern with the legal aspects of the human right to safe drinking water without discrimination, including calling on states to "identify patterns of failure to respect, protect, or fulfil the human right to safe drinking water . . . without discrimination," and to "ensure that effective remedies for violations of their obligations," including through their judicial systems.¹²⁵ The resolution also calls for judges and prosecutors to receive the appropriate education in the human right to water, and for law schools to include this topic in their curricula.¹²⁶

B. *Challenges to Implementation*

States, especially developing and poor countries, face formidable challenges to implement the human right to water. By calling for progressive realization rather than immediate implementation, the ICESCR framework creates a stumbling block in enforcing state obligations.¹²⁷ This glaring gap exists notwithstanding the reiteration since 2010 by national and international leaders that the right to water

122. Human Rights Council, Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Stigma and the Realization of the Human Rights to Water and Sanitation*, U.N. Doc. A/HRC/21/42 (July 2, 2012), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-42_en.pdf (on file with *The University of the Pacific Law Review*).

123. Human Rights Council, Res. 21/2, U.N. Doc. A/HRC/RES/21/2 (Sept. 27, 2012), <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/173/89/PDF/G1217389.pdf> (on file with *The University of the Pacific Law Review*).

124. *Id.* ¶ 11.

125. Human Rights Council Res. 27/7, U.N. Doc. A/HRC/RES/27/7 (Oct. 2, 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/177/87/PDF/G1417787.pdf> (on file with *The University of the Pacific Law Review*).

126. *Id.*

127. *Key Concepts on ESCRs – What Are the Obligations of States on Economic, Social and Cultural Rights?*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/ESCR/Pages/WhataretheobligationsofStatesonESCR.aspx> (last visited Apr. 6, 2018) (on file with *The University of the Pacific Law Review*).

mandates state obligations to provide universal access to safe drinking water.¹²⁸

The preceding section has implicitly identified challenges to implementing the right to water. These include: lack of adequate information awareness that this enforceable right exists; lack of sufficient human and financial resources and sound fiscal management; lack of appropriate policies, strategies, and plans of action; and lack of adequate legislation, regulations, and effective measures on the part of states. Other challenges relate to lack of effective participation of all stake holders and lack of comprehensive monitoring of service and quality levels, along with regulation and accountability. Many states suffer from inadequate capacity, corruption, lack of coordination, and integrated planning, as well as inappropriate technology choices. Many countries do not set priorities to ensure that access is available to the most vulnerable and marginalized part of the population. An urban-rural gap is a common feature in many states. Many countries lack reliable data, which must be available to monitor the progress, and thus to measure if the targets are met.

C. California Faces the Implementation Challenge

After the California Assembly passed Bill No. 685¹²⁹ in 2012, California became the first state in the United States to explicitly recognize a human right to water. Under the law, every human being in California has the right to safe, clean, affordable, and accessible water.¹³⁰ The bill sets water rights as a priority for California's relevant agencies and officials, and prioritizes water for personal and domestic use over commercial and other uses.¹³¹ California officials are required to consider the right to water in all policy, programming, and budgetary activities.¹³² However, it does not provide any finances, nor is it enforceable.¹³³

The California legislature has struggled to formulate a program to ensure affordable water, especially for those who spend a sizeable percentage of their income to buy bottled water.¹³⁴ A UCLA study published in October 2017 found substandard access and quality of water in California's mobile home parks.¹³⁵ Reportedly, 300 communities and one million people in California lack safe water;

128. *Id.*

129. AB 685, 2012 Leg., 2011–2012 Sess. (Cal. 2012) (enacted); CAL. WATER CODE § 106.3 (West 2013).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. See, e.g., Jennifer Clary et al., *California's Poor Hit Hardest by Unsafe Drinking Water*, SAN DIEGO UNION-TRIB. (Apr. 13, 2017), <http://www.sandiegouniontribune.com/opinion/commentary/sd-utbg-safe-water-california-20170413-story.html> (on file with *The University of the Pacific Law Review*).

135. Gregory Pierce & Sylvia Gonzales, *Drinking Water Access and Quality in Mobile Home Parks*, 10 ENV'T'L JUSTICE, no. 5, 2017, at 168–73; see also Brett Walton, *California Water Board Delays Affordability Report*, CIRCLE BLUE (Feb. 2, 2018), <http://www.circleofblue.org/2018/world/california-water-board-delays-affordability-report/> (on file with *The University of the Pacific Law Review*).

hence, the recognition of the right has yet to translate into access for them.¹³⁶ This example illustrates that the challenge of implementation is not simply in developing countries, because one of the richest places in the world—California—suffers from the same deficit.

IV. CONCLUSION

The human right to water requires that it be available, accessible, safe, acceptable, and affordable for all without discrimination. Since 2010, there is clear understanding of the scope and content of the right. States' obligations and proscribed violations have been identified. Sufficient guidance by the pertinent U.N. entities is available. However, challenges, especially for the developing countries, are indeed immense. The key lies in effective coordination and collaboration between states and international organizations to ensure that finance and capacity-building challenges are met. It will obviously take time for the progressive realization of this right, but as the ICESCR mandates, each state party is to take steps "to the maximum of its available resources, with a view to achieving progressively the full realization" of the right to water.¹³⁷ Political will is critical to ensure that this is not a false promise.¹³⁸

136. Clary, *supra* note 134.

137. G.A. Res. 2200A, *supra* note 37, pt. II, art. 2 ¶ 1.

138. See Stephen C. McCaffrey, *Symposium: The Promise and Perils of an International Law of Property. The Human Right to Water: A False Promise?*, 47 U. PAC. L. REV. 221 (2016).