

Water They Waiting For?

The Imperative to Codify the Human Right to Safe Drinking Water

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Introduction

In the past several decades, international law has seen an emerging trend toward the recognition of a human right to safe drinking water.² Many States³ have also begun to recognize this right either through legislation or concrete actions. Despite the emergence of this right, it often seems more like a lofty ideal than a well-established right. This paper posits that although a right to safe drinking water exists under customary international law, it is frustrated by limited adoption by individual States, economic and resource capacity constraints, and a lack of political will. The solution to this problem is seemingly simple—adopt a binding international treaty on the human right to safe drinking water—but this approach runs into many of the same problems.

This paper will examine the international law bases for a human right to safe drinking water and then assess the challenges States face and how those challenges can be mitigated. This paper then asserts that the global community should adopt an international treaty codifying the human right to safe drinking water and requiring that States do their due diligence⁴ in fulfilling that right, despite the challenges they may face.

International Law Bases for the Human Right to Safe Drinking Water

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² This paper shall use the terms “human right to water” and “human right to safe drinking water” interchangeably for brevity.

³ In this paper, “States” refers to states in the international community, also often referred to as countries.

⁴ There is “no uniform, widely agreed, definition of due diligence.” But there are recognized elements, such as “‘due, or merited, care’ which lies at its core,” along with a concern with “*means* and not *result*.” Katja L.H. Samuel, *The Legal Character of Due Diligence: Standards, Obligations, or Both?*, 1 CENT. ASIAN Y.B. INT’L L. at *10 (forthcoming 2018/2019), <https://dx.doi.org/10.2139/ssrn.3264764>; *Id.* at 11 (quoting Robert Perry Barnidge, *The Due Diligence Principle Under International Law*, 8 INT’L CMTY. L REV. 1, 118 (2006)); *Id.* (citing Timo Koivurova, *Human Rights and Climate Change*, 106 AM. J. INT’L L. 437 (2012)).

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The U.N. Committee on Economic, Social, and Cultural Rights defines the human right to water as one that “entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”⁵ Similarly, U.N. General Assembly resolution 64/292 recognized the “right to safe and clean drinking water and sanitation as a human right” and characterized it as a “right that is essential for the full enjoyment of life and all human rights.”⁶ The resolution then called for States to support efforts “to provide safe, clean, accessible and affordable drinking water and sanitation for all.”⁷ The resolution also incorporated by reference the Universal Declaration of Human Rights (UDHR),⁸ the International Covenant on Economic, Social, and Cultural Rights (ICESCR),⁹ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁰, and the Convention on the Rights of the Child (CRC),¹¹ among others. The main issue with the resolution, however, is that it is not binding on the States, and thus lacks mechanisms to compel States to respect a human right to water.

Some of the incorporated international law documents, however, are binding on States. For example, ICESCR prescribes an affirmative obligation that States recognize a right to an “adequate standard of living,” which could be read to imply a right to water necessary to sustain life and carry out life’s basic functions such as preparing food, hygiene, laundry, and other domestic tasks.¹² Although ICESCR’s drafters did not explicitly mention water, they did state that “adequate food, clothing and housing” are essential to an adequate standard of living.¹³ In 2002, General Comment No. 15

⁵ Comm. on Econ, Social & Cultural Rights, General Comment No. 15, U.N. Doc. E/C.12/2002/11 (2002) [hereinafter General Comment No. 15].

⁶ G.A. Res. 64/292, at 2–3 (Aug. 3, 2010).

⁷ *Id.*

⁸ G.A. Res. 217 A (III) (Dec. 10, 1948).

⁹ International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

¹⁰ United Nations Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sep. 3, 1981) [hereinafter CEDAW].

¹¹ United Nations Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sep. 2, 1990) [hereinafter CRC].

¹² ICESCR, *supra* note 8, Art. 11(1).

¹³ *Id.*

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interpreted ICESCR to include an implied right to water.¹⁴ It delineated three broad obligations of States Parties to ICESCR: respect, protect, and fulfill the right to water.¹⁵

CEDAW, which entered into force in 1980, explicitly states that water is a prerequisite to adequate living conditions. It states that women have a right to “adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”¹⁶ CEDAW was the first international treaty to explicitly name water as a human right. Similarly, CRC, which came into force in 1990, imposes on States an obligation to “combat disease and malnutrition . . . through the provision of adequate nutritious foods and clean drinking-water, . . .”¹⁷ CRC was the first international treaty to not only concern itself with a right to water, but a right to water quality.

Challenges to States’ Adoption of the Human Right to Safe Drinking Water

The obligations set forth in these international documents are laudable, but when viewed pragmatically, one begins to realize that these goals are overbroad and unrealistic for States with limited resources. It may be difficult for States to respect and protect a human right to water, let alone fulfill it, when economic and resource constraints limit the fulfilment of basic services to citizens. As observed by Salman M.A. Salman and Siobhán McInerney-Lankford in *The Human Right to Water: Legal and Policy Dimensions*, “the human right to water implies considerable state responsibility and action.”¹⁸ Also acknowledged by Salman and McInerney-Lankford is the relative overstatement of the capabilities of the States in General Comment No. 15 in stating that “[r]ealization of the right should be feasible and practicable, since all States Parties exercise control over a broad range of resources.”¹⁹ The feasibility of these obligations, however, becomes less of a problem when viewed through a due diligence lens rather than a more results-oriented one: take, for example, States with limited water resources

¹⁴ General Comment No. 15, *supra* note 4.

¹⁵ *Id.*

¹⁶ CEDAW, *supra* note 9, Art. 14(2)(h).

¹⁷ CRC, *supra* note 10, Art. 24(2)(c).

¹⁸ SALMAN M.A. SALMAN & SIOBHÁN MCINERNEY-LANKFORD, *THE HUMAN RIGHT TO WATER: LEGAL AND POLICY DIMENSIONS* 65 (2004).

¹⁹ *Id.* at 66–67 note 245 (quoting General Comment No. 15 para. 18, *supra* note 4, at 8).

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that make a concerted effort to provide water for their citizens despite the challenges; similarly, there are States with limited economic and technological resources but ample water resources that still make an effort by recognizing water as a human right and removing barriers to access, even if they cannot ensure access for all their citizens. These States are doing their due diligence, by giving due regard to a human right to water.

An example of the resource constraints faced by States is Chile—home to the Atacama Desert, the driest desert in the world—which is suffering from one of the worst droughts in its history.²⁰ Chile does not recognize a human right to water under its constitution, but has begun to recognize it in its water code, as of its 2022 amendment.²¹ Moreover, courts in Chile have recognized water as a human right in several decisions.²² For example, in *Instituto Nacional de Derechos Humanos c. Gobernación Provincial de Petorca* (*National Institute of Human Rights v. Provincial Government of Petorca*), the Supreme Court of Chile held that the provincial government had to continue delivering water via tanker truck to communities that were without running water.²³

International organizations WHO and UNICEF estimated in 2020 that 98.8 percent of Chile's population received water from a safely managed drinking water source.²⁴ The CIA World Factbook additionally shows Chile having 100 percent access to an improved drinking water source.^{25, 26} These figures would suggest that Chile is

²⁰ Camila Boettinger Phillips, *Derecho Humano al Agua: Los Desafíos para su Integración en la Institucionalidad Pública del Agua en Chile*, 45 ACTUALIDAD JURIDICA 203, 204 (2022).

²¹ Elizabeth MacPherson, et al., *Evolving Rights to (and of) Water in Chile: A Case for Relationship-Based Water Law and Governance*, INT'L J. HUMAN RIGHTS at 18, <https://doi.org/10.1080/13642987.2023.2266719>

²² Boettinger Phillips, *supra* note 19, at 213.

²³ *Id.* (citing Corte Suprema [C.S.] [Supreme Court], marzo 23, 2021, "*Instituto Nacional de Derechos Humanos c. Gobernación Provincial de Petorca*," Rol de la causa 131140-2020 (Chile)); see also Ximena Insunza Corvalán, *Derecho Humano al Agua: SCS Rol N° 131140-2020*, 2021 SENTENCIAS DESTACADAS 103 (2021).

²⁴ World Health Organization [WHO] & U.N. Children's Fund [UNICEF], JMP Global Database (2020), <https://washdata.org/data/household#!table?geo0=region&geo1=sdg> [Hereinafter JMP Global Database] (Select "Country" from Geography dropdown, select "Chile" from dropdown, check "Drinking water" under Measure, check "Total" under Inequality, toggle "Analyze by service level," select "2020" from dropdown for Time period).

²⁵ United States Central Intelligence Agency, The World Factbook: Chile, <https://www.cia.gov/the-world-factbook/countries/chile> (last visited Mar. 20, 2025).

²⁶ An improved drinking water source is defined as "Piped household water connection[s] located inside the user's dwelling, plot or yard. Public taps or standpipes, tube wells or boreholes, protected dug wells,

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doing its due diligence to fulfill the human right to water. Anecdotal evidence tells a different story, however, as a relatively recent article stated that 383,204 homes lacked potable water and approximately one million people lacked an “official” water source as recently as 2021.²⁷ Evidently, Chile has been able to partially address its resource constraints through a concerted effort to recognize its citizens’ right to safe drinking water, but is still struggling to fully fulfill the human right to water due to the ongoing drought and other constraints. When one is struggling to survive, having to travel to obtain basic necessities such as water makes the going all the tougher, but at least Chile is delivering water to those who are without access to a local water utility connection via tanker trucks, demonstrating due diligence.

Colombia, on the other hand, paints a different picture—one of a State with abundant water resources, but a high degree of income inequality and poverty hampering its ability to effectively fulfill the human right to water.²⁸ Colombia, like Chile, does not have a constitutional right to water, and worse still, does not have a statutory right to water.²⁹ Courts in Colombia, however, have held that water utilities cannot shut off residential water supplies for those who cannot afford to pay, but merely limit them to 50 liters of water per person, per day.³⁰ The Constitutional Court interpreted the constitution’s general welfare article as requiring access to water, holding that “[t]he general welfare and the improvement of the quality of life of the populace are social ends of the State. It shall be a fundamental objective of its activities the resolution of

protected springs or rainwater collection.” U.N. Water Decade Programme on Advocacy and Communication, Glossary on the Human Right to Water and Sanitation, at 2, https://www.un.org/waterforlifedecade/pdf/hrw_glossary_eng.pdf. This is not an ideal situation, because people may still lack access to safe drinking water at home, having to walk or drive to a public standpipe, but an improvement over unimproved drinking water sources such as unprotected shallow wells and untreated surface water. *Id.* at 3.

²⁷ Camilo Fernando Mansilla Quiñones, *Derecho Humano al Agua en Chile, Entre Voluntades de Papel y Fierros Secos*, Movimiento de Defensa del Agua, la Tierra, y la Protección del Medioambiente at 2, https://www.cetim.ch/wp-content/uploads/Informe_El-Derecho-humano-al-agua-en-Chile.pdf.

²⁸ Food and Agriculture Organization of the United Nations [UNFAO], Computation of long-term annual renewable water resources (RWR) by country (in km³/year, average): Colombia, <https://www.fao.org/aquastat/en/countries-and-basins/country-profiles/> (accessible by selecting “Colombia” from Country List); United States Central Intelligence Agency, The World Factbook: Colombia, <https://www.cia.gov/the-world-factbook/countries/Colombia> (last visited Mar. 20, 2025).

²⁹ Judith Echeverría-Molina & Shirley Anaya-Morales, *El Derecho Humano al Agua Potable en Colombia: Decisiones del Estado y de Los Particulares*, 136 VNIVERSITAS 1, 3 (2018).

³⁰ Corte Constitucional [C.C.] [Constitutional Court], octubre 3, 2011, Sentencia T-740/11, <https://www.corteconstitucional.gov.co/Relatoria/2011/T-740-11.htm> (Colom.).

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unsatisfied necessities . . . of potable water.”³¹ Colombia has also instituted a progressive water tariff system for decades now, which allows the poorest water users to be subsidized by the wealthiest.³²

Colombia is facing its economic challenges and inequities head on despite its continuing struggles with wealth inequality and recognizes its need to provide all its citizens with water regardless of their ability to pay. WHO and UNICEF have assessed Colombia’s access to safe drinking water sources at 73%, while the CIA—admittedly using slightly different metrics, as discussed in footnote 26—states that 97.7 percent of the population has access to drinking water from improved sources.³³ Despite the disparity in the statistics, one can infer that Colombia is doing its due diligence within the constraints of its economic realities to ensure access to water for its population.

The most complicated issue to tackle, however, is the lack of political will to implement and fulfill a human right to water, the United States being a prime example. The United States Constitution does not guarantee a right to water—safe or otherwise—and only one state, California, explicitly recognizes a human right to safe drinking water in its statutes.³⁴ Federal courts in the United States also do not recognize a human right to safe drinking water.³⁵ This is all despite the United States being the wealthiest and most powerful country in the world by nearly all appreciable metrics.³⁶ In fact, the United States abstained from voting on General Assembly Resolution 64/292, and disclaimed the existence of a human right to water.³⁷ Evident by the dearth of support for a human right to water by most U.S. states and the federal government, the

³¹ *Id.* (quoting CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 366) (Matthew Allen trans.).

³² Echeverría-Molina & Anaya-Morales, *supra* note 28, at 7. The progressive tariff system works as such: Strata 1 through 3—based on a stratified neighborhood classification system of 1 through 6, with 1 being the most impoverished and 6 being the wealthiest—receive water at a substantial tariff discount subsidized by those living in Strata 5 and 6.

³³ U.N. Water, Summary Progress Update 2021: SDG 6 — Water and Sanitation for All 44 (2021); CIA World Factbook: Colombia, *supra* note 27. See also JMP Global Database, *supra* note 23 (corroborating Summary Progress Update Data).

³⁴ U.S. CONST.; Cal. Water Code § 106.3; see also Stephen C. McCaffrey, *The Human Right to Water: A False Promise?*, 47 U. PAC. L. REV. 221, 231 (2016).

³⁵ See, e.g., *In re City of Detroit*, 841 F.3d 684 (6th Cir. 2016).

³⁶ United States Central Intelligence Agency, The World Factbook: United States, <https://www.cia.gov/the-world-factbook/countries/united-states> (last visited Mar. 20, 2025).

³⁷ Mark Leon Goldberg, *Why the United States Did Not Support “Water as a Human Right” Resolution*, U.N. DISPATCH (July 28, 2010), <https://undispatch.com/why-the-united-states-did-not-support-water-as-a-human-right-resolution>.

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United States seemingly lacks the political will to implement and support a human right to safe drinking water, and accordingly is not doing its due diligence.

Possible Solutions to Address the Human Right to Water

Despite advancements of the human right to water and recognition by most of the international community, there are still significant barriers to recognition and fulfillment of the human right to water. The international community must adopt a binding international treaty on the human right to water that would require States to not only respect and protect water resources but do their due diligence to fulfill the human right to safe drinking water. This solution, however, may run into the same obstacles as the extant right under customary international law because it cannot address some of the root causes of water insecurity.

To address economic and resource constraints, it is imperative that a fund be established to develop and field new technologies to provide safe drinking water to those who are currently going without. The treaty must also prescribe minimum amounts of water that States must ensure persons have access to, irrespective of their ability to pay. States with abundant water resources must also be encouraged to share with their less fortunate neighbors, perhaps in exchange for other resources. Water is a basic building block of life for most of Earth's inhabitants, and it must be treated as a right and not as a commodity; States that fail to do their due diligence and ensure a basic level of access to safe drinking water must be brought to task.

Conclusion

Since the inception of a human right to safe drinking water as a right necessary for the fulfillment of other human rights, the right has evolved to become a right of its own recognized by the United Nations and many of its member States. Despite this recognition, the right is still being frustrated by economic and resource constraints, limited adoption, and a lack of political will. Some States are taking measures to ensure that the right to water is respected, protected, and fulfilled, with some notable holdouts. By adopting a binding treaty that addresses the aforementioned constraints, the global

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community can ensure that all of humankind has access to safe drinking water. The question is, what are they waiting for?