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A Modest Proposal: A Dialogue to Implement the Human Right to Water

Derrick Howard[†]

I. INTRODUCTION

If you were told that every two minutes, you could save the life of a future Albert Einstein, Martin Luther King Jr., or Liu Xiaobo simply by giving them two buckets of water a day, you probably would not hesitate to do this seemingly small thing. That is, unless you had to watch your own child die from thirst to save those global luminaries. Each day an estimated thirty nine thousand children under the age of five suffer such a tragic outcome as they die from water-related diseases, diarrhea and dehydration.¹

Water is quickly and, in some parts of the developed world, quietly becoming a scarce natural resource that is vital for mankind's survival. The average person needs at least twenty six gallons of water each day to satisfy basic survival and health needs.² Although water is unequivocally essential for human survival, over one billion people lack access to clean drinking water, and more than twice as many lack sanitary facilities.³

Globally, more than five million people die every year from water-related illnesses⁴; only HIV/AIDS and malnutrition cause more annual

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1. Ashfaq Khalfan, *The Human Right to Water: Recent Progress and Continuing Challenges*, 11 HUM. RTS. TRIB., Autumn 2005, at 34, 34, <http://www.hri.ca/pdfs/HRT%20Volume%2011,%20No.3%20Autumn%202005.pdf>. See also MAUDE BARLOW & TONY CLARKE, BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD'S WATER 52 (2002) (“[E]very eight seconds, a child dies from drinking contaminated water . . .”).

2. Michael T. Klare, *Resource Wars: The New Landscape of Global Conflict* 142 (2001).

3. Ismail Serageldin, *Beating the Water Crisis*, OUR PLANET (Oct. 1996), <http://www.ourplanet.com/imgversn/83/serag.html> (explaining that it is estimated that about 1 billion people in the world lack access to fresh water and 1.7 billion lack adequate sanitation).

4. Sara Grusky, *IMF Forces Water Privatization on Poor Countries*, WATERUNC.COM (Feb. 2001), <http://www.waternunc.com/gb/ProblemofWater.htm>. See also STEVEN SHRYBMAN, THE IMPACT OF INTERNATIONAL SERVICES AND INVESTMENT AGREEMENTS ON PUBLIC POLICY AND LAW CONCERNING WATER 8-9 (2002) available at

deaths in the developing world.⁵ Recent estimates indicate global water consumption may double during the next twenty years,⁶ and the United Nations anticipates that by 2040, demand for water will exceed the world's supply by more than 30 %. Further, despite the United States' status as a developed country and "leader of the free world," the National Resources Defense Council predicts that more than 1,100 counties in the United States will face higher risks of water shortages by 2050.⁷

The impending water shortage, and its effects, presents a quandary for national and world leaders. Solving the water shortage, both now and in the future, implicates two major issues: (1) adjusting legal doctrines affecting competing ethical and property claims to water sources; and, (2) addressing the stratagem between governments, in *parens patriae*,⁸ and private corporations to share the benefits and costs of water privatization. Tackling the impending water resource crisis presents a major problem: no matter the solution, the resulting cost is one that many governments are not prepared to address. As a result, there is diametrical opposition over whether corporate exploitation of water resources should be prevented or whether governments should eagerly accept any corporate cash offered to address water resource management.

Both developed and underdeveloped countries face the same cost problems and competing interests. For example, the United States' economic strength arguably suffers under the weight of a trillion dollar deficit⁹ and the financial repercussions of responding to uprisings and con-

http://www.robarts.yorku.ca/archives/doha/pdf/doha_shrybman.pdf ("[B]y 2025, more than two-thirds of the world's population, 5.5 billion people, will experience water shortage. . . . More than 34 [percent] of the world's population live in countries with significant water stress, and this figure is expected to double during the next 25 years.").

5. Alan Hecht, *International Efforts to Improve Access to Water and Sanitation in the Developing World: A Good Start, but More is Needed*, SK046 ALI-ABA 321, 325 (2005).

6. BARLOW & CLARKE, *supra* note 1, at 7.

7. Matthew McDermott, *Higher Water Shortage Risk in One Third of US Counties Due to Climate Change: NRDC Report*, TREEHUGGER.COM (July 21, 2010), <http://www.treehugger.com/files/2010/07/higher-water-shortage-risks-one-third-u-s-counties-climate-change.php>.

8. AMERICAN WATER THE WATER INDUSTRY, <http://www.amwater.com/learning-center/water-101/the-water-industry.html> (last visited Apr. 28, 2011) ("The United States water industry has two main segments: utilities, which involve supplying services to customers, and general services, which involve providing water and wastewater related services to utilities and other consumers on a fee-for-service contract basis."). In addition, privatization of water by large companies also entails the bottling of water for profit. See Zoe Maggio, *The Water Front: Water Privatization and Bottled Water*, POLARIS INSTITUTE, http://www.polarisinstitute.org/the_water_front_water_privitization_and_bottled_water (last visited Apr. 28, 2011).

9. *The Debt to the Penny and Who Holds It*, TREASURYDIRECT.GOV, <http://www.treasurydirect.gov/NP/BPDLLogin?application=np> (last visited May 27, 2011).

flicts in the Middle East and Africa.¹⁰ The financial pressures on the United States manifest themselves in the country's inability to respond to its own poverty to the point that the United States has the highest percentage of impoverished citizens in the developed world.¹¹ At the same time, large regions of the United States, particularly in the southwest,¹² face water scarcity now and are not financially able to pay for significant or innovative improvements to increase access to water.¹³ Elsewhere, Japan suffered an economic and environmental "free fall" following the deadly tsunami and earthquake on March 11, 2011.¹⁴

In underdeveloped countries, governments continue to struggle with the water shortages they have faced for decades, bringing some nations nearly to the brink of war.¹⁵ It is anticipated that the world's poorest populations will soon experience vast inequality in access to water and, thereby, an exacerbation of the global water crisis due to desertification.¹⁶ As a result, developed and underdeveloped countries face incredi-

10. See The CNN Wire Staff, *Unrest in the Middle East and Africa—Country by Country*, CNN.COM (Mar. 12, 2011), <http://edition.cnn.com/2011/WORLD/africa/03/10/middle.east.africa.unrest/>.

11. Paul Harris, *37 Million Poor Hidden in the Land of Plenty*, THE OBSERVER (Feb. 16, 2006), <http://www.guardian.co.uk/world/2006/feb/19/usa.paulharris> (last visited Mar. 10, 2011) ("A shocking 37 million Americans live in poverty. That is 12.7 [percent] of the population—the highest percentage in the developed world. They are found from the hills of Kentucky to Detroit's streets, from the Deep South of Louisiana to the heartland of Oklahoma.")

12. See Bryan Walsh, *A New Study Finds That Global Warming Could Dry Out the Southwest*, ECOCENTRIC (Feb. 10, 2011, 4:41 PM), <http://ecocentric.blogs.time.com/2011/02/10/climate-a-new-study-finds-that-global-warming-could-dry-out-the-southwest/#ixzz1G8UvOB1V>.

13. *Id.* ("Based on the price of adding reservoir capacity in California, meeting the baseline water shortage could cost \$2.3 trillion . . . plus \$353 billion to \$549 billion if climate change is factored in. Higher water prices would make adaptation even more expensive—assuming additional water could be found at all in a drier future.") (emphasis omitted).

14. Erica Ho, *Breaking: 8.9 Earthquake Hits Japan, Followed by Tsunami*, TIME NEWS FEED (Mar. 11, 2011), <http://newsfeed.time.com/2011/03/11/breaking-8-9-earthquake-hits-japan-followed-by-tsunami/>. See also Hiroshi Hiyama, *Japan's Post-disaster Economy Faces Electric Shock*, AFP (Apr. 9, 2011), <http://www.google.com/hostednews/afp/article/ALeqM5gdTAoUkTA2AdiPnWWqV8RIMWM6Mw?docId=CNG.36db2129cefe2fd937f948acfab92b.de1> ("Japan's economy, the world's third-largest, has been in trouble for nearly a generation, but nothing prepared it for the brutal impact of power shortages following the March 11 disaster. . . . Shortages have occurred in unexpected places—fears over water contamination have pushed up demand for bottled mineral water, leaving the beverage industry scrambling for caps for plastic bottles.")

15. Erik Rasmussen, *Prepare for the Next Conflict: Water Wars*, THE HUFFINGTON POST (Apr. 12, 2011, 11:11 AM), http://www.huffingtonpost.com/erik-rasmussen/water-wars_b_844101.html ("[W]ater will likely replace oil as a future cause of war between nations. . . . Today the first glimpses of the coming water wars are emerging. Many countries in the Middle East, Africa, Central and South Asia—e.g. Afghanistan, Pakistan, China, Kenya, Egypt, and India—are already feeling the direct consequences of the water scarcity—with the competition for water leading to social unrest, conflict and migration.")

16. *Id.* ("The worst water-effects of the climate change have yet to emerge. As the climate epidemic spreads and the global warming accelerates, 38 percent of the world's surface is expected to desertificate and dry out—especially the subtropics and mid-latitudes, where much of the world's

ble impediments to formulating the constructs of a human right to water at a time when cataclysmic, environmental events and man-made conflicts combine to form a perfect storm of global financial instability. Accordingly, overcoming the international water shortage may require the inclusion of private corporations investing their financial assets and the privatization of water and improved infrastructure needed to supply water to those who in need.

This article begins by surveying the United States' efforts to define its obligations as one of the members of the international community struggling with implementing the human right to water, recently reaffirmed by the United Nations. To explore the magnitude and complexity of this task, it is instructive to examine the most recent resolutions from the United Nations addressing the global water shortage, as well as the United States' reticence about prematurely undertaking this monumental task. Thereafter, this article examines the necessity of bringing private companies into the discussion of implementing the human right to water, the potential conflicts inherent in letting for-profit corporations manage an increasingly-scarce natural resource required by citizens, and finally, suggestions for successfully overcoming those concerns.

II. DISCOURSE AMONG COMPETING INTERESTS

It is estimated that in only fourteen years, two-thirds of the world's population will face a water shortage.¹⁷ Despite the far-reaching impact of this tragedy, the flow of discourse among world leaders, civic organizations, ecologists, and corporations has been stifled not necessarily by a lack of will, but by the lack of a comprehensive and common plan for what to do next. Although concerted and conscientious efforts have been undertaken to provide sanitary and drinkable water in developing and developed countries, positions regarding what form these efforts should take are polarized. The importance of water in so many facets of daily human life makes a single solution unwieldy and conceivably unobtainable.¹⁸

The human right to water competes with other recognized human rights in the rapidly emerging field of international human rights law.

poorest populations live—leading to a severe increase in the gap between supply and demand, to a vast inequality in access to water and thus an exacerbation of the water crisis.”).

17. *Water & Poverty, An Issue of Life & Livelihoods*, FOOD & AGRIC. ORG. OF THE U.N., <http://www.fao.org/nr/water/issues/scarcity.html> (last visited May 28, 2011).

18. WORLD WATER COUNCIL, *THE RIGHT TO WATER 1*, available at http://www.worldwatercouncil.org/fileadmin/wwc/Library/Publications_and_reports/Right_to_Water_UK_final.pdf (“[E]ven though a legal framework may exist, the right to water is often not applied for a variety of reasons: lack of resources, absence of political will, or simply people and governments are not aware of the existence of the right or they don’t know how to implement it.”).

These human rights have many dimensions,¹⁹ entitling individuals to be free from various societal ills such as slavery, torture, and genocide.²⁰ The importance of one human right over another leads to much debate. In Ling-Yee Huang's note *Not Just Another Drop In The Human Rights Bucket: The Legal Significance of a Codified Human Right to Water*,²¹ he suggests the human right to water should be protected as a *jus cogens* norm,²² "rendering the right inviolable even during times of armed conflict."²³ However, bestowing this significant legal standing on access to a natural resource so closely tied to human existence presupposes both a static interpretation in international law of a State's sovereign right to regulate and exploit water, and the international community's acknowledgement of what constitutes customary norms entitled to universal recognition.²⁴ According to Huang, some scholars fear that the recent proliferation of human rights and the resultant dialogue may lead to a dilution of rights.²⁵ Thus, nations must both come to a uniform understanding of what the human right to water means within and beyond borders, and agree on how to protect that right while allowing water to be used for all of its beneficial purposes.

19. *What Are Human Rights?*, U.N. OFFICE OF THE HIGH COMM'R ON HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (last visited May 28, 2011) ("Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.")

20. Derrick Howard, *21st Century Slavery: Reconciling Diplomatic Immunity and the Rule of Law in the Obama Era*, 3 U. ALA. C.R. & C.L. L. REV. 26, n.139 (forthcoming) ("Traditional *jus cogens* norms include slavery, piracy, and genocide.")

21. Ling-Yee Huang, Note, *Not Just Another Drop In The Human Rights Bucket: The Legal Significance of a Codified Human Right to Water*, 20 FLA. J. INT'L L. 353, 366 n.82 (2008) ("Here, the international humanitarian law principles of humanity, military necessity, proportionality, and discrimination would apply to preclude conflicting parties from targeting water resources vital to the survival of the civilian population."). See also Antoine Bouvier, *Protection of the Natural Environment in Time of Armed Conflict*, 285 INT'L REV. RED CROSS 567 (1991); and Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 YALE J. INT'L L. 1 (1997).

22. See, e.g., Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (Recognizing preemptory norms from which no derogation is permitted.)

23. Huang *supra* note 21, at 366.

24. Melina Williams, Note, *Privatization and the Human Right to Water: Challenges for the New Century*, 28 MICH. J. INT'L L. 469, 486 (2007) ("States have three kinds of human rights obligations: the negative obligation to respect the right (not to violate it), the positive obligation to protect the right (to prevent third-party violations), and the obligation to fulfill the right (to ensure the individual's ability to enjoy it).")

25. Huang, *supra* note 21, at 367, (citing Gayle Binion, *Human Rights: A Feminist Perspective*, 17 HUM. RTS. Q. 509, 518 (1995)).

Specifically, there is enormous disagreement over exactly what the human right to water entitles individuals to receive.²⁶ The intricate question of whether and to what degree water should be free, or alternatively, treated as a commodity,²⁷ must be answered before the current water crisis reaches catastrophic levels. Some have argued that water should always be available free of cost because it is so closely tied to other fundamental human rights, such as the right to life.²⁸ But even if the human right to water is deemed a fundamental right, that right can never entitle anyone to an unlimited and uninterrupted flow of water under all circumstances. Economists and legal scholars have argued that treating water as a commodity will force individuals to use it more conscientiously.²⁹ Establishing the bounds of what the human right to water entails, and how it ought to be managed, presents a critical first step in establishing and preserving the human right.

Further, the consequences of water unavailability vary throughout various cultures and social strata. Water, or the lack thereof, impacts the fundamental right to participate in the political process, to seek, receive, and impart information, to demonstrate peacefully, and to freely express dissenting opinions.³⁰ Many individuals in developing nations report discrimination within their own borders or by more powerful neighboring states that share contiguous water sources.³¹ Economic discrimination forces the poor and disenfranchised to pay ten to twelve times what wealthier individuals pay for the same quantity of water.³² As a result, the fundamental rights of those without wealth, social status, or military

26. Saby Ghoshray, Searching for Human Rights to Water Amidst Corporate Privatization in India: *Hindustan Coca-Cola Pvt. Ltd. v. Perumatty Grama Panchayat*, 19 GEO. INT'L ENVTL. L. REV. 643, 669 (2007) ("In order to understand the right to water as a fundamental right, we must delineate some contiguous rights because the rights of one entity may be bundled with the rights of other entities.").

27. *Id.* at 653 n.36 ("In *Attakoya Thangal v Union of India* 1990 (1) KLT 580, the court held that under Article 21 of the Indian Constitution, the right to water and other natural resources, like air, are attributes of the right to life. The Supreme Court of India also held in *Virender Gaur v. State of Haryana*, 1995 (2) SCC 577 that issues of the environment, including harm to water and air, should be considered a violation of Article 21. Article 21 of the Indian Constitution covers the protection and right to life."). See also INST. FOR HUMAN RIGHTS & BUS., DRAFT: BUSINESS, HUMAN RIGHTS & THE RIGHT TO WATER, CHALLENGES, DILEMMAS & OPPORTUNITIES, ROUNDTABLE CONSULTATION REPORT 10 (2009) available at http://www.institutehrb.org/pdf/Draft_Report-Business_Human_Rights_and_Water.pdf.

28. Ghoshray, *supra* note 27. See also INST. FOR HUMAN RIGHTS & BUS., *supra* note 27.

29. Inst. for Human Rights & Bus., *supra* note 27.

30. *Id.* at 7–8.

31. See Huang, *supra* note 21, at 354 ("Projected global populations will increasingly strain water resources, potentially leading to greater conflicts over this precious natural resource. Conflicts have already arisen in parts of the Middle East and sub-Saharan Africa and even include conflicts between humans and native fauna.").

32. Inst. for Human Rights & Bus., *supra* note 27 at 7.

proress go unrealized or marginalized in favor of a privileged minority. Thus, as it has been aptly observed, water is power—those who control the flow of water control the flow of power, and it is often claimed that clean water flows towards the rich and wastewater towards the poor.³³ Unfortunately, a growing number of people worldwide have no guaranteed access to water because they lack an economic or political voice. This divide will continue to be reflected in nations, including the United States, particularly if a comprehensive solution to domestic and international water shortages is not addressed.

Despite the shortage of water around the globe, mismanagement of water in countries like the United States, which currently has an adequate supply, portend dire ecological consequences. As Huang explains:

Draining wetlands decreases water retention and recycling capacity; and contaminated runoff and pollution of natural water bodies foreclose human use. The destruction of ecological habitats contributes to the increase of greenhouse gases and further exacerbates projected temperature increases. Projections indicate a disproportionate increase of volatile weather patterns across the globe. Increased severity of floods, such as those in India, will cause greater contamination of water sources and speed the spread of disease, while other areas will experience corresponding drought and desertification.³⁴

A recent report by the Stockholm Environment Institute (SEI)³⁵ indicates that Arizona, California, Nevada, New Mexico, and Utah will experience major water shortfalls as a result of the effects of global warming and the growth of both population and personal income.³⁶ According to Frank Ackerman, co-author of the SEI study and Director of the Climate Economics Group in the organization's United States division, "Climate policy choices we make today are not just about exotic environments and far-future generations—they will help determine how easy or hard it is to create a sustainable water system in the most arid region of the country."³⁷ Thus, addressing the human right to water implicates the broader discussion of climate change and environmental stewardship.

33. *Poverty in Africa Linked to Water Management*, MERCY CORPS (March 31, 2006), <http://www.globalenvision.org/library/1/1024>.

34. Huang, *supra* note 21, at 354-355.

35. See Walsh, *supra* note 12.

36. *Id.* ("[G]lobal warming could increase the long-term water shortfall by a quarter, adding an additional 282 million to 439 million acre feet of water to the 1.815 billion acre feet shortfall already expected.").

37. *Id.*

III. RECOGNIZING A HUMAN RIGHT TO WATER

Even well-intended participants in the debate over access to water are polarized about conserving this critical resource for future generations and saving the lives currently lost by its scarcity. A central tenet in this debate is undeniable: a water shortage that spreads across the globe with the force of a pandemic must be treated with a comprehensive cure, not a bandage. Thus, at first blush, the United Nations General Assembly's adoption of a nonbinding resolution on July 28, 2010, recognizing the human right to water and sanitation would seem to be a decisive step towards leaders speaking with one voice.³⁸ However, some observers disagree. The organization Global Governance Watch suggests that the broad resolution undercuts the world's faith in the United Nations' effort to realistically address the international water shortage. In fact, although the Assembly's resolution passed by a vote of 122–0, the United States abstained based on concerns similar to those expressed by Global Governance Watch and other observers.³⁹

Those disagreeing with the resolution assert that, in adopting, the Assembly ignored the fact that, under the guidance of a United Nations' independent expert on the subject, the Geneva-based United Nations Human Rights Council is considering and debating the very existence and nature of a right to water and sanitation. The dissenters believe that the Assembly's action evidences that, when it comes to inventing economic rights, there is no room for thoughtful deliberation and respect for the views and sovereignty of United Nation member states.⁴⁰

John F. Sammis, U.S. Deputy Representative to the United Nations Economic and Social Council, revealed the Obama Administration's concerns about affirming a human right to water without a clear consensus among nations.⁴¹ On behalf of the administration, Sammis acknowledged that water plays an integral part in advancing certain human rights,

38. G.A. Res. 64/292, at 2, U.N. Doc. A/64/L.63/Rev.1 (July 10, 2010). (The resolution "[r]ecognizes 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; [and] [c]alls 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.") (emphasis in original).

39. *Id.*

40. Jim Kelly, *UN General Assembly Invents a Right to Water and Sanitation*, GLOBAL GOVERNANCE WATCH (Sept. 22, 2010), http://www.globalgovernancewatch.org/spotlight_on_sovereignty/un-general-assembly-invents-a-right-to-water-and-sanitation.

41. John F. Sammis, U.S. Deputy Representative to the Econ. & Soc. Council, Explanation of Vote on Resolution A/64/L.63/Rev.1, the Human Right to Water (July 28, 2010), *available at* <http://usun.state.gov/briefing/statements/2010/145279.htm>.

saying “The United States is deeply committed to finding solutions to our world’s water challenges. We support the goal of universal access to safe drinking water . . . Water is essential for all life on earth.”⁴² Nevertheless, Sammis added that the United Nations had not engaged in sufficient discussions with its member States to ensure adoption of a comprehensive, workable plan:

The United States had hoped to negotiate and ultimately join consensus on this text, on a text, that would uphold and support the international process underway at the Human Rights Council. Instead, we have here a resolution that falls far short of enjoying the unanimous support of member States and may even undermine the work underway in Geneva. This resolution describes a right to water and sanitation in a way that is not reflective of existing international law; as there is no “right to water and sanitation” in an international legal sense as described by this resolution.⁴³

Accordingly, the United States refused to engage in a political process that did not clearly define the scope of legally binding obligations designed to resolve the world water shortage. According to Sammis, despite the appearance of having resolved the issue, the resolution “was not drafted in a transparent, inclusive manner, and the legal implications of a declared right to water have not yet been carefully and fully considered in this body or in Geneva.”⁴⁴ In essence, Sammis said, the General Assembly Resolution paid lip service to a complicated problem that merits more thoughtful discussion, not merely a rushed attempt “to take a shortcut around the serious work of formulating, articulating and upholding universal rights.”⁴⁵

Those in need of a water shortage solution take little comfort in hearing calls for more discussion before addressing their plight. Ultimately, however, the United States’ concerns about the General Assembly Resolution were placated. A subsequent resolution by the United Nations Human Rights Council on September 30, 2010, reaffirmed the human right to water in greater detail than the General Assembly Resolution and procedurally complied with the process supported by the United States.⁴⁶ According to Catarina de Albuquerque, the United Nations’ independent expert on human rights, obligations created by the updated resolution related to access to safe drinking water and sanitation:

42. *Id.*

43. *Id.*

44. *Id.*

45. H.R.C. Res. 15/9, U.N. Doc. A/HRC/RES/15/9 (Oct. 6, 2010).

46. Press Release, Human Rights Council, 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#>.

The right to water and sanitation is a human right, equal to all other human rights, which implies that it is justiciable and enforceable. 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.⁴⁷

The Human Rights Commission Resolution drew strong support from the United States, which indicated it was “proud to take this significant step of joining consensus on this important resolution regarding the right to safe drinking water and sanitation which is to be progressively realized.”⁴⁸ The Commission’s Resolution drew strong support from non-governmental organizations as well, such as the Freshwater Action Network (FAN). Danielle Morley, FAN’s executive secretary, said, “In 160 countries in all regions of the world, governments can no longer deny their legal responsibility to ensure that water and sanitation services are provided to the billions of poor people lacking access.”⁴⁹ The creation of the human right, neither simple nor easy, illustrated the importance of creating consensus on such a universal issue.

IV. CHARTING A NEW COURSE

As this nation continues to divert its collective attention to universal healthcare, the burgeoning deficit, and winning the elusive war on terrorism, people in predominantly Third World countries rejoice at the recognition of their basic human right to water.⁵⁰ Now that the international community has affirmed this right as part of the right to an adequate standard of living, the United States must comprehensively design a plan to reconfigure laws and legal relationships inextricably impacting how the human right to water can be solidified as justiciable and enforceable.⁵¹ Dr. Peter Gleick, president of Pacific Institute, interprets the right to water as requiring a considerable overhaul of legal and financial stratum needed to efficiently provide individuals with an adequate supply of sanitary and drinkable water:

What is needed now is to develop appropriate tools and mechanisms to achieve progressively the full realization of these rights, including appropriate legislation, comprehensive plans and strategies for

47. *Id.*

48. Peter Gleick, *The Human Right to Water, At Last*, SAN FRANCISCO CHRONICLE (Oct. 26 2010), http://www.sfgate.com/cgi-bin/blogs/gleick/detail?entry_id=75517.

49. *Id.*

50. See *id.*

51. See Comm. on Econ., Soc. & 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); Jennifer Naeyegele, What is Wrong with Full-Fledged Water Privatization?, 6 J.L. SOC. CHALLENGES 99, 101 (2004).

the water sector, and financial approaches. As the UN has noted, the right to water also requires full transparency of the planning and implementation process in the provision of safe drinking water and sanitation and the active, free and meaningful participation of the concerned local communities and relevant stakeholders, including vulnerable and marginalized groups. And it is time to acknowledge that even here in the richest country of the world, there are people without access to safe drinking water and adequate sanitation, and to work harder to meet those needs as soon as possible.⁵²

The legal implications of a human right to water in existing American jurisprudence would likely be quite extensive. How the international community's recognition of that right comports with what has already been codified in American law deserves separate analysis. However, to illustrate the complexity of this issue, in *Water and the Web of Life*, John Scanlon, Angela Cassar, and Noémi Nemes of the IUCN Environmental Law Programme noted, "Eight state constitutions recognize the right to a healthy environment. Besides, the Constitutions of Illinois, Pennsylvania, Massachusetts and Texas all recognize the right of people to pure water."⁵³ What constitutes minimal water quality standards on the federal level can also be found in the Water for the Poor Act, enacted in 2005.⁵⁴ Unlike other nations whose laws did not develop from a common or civil law tradition, the United States regulates use and access to public waterways in large part through the Public Trust Doctrine, which requires that water be held in trust for public use.⁵⁵ Many state constitutions incorporate the Public Trust Doctrine, and courts in at least five states have relied on the doctrine to review state action.⁵⁶

Furthermore, the aforementioned statutory rights would have to be harmonized with common law doctrines that impact the right to use, own, and distribute water. In *The Implications Of Formulating a Human Right To Water*, Erik B. Bluemel suggests that common law doctrines

52. Gleick, *supra* note 48.

53. JOHN SCANLON, ANGELA CASSAR & NOÉMI NEMES, *WATER AND THE WEB OF LIFE* (2003), available at <http://www.genderandenvironment.org/arcangel2/documentos/278.pdf>.

54. *Right to Water and Sanitation*, US HUMAN RIGHTS NETWORK, <http://www.ushrnetwork.org/content/campaignproject/right-water-and-sanitation> (directing foreign assistance to ensure that the poor have access to "safe, affordable" water) (last visited March 11, 2011).

55. Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892) (precluding Illinois from abdicating its trust responsibilities over harbor in favor of a private corporation).

56. ENVTL LAW INST., *CONSTITUTIONAL ENVIRONMENTAL LAW: GIVING FORCE TO FUNDAMENTAL PRINCIPLES IN AFRICA* 24 (May 2000). See also WIS. CONST. art. IX, § 1 as an example of one of several states allowed into the Union on the condition that the Public Trust Doctrine be incorporated into state constitutions.

concerning riparian water rights law will have to be aggressively reconciled with the human right to water:

[D]eveloping countries must enact significant legal changes in order to fully effectuate a right to water. States that use a riparian doctrine will need to significantly limit this doctrine in order to enable inter-regional water transfers. Similarly, the prior appropriation doctrine of water allocation is not compatible with a right to water, because a water rights system based upon prior appropriation is inflexible and cannot provide for the needs of late comers. In addition to these major incompatibilities, a human right to water may also impact laws and regulations relating to privatization, antitrust, agriculture, wetlands, pollution, and takings.⁵⁷

Finally, in February and March 2011, the Obama Administration hosted Catarina de Albuquerque, the United Nations Human Rights Council's independent expert.⁵⁸ The focus of her mission was nondiscrimination and good practices in overcoming challenges in the drinking water and sanitation sector in light of passage of the Human Rights Council Resolution.⁵⁹ During her visit, de Albuquerque shared information with the Obama Administration about the human right to water and sanitation and how it is implemented to benefit individuals around the world. At the conclusion of her visit, de Albuquerque also commented on the complexity of implementing a human right to water in the United States:

The legal framework governing access to water and sanitation in the United States is a complex amalgam of federal and state statutes and common law principles. This multi-tiered system coupled with an array of variances available to states and private actors make generalizations about the U.S. legal framework's capacity to reflect access to safe drinking water and sanitation as a human right particularly difficult. Nevertheless, in the absence of a federally recognized right to safe drinking water and sanitation, there are no legal barriers preventing individual states from adopting their own legislation recognizing such a right. The states of Massachusetts and Pennsylvania have already recognized a right to water (though not to sanitation) in their constitutions. I also learned that in California a bill

57. Erik B. Bluemel, *The Implications Of Formulating a Human Right To Water*, 31 *ECOLOGY L.Q.* 997 (2004).

58. *See* Dear Colleague Letter, Unitarian Universalist Service Committee, UN Independent Expert On The Human Rights To Water And Sanitation (Dr. Catarina de Albuquerque) Mission to the United States (Feb. 20, 2011), *available at* http://www.hks.harvard.edu/cchpr/initiatives/right_to_water/UN_IE_Testimony_Schedule_Feb_20_2011.pdf

59. *Id.*

package has just been introduced in the state Assembly that recognizes the human right to water.⁶⁰

Neither the General Assembly nor the Human Rights Council Resolution expressly addressed how member states must reconcile the aforementioned constitutional, statutory, and common law rights or, more pressingly, how they can financially afford to comply with this reaffirmed human right. Yet, the resolutions impose upon the international community the obligation to provide drinking water and sanitation in an available, safe, acceptable, and affordable manner without a blueprint for success.⁶¹ Completion of this task may involve difficult decisions such as the privatization of water supplies and systems in some manner that does not intrinsically violate human rights.⁶²

A. Necessity of Privatization to Advance the Human Right to Water

In a “land of plenty,” the notion that anyone can or should die from thirst or diarrhea is as inconceivable as waking up to a Canadian invasion of the United States. However, as previously noted, water shortages are already leading to armed conflict among nations.⁶³ Yet, because at least some of the American public apparently does not appreciate that water is more valuable in other parts of the world than gold, diamonds, or oil, some fear private corporations will be permitted to continue their efforts to siphon, bottle, and exploit water in this country, or seek profit from taking over the government’s provision of water to the public.⁶⁴ However, including private companies in the equation when considering how to solve the water shortage domestically and abroad offers real potential and may ultimately prove to be an inescapable necessity. The key lies in

60. Press Release, U.S. Human Rights Network, 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, (last visited Apr. 28, 2011), <http://www.usrnetwork.org/content/pressrelease/catarina-de-albuquerque-un-independent-expert-right-water-and-sanitation-missio>.

61. Right to Water and Sanitation, *supra* note 54.

62. Maria McFarland Sanchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 *FORDHAM INT’L L.J.* 1663, 1775 (2004). *See also* Jessica Budds & Gordon McGranahan, *Are the Debates on Water Privatization Missing the Point? Experiences from Africa, Asia, and Latin America*, 15 *ENV’T & URBANIZATION* 87, 95 (2003).

63. Huang, *supra* note 21, at 354; Rasmussen note 15.

64. Shawn Tully, *Water, Water Everywhere*, *FORTUNE*, May 15, 2002, at 344 (“Water promises to be to the 21st century what oil was to the 20th century: the precious commodity that determines the wealth of nations.”).

the proper regulation of private companies without allowing them to slowly siphon billions of gallons of water purely for corporate gain.⁶⁵

Recent civil unrest in Africa and the Middle East has caused gas prices to skyrocket and nearly caused a double dip recession in the United States.⁶⁶ Thus, one unavoidable question is how nations will navigate financial obstacles while complying with the human rights obligations owed to individuals. This is not a simple task because, even in developed countries, funding to repair water infrastructure is limited. Although the Environmental Protection Agency predicts \$300 billion is needed for water infrastructure repairs in the United States, the Obama Administration has received only \$6 billion.⁶⁷ While a Republican-controlled Congress demands belt-tightening in many facets of government, “more than half a million pipes burst every year” and “more than 6 billion gallons of water are lost to leaky pipes.”⁶⁸

Multiple states and municipalities have privatized water supplies or are contemplating privatization to address the conflict between their lofty goal of providing water to all citizens and their struggle with limited funds.⁶⁹ Currently, multinational companies are expanding the market of water management services in the United States⁷⁰ despite a widely publicized, negative experience in Atlanta.⁷¹ For example, United States Fil-

65. Williams, *supra* note 24, at 487 (“Due to the fact that state parties retain certain obligations to protect the right to water even under privatization arrangements, a human rights perspective may tend to clarify states’ responsibilities, elucidate how privatization could potentially violate rights, and indicate possible steps states should take to mitigate such impact on human rights.”).

66. The CNN Wire Staff, *supra* note 10.

67. Jeneen Interlandi, *The New Oil: Should Private Companies Control Our Most Precious Natural Resource?* NEWSWEEK (Oct. 08, 2010), <http://www.newsweek.com/2010/10/08/the-race-to-buy-up-the-world-s-water.html>.

68. *Id.*

69. *Id.* (“In response to the funding gap, hundreds of U.S. cities—including Pittsburgh, Chicago, and Santa Fe, N.M.—are now looking to privatize. On its face, the move makes obvious sense: Elected officials can use the profits from water sales to balance city budgets, while simultaneously offloading the huge cost of repairing and expanding infrastructure—not to mention the politically unpopular necessity of raising water rates to do so—to companies that promise both jobs and economy-stimulating profits. An effective partnership must be forged between the government as trustee of this natural resource and companies as vendors to provide the necessary services to the public.”).

70. Erika Hobbs, *Low Rates, Needed Repairs Lure “Big Water” to Uncle Sam’s Plumbing*, THE CENTER FOR PUBLIC INTEGRITY (February 12, 2003), <http://projects.publicintegrity.org/water/report.aspx?aid=54>.

71. In Atlanta, the water system was taken over by United Works, a subsidiary of the French corporate conglomerate Suez, to operate Atlanta’s water system. Although it was to signal the beginning of large cooperative efforts by private corporations to manage the water systems of major cities it was plagued by United Works’ increased water bills to citizens, dangerous downsizing of necessary personnel, delayed service of complaints made by citizens, and overbilling the city. See PUBLIC CITIZEN, WAVES OF REGRET (2005), available at <http://www.citizen.org/documents/waves.pdf>. See also Sanchez-Moreno & Higgins, *supra* note 62; Douglas Jehl, *As Cities Move to Privatize Water, Atlanta Steps Back*, N.Y. TIMES, Feb. 10, 2003, at

ter, a subsidiary of the French company Vivendi, treats sewage for Oklahoma City and New Orleans, supplies drinking water to Tampa and Indianapolis, and recycles Honolulu's wastewater. United Water, a subsidiary of the French conglomerate Suez, treats sewage for Indianapolis and Milwaukee, and supplies drinking water in a number of major cities, including Pittsburgh⁷².

The United States' water supply is also being bottled and sold as a commodity by several private companies. For example, water from the Great Lakes is sold bearing the Dasani label.⁷³ A recent *Newsweek* Magazine article documented True Alaska Bottling Company's efforts to purchase rights to transfer three billion gallons of water a year from Sitka, Alaska, to sell to China.⁷⁴ It has been noted that while proponents of privatization say markets are the best way to solve that problem, the benefits of the market come at a price—by definition, a commodity is sold to the highest bidder, not the customer with the most compelling moral claim.⁷⁵ Through its efforts, and the cooperation of the Alaska state and local government, True Alaska Bottling is successfully converting water into a commodity at the possible detriment of Alaskan citizens—selling a natural resource to the highest bidder without a sustainable replacement.⁷⁶

State government officials justify privatization schemes as necessary measures to avoid raising rates and to efficiently manage local financial burdens of rebuilding antiquated water systems.⁷⁷ At the behest of the United States Conference of Mayors, the federal government revised various tax codes to favor, or at least not penalize, privatization efforts.⁷⁸ However, several states disfavor privatization either as a result of anticipated problems or those experienced firsthand.⁷⁹ For example, when Nestlé/Perrier attempted to obtain permits to bottle the spring waters feeding Wisconsin's Mekan River in 2000, there was a public back-

A14, available at <http://www.nytimes.com/2003/02/10/us/as-cities-move-to-privatize-water-atlanta-steps-back.html>.

72. Tom Arrandale, *Foreign Faucet*, GOVERNING (June 2003), <http://www.governing.com/topics/health-human-services/Foreign-Faucet.html>.

73. Milwaukee is currently selling water to Coca-Cola for its Dasani brand of bottled water. See John Schmid, *Looking to Soak up Lake's Potential: Economic Asset Largely Untapped*, *Leaders Say*, MILWAUKEE J. SENTINEL, June 24, 2006, at A1.

74. Interlandi, *supra* note 67.

75. *Id.*

76. *Id.*

77. Arrandale, *supra* note 72.

78. Hobbs, *supra* note 70. See also Robert Vitale, *Privatizing Water Systems: A Primer*, 24 FORDHAM INT'L L.J. 1382 (2000), available at <http://ir.lawnet.fordham.edu/ilj/vol24/iss4/11>.

79. PUBLIC CITIZEN, WATER PRIVATIZATION FIASCOS: BROKEN PROMISES AND SOCIAL TURMOIL (2004) available at <http://www.publiccitizen.org/documents/privatizationfiascos.pdf>.

lash.⁸⁰ Undaunted, Nestlé/Perrier attempted to siphon water from the spring waters feeding the Big Springs area near the river's watershed.⁸¹ As a result of litigation and community action, local citizens and the state legislature defeated these efforts.⁸²

B. Solutions to the Pitfalls of Privatization

The mention of private corporations exploiting water raises the major concern of water being treated as no more than a commodity:

As the crisis worsens, companies ... that own the rights to vast stores of water (and have the capacity to move it in bulk) won't necessarily weigh the needs of wealthy water-guzzling companies like Coca-Cola or Nestlé against those of water-starved communities in Phoenix or Ghana; privately owned water utilities will charge what the market can bear, and spend as little as they can get away with on maintenance and environmental protection.⁸³

To alleviate this concern, government regulation of private companies engaged in serving water supplies or attempting to exploit water should guarantee that privatization is implemented only in ways that comport with human rights requirements.⁸⁴ Although the Human Rights Council Resolution does not indicate how businesses can fill this supportive role without overstepping bounds, the Office of the United Nations High Commissioner for Human Rights suggests that "international human rights law entail clear obligations in relation to access to safe drinking water" set an expectation of an affirmative role.⁸⁵

In 2008, the Institute for Human Rights and Business held several meetings in Washington, D.C., to explore the issues of water, human rights, and the role of the private sector. As a result of those discussions, it was determined that advancing a human right to water requires imposition of equal obligations from the government to corporations:⁸⁶

[T]he topic is vast, complex, and affects or involves a wide range of industries ... Given that the human rights system in a State does not

80. Tom Vanden Brook, Perrier Wants to Draw Water on State Land: Bottler's Proposal Sparks Concern for Trout Stream, MILWAUKEE J. SENTINEL, Dec. 19, 1999, at A1.

81. Kevin Murphy, Nestle Waters Won't Develop Big Spring Site: Company Says Project is Dead, Letting High-Capacity Well Permits Expire, MILWAUKEE J. SENTINEL, Sept. 20, 2002, at B7.

82. *Id.*

83. Interlandi, *supra* note 67.

84. Williams, *supra* note 24, at 501.

85. U.N. Human Rights Council, Report of the United Nations High Commissioner for Human Rights 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, U.N. Doc. A/HRC/6/3 (Aug. 16, 2007).

86. Williams, *supra* note 24, at 488-489.

always function effectively, and the situation can worsen when a State cannot or does not fulfill its duties in this area, the role of business becomes directly relevant and important. While business does not have the legal obligation of States to protect and fulfill rights [businesses have] ... responsibility to respect human rights. This responsibility includes the responsibility to do no harm to the enjoyment of human rights. Good conduct in one area cannot offset an abuse in another area and to discharge their responsibility to respect human rights requires a company to undertake due diligence to become aware of, prevent and address adverse human rights impact.⁸⁷

An example of a legal construct for regulation of private companies involved in the implementation of the human right to water can be found in the United Nation's Global Compact.⁸⁸ The first two of the Ten Principles of the Compact state "Businesses should support and respect the protection of internationally proclaimed human rights" and make sure that they are not complicit in human rights abuses."⁸⁹ Although neither of those two, nor the other eight, core principles of the Compact directly relate to water as a distinct natural resource, the Compact does state that companies should comply with international human rights norms.⁹⁰ Based on the General Assembly and Human Rights Council resolutions, the human right to water has been reaffirmed to be part of those norms.

In addition to regulating private corporations' access to water supplies and in order to ensure actions consistent with human rights requirements, the United States' government should establish a clear level of tort liability that might be imposed against companies or in favor of individual citizens. Making private corporations accountable on the same level as governments cannot work if the corporations are allowed to exploit water sources without clear regulations and oversight of the use and pricing of water, as well as management of water supply systems.⁹¹

Further, it has been repeatedly observed that a danger exists that corporations, left to their own devices, might indiscriminately sell water to the highest bidder and exclude those who are unable to pay for it. It has been noted that "[a]s more assets and control shift to the private corporation, the government progressively loses the ability to provide water

87. INST. FOR HUMAN RIGHTS & BUS., *supra* note 27, at 3-4.

88. See generally U.N. Global Compact, The Ten Principles, <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html> (last visited May 27, 2011).

89. *Id.*

90. *Id.*

91. Naegele, *supra* note 51, at 99 ("Privatization of water is a violation of human rights 'unless the state retains control so as to fulfill its obligation to ensure both minimal and progressive access to needed services on a nondiscriminatory basis.'") (internal citations omitted).

independently, and the more the government will need to rely on its regulatory function to ensure that water is provided to the population and human rights obligations are met.”⁹² Therefore, the only assurance governments and citizens will have that corporations will not violate their pledges of protecting human rights is to structure agreements with private corporations involved in the use, distribution, commoditization, and management of water supply systems that explicitly require the promotion of human rights.⁹³

As a direct result of the General Assembly and Human Rights Council resolutions, the human right to water has been lifted to the status of a fundamental right. Nonetheless, this right, though reaffirmed as inherent to human life, is in its infancy in the realm of legal discourse. To provide full access to this right, concerned parties must be prepared to pay more than lip service to this problem of global significance.⁹⁴ Reliance upon instruments such as the Global Compact that already contemplate private corporate involvement in the provision of water, consistent with human rights obligations, may speed the creation of globally uniform standards.

V. CONCLUSION

No one wants to be in the unenviable position of allowing one child to drink while another remains thirsty. Legal scholars like Garrett Hardin, however, have contemplated the day when tough decisions—seemingly incongruent with morality—will need to be made to manage dwindling natural resources.⁹⁵ Absent a miraculous scientific advancement, we may be helpless to halt or reverse this tragedy of the commons. The human right to water must be crafted prospectively and inclusively, not only to ensure water to developing countries, but also to prevent pri-

92. Williams, *supra* note 24, at 493-494.

93. Cf. Tilde Herrera, *The Water Risks Companies Face, and How to Address Them* (March 22, 2010), <http://www.greenbiz.com/blog/2010/03/22/water-risks-companies-face-how-address-them#ixzz1GCw50ws5>.

94. Williams, *supra* note 24, at 488 (“[U]nder a human rights perspective, the right to water is understood as a fundamental individual right that should be secured by overlapping layers of state responsibility that govern state actions both internally and internationally. In the context of the potential privatization of water supplies and services in a globalized economy, the significance of such an understanding of the right is that a number of state and international actors have a duty to respect, protect, and fulfill the right. Where the right applies, however, responsibility does not fall solely on the state.”).

95. Garrett Hardin, *An Ecolate View of the Human Predicament* (June 9, 2003), http://www.garretthardinsociety.org/articles/art_ecolate_view_human_predicament.html (“Under conditions of overpopulation, freedom in an unmanaged commons bring ruin to all”).

vatization from siphoning a finite natural resource in developed countries⁹⁶

The United States must strive to balance its ambitions with this challenge, and prudence dictates that progress occur in a sustainable and fiscally responsible manner. The reality of our time is that world-wide, 1.5 million children under the age of five die each year from the lack of sanitary and drinkable water.⁹⁷ The community of nations, non-governmental agencies, ecologists, and corporate leaders, among others, owe it to children and the future to accept a modest proposal for all-inclusive dialogue to solve a water shortage that is claiming life much too soon. Humanity's plight need not consume our children, nor should the solution.

96. Williams, *supra* note 24, at 501 ("There may be good reason to react with skepticism to broad-brush assertions of governments' ability to regulate and protect citizens against violations of their rights caused by privatization. But if a government is not in a position to protect the right to water through regulation of private industry, it seems unlikely that the government would be in a position to meet the right itself.").

97. United Nations News Centre, *Right To Water And Sanitation Is Legally Binding*, Affirms Key UN Body, (October 1, 2010), <http://www.un.org/apps/news/story.asp?NewsID=36308#>.