



The Human Right to Water in the United States:

*A Primer for Lawyers
& Community Leaders*

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INTRODUCTION

While the United States possesses an abundance of fresh water resources and a significant percentage of the population takes for granted access to water of reasonable quality at an affordable price, water-related problems affect increasing numbers of people in the U.S. each year. The long-term drought in California, mass water shutoffs in Detroit, Michigan, the highly-publicized contamination of the public water supply in Flint, Michigan and the standoff over the Dakota Access Pipeline have brought increased public attention to these issues. To date, this attention has not necessarily translated into more effective responses by public officials.

Over the past decade, the international community has affirmed the existence of the human right to clean, affordable water as a fundamental right to a basic necessity of life. Building on this work, we believe that promotion of the human right to water can contribute to addressing the worsening water problems in the U.S. This primer suggests some of the forms such promotion might take, even in the context of the U.S. government's refusal to recognize this right.

We begin by clarifying the sources of the human right to water and touching on some of the obstacles to realizing the right in the U.S. The primer then examines several high-profile water disputes, some of which have involved the use of the human rights framework as part of an overall strategy to resolve the issue. We conclude with a reflection on possible future uses of the human right to water in legal and policy advocacy within the U.S.

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I WHAT ARE HUMAN RIGHTS?

A What are the sources of international human rights law?

Following the atrocities of World War II, countries around the world came together to form new international and regional legal systems, such as the United Nations (U.N.), with the purpose of achieving global cooperation to solve international economic, social, cultural or humanitarian problems. These systems promoted respect for human rights and fundamental freedoms regardless of race, sex, religion or language.²

Although the U.N. Charter did not provide additional detail regarding the human rights to be protected, those rights were more fully described in the American Dec-

laration of the Rights and Duties of Man in April 1948, and enshrined a few months later in the Universal Declaration of Human Rights (UDHR).³ These human rights declarations set out basic human rights principles that articulate norms that would later become the basis of the global human rights treaties that form the key building blocks of human rights law.

Those rights were placed into two principle treaties that, along with the UDHR, form the International Bill of Rights: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).⁴ For the countries that ratify them, these treaties create legal obligations to protect, respect and fulfill basic human rights. Subsequent treaties have been created to further explain the application of these rights to particular groups including racial minorities, women, children and persons with disabilities.

In addition to treaties and other human rights instruments that set forth a comprehensive set of rights, the international community also established human rights bodies and mechanisms for protecting and promoting these rights. For example, the Organization of American States (OAS) established the Inter-American human rights system as the regional system for North, Central and South America.

B What is the connection between the human rights system and U.S. law?

1 Supremacy Clause

Article VI, Clause 2 of the Constitution provides that once Congress ratifies a treaty, it becomes the “supreme Law of the Land,” giving it status equivalent to a federal statute. However, enforcing human rights treaties in domestic courts is challenging because the U.S. ratified them with the understanding that they are “non-self-executing,” meaning that Congress must enact implementing legislation in order to make these treaties enforceable by domestic courts.⁵

2 U.N. Treaty Obligations

Ratifying a treaty creates international obligations for the U.S., not only to protect, respect and fulfill the rights enshrined within the treaty, but also to periodically report to the treaty body, a U.N. committee of human rights experts, which evaluates the country’s progress implementing those rights.⁶ Even though the recommendations of the treaty bodies are generally not binding, advocates can use them in domestic advocacy efforts. For example, advocates can offer them as persuasive authority in domestic litigation or to lobby the government for policy changes.⁷

Where the U.S. has signed, but not ratified a treaty, it is obligated “to refrain

from acts which would defeat the object and purpose of [the] treaty” until it makes clear its intention not to become a party to the treaty.⁸

Human rights treaties that the U.S. has ratified:

- International Covenant on Civil and Political Rights (ICCPR)
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Two Optional Protocols on the Convention on the Rights of the Child (CRC), which address the sale of children and children in armed conflict

Human rights treaties that the U.S. has signed, but not ratified:

- International Covenant on Economic, Social, and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of the Child (CRC)
- Convention on the Rights of Persons with Disabilities (CRPD)

3 Other U.N. Mechanisms

In addition to treaty obligations, additional U.N. mechanisms, such as U.N. Special Procedures and the Universal Periodic Review (UPR), offer U.S. advocates opportunities to raise human rights concerns and leverage international attention for domestic advocacy purposes.⁹ Special Procedures are human rights experts within the U.N. system who conduct country visits and respond to individual complaints to evaluate human rights concerns regarding particular thematic issues or in specific countries. As a party to the U.N. Charter, the U.S. is obligated to take part in the UPR, which is a “peer review” of its progress on implementation of rights recognized in the Charter and the UDHR by other member states once every four years.¹⁰

4 Obligations Under the Inter-American System

Under the Inter-American regional system, the U.S. is subject to the jurisdiction of the Inter-American Commission on Human Rights (IACHR), which considers cases on human rights violations and country conditions brought by individuals and groups. Although the U.S. government asserts that IACHR decisions are non-binding, the Commission offers other benefits for advocates addressing human rights violations in the U.S. For example, thematic hearings before the Commission present opportunities to raise awareness about particular human rights violations on an international stage, which can support education and

media outreach efforts. Engagement with the Inter-American system also provides opportunities for ongoing dialogue with the U.S. government over human rights concerns and the Commission's findings contribute to the international record on particular issues. Additionally, for many victims of human rights violations, the Commission process may offer the only formal acknowledgment of their experience. Advocates should have clear and limited expectations about what a Commission decision or hearing can accomplish, because of the U.S. government's refusal to accept the Commission's legal authority.¹¹

5 U.S. Courts and Governments

International human rights law can be used domestically, in state and federal courts, as nonbinding persuasive precedent. The U.S. Supreme Court has at times considered non-domestic law, but when asked to identify new fundamental rights in the first instance, the Court relies on American, not foreign, values.¹² State courts have used international human rights law to aid in interpretation of state constitutional provisions that do not have a counterpart in the federal constitution.¹³ However, some state courts have been hesitant to use international law.¹⁴ The federal government and some state and municipal governments have used human rights principles to inform specific legislation and government policies.¹⁵

II SOURCES OF THE HUMAN RIGHT TO WATER

The human right to water is recognized in international law and some U.S. state and local laws. Although the U.S. federal government does not recognize this right, some provisions of federal laws promote particular aspects of the right to water. The right to sanitation is frequently connected to the right to water because sanitation can impact water quality and some sanitation systems are water-based. However, sanitation is not always water-based and raises unique concerns with regard to public health and personal responsibility.¹⁶ This primer will focus solely on the right to water and will not address the unique concerns raised by the right to sanitation.

A International Sources of the Right to Water

The right to water is recognized in some treaties, and has been further developed in General Comments explaining the provisions of those treaties. The U.N. General Assembly adopted a resolution in 2010, explicitly recognizing for the first time the human right to water and sanitation and acknowledging that clean drinking water and sanitation are essential to the realization of all human rights.¹⁷

1 Right to Water in Agreements Ratified by the U.S.

A International Covenant on Civil and Political Rights (ICCPR)

Although the ICCPR does not explicitly refer to a right to water, Article 6(1) sets out the inherent right to life. The U.N. Human Rights Committee's 1982 interpretation of the ICCPR in General Comment No. 6 notes that States must adopt positive measures to protect the right to life and ensure access to the means of survival.¹⁸ As water is necessary to sustain a life, the right to life in the ICCPR arguably includes the right to water.¹⁹

B International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

ICERD requires that economic, social and cultural rights be fulfilled in a non-discriminatory manner and, because the U.S. ratified that treaty, it is bound by that principle.²⁰ ICERD specifically recognizes the right to housing and public health, but the treaty does not provide an all-inclusive list of protected rights.²¹ The U.S. has committed itself to address issues of discrimination in the areas of housing, medical care, social services and public health.²² The CERD Committee recognized the right to water as a component of both the right to housing and the right to health.²³

2 Right to Water in Agreements the U.S. Signed But Has Not Ratified

A International Covenant on Economic, Social, and Cultural Rights (ICESCR)

While the human right to water is not explicitly recognized in the ICESCR, General Comment No. 15 of the Committee on Economic, Social and Cultural Rights explains that the right to water is included in Articles 11 and 12 of the Covenant and recognizes water as “indispensable for leading a life in human dignity.”²⁴ Article 11(1) recognizes the right to an adequate standard of living, which includes adequate food, clothing and housing. The list was not intended to be exhaustive and General Comment No. 15 identifies water as “one of the most fundamental conditions for survival” and essential to an adequate standard of living.²⁵ The right to water is also necessary to ensure the right to health under Article 12(1) and the rights to housing and adequate food under Article 11(1).

General Comment No. 15 explains the meaning of the right to water that is adequate for human dignity, life and health. Adequate water includes access to sufficient water for personal use. The water must be safe for personal and domestic use, free of contaminants and must have an acceptable odor and taste. Physical access to water should be provided without dis-

crimination and an individual's personal safety cannot be compromised in order to access water. Water should also be economically accessible, such that "direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights" such as housing, food, education and health.²⁶

General Comments Nos. 13 and 14 explain that the right to education and the right to health also imply a right to water. The right to education specifies that in order for education to be available, school facilities should have safe drinking water for students.²⁷ The right to health includes the right to "underlying determinants" of health, including access to safe and potable water.²⁸ Health care facilities should have safe water.²⁹ Access to safe water is also necessary for environmental and industrial hygiene.³⁰ States have an obligation to refrain from unlawfully polluting water supplies and to ensure equal access to an adequate supply of safe and potable drinking water.³¹

B Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

CEDAW was the first primary human rights instrument to explicitly reference the right to water. Article 14(2)(h) recognizes that women who live in rural areas face unique challenges and, in order to eliminate discrimination against them, states should ensure to rural women the right to enjoy adequate living conditions, which includes an adequate water supply.³² General Comment No. 34 on the rights of rural women does not interpret this right to require equal access to water, but does recognize a right to clean water.³³

C Convention on the Rights of the Child (CRC)

The CRC expressly links safe drinking water to health and includes the right to water under the right to health. Article 24 recognizes that children have a right to the highest attainable standard of health and state parties are to take steps to combat disease and malnutrition, including through the provision of clean drinking water.³⁴

D Inter-American System

The U.S. is party to the Organization of American States (OAS) Charter and the American Declaration of the Rights and Duties of Man and has signed, but not ratified, the American Convention on Human Rights. Article 1 of the American Declaration and Article 4 of the American Convention recognize the right to life but neither explicitly links that right to water.³⁵ Although the U.S. government under President Obama generally participated in formal cases before the Inter-American Commission

on Human Rights (IACHR), no mechanism for enforcing Commission decisions exists and the U.S. regularly asserted that the decisions are non-binding.³⁶ In the first months of the Trump administration, the U.S. government failed to appear at multiple hearings addressing human rights concerns in the U.S., suggesting an unwillingness to work toward solutions through the Inter-American system.³⁷

3 Customary International Law

In international law, well-established country practices that are followed because of a sense of legal obligation can become binding on all countries through their wide international acceptance and consistent conforming practice.³⁸

Although the American Declaration and the Universal Declaration of Human Rights are framed as guiding principles, the right to water is implicit in them, under the right to life and the right to an adequate standard of living, and one can argue that they represent a formalization of customary international law that binds the U.S.³⁹

B Domestic Sources of the Right to Water

During the Obama administration, the U.S. government supported the recognition of the right to water in international law, but acted with ambivalence as to its relevance in U.S. domestic law. Yet while international human rights law may not provide a domestic cause of action to individuals deprived of water, human rights norms can play an important role in the U.S. as judges define baseline principles of equality and interpret constitutional and statutory laws.⁴⁰

1 Federal Framework on the Right to Water

The U.S. federal government does not recognize the human right to water, but some provisions of federal laws promote particular aspects of the right.

A Clean Water Act and Safe Drinking Water Act

The 1972 Clean Water Act and the 1974 Safe Drinking Water Act address water quality, but neither recognizes a right to safe drinking water for all citizens.⁴¹ The reauthorization of the Safe Drinking Water Act in 1996 requires affordability studies for populations that rely on non-public water systems for residential needs, but does not require remedial action.⁴²

B Environmental Protection Agency (EPA) Regulations

The EPA established minimum standards for regulating water quality. The states are responsible for monitoring and enforcing water quality

standards at local sources, managing wastewater treatment and developing appropriate infrastructure. States may adopt their own regulations, which must meet or surpass the minimum federal standards.⁴³

The EPA also has regulatory responsibility to monitor and investigate discrimination by any agency or organization receiving federal funding from the EPA.⁴⁴ Recipients of federal assistance are required to collect data and information to show compliance with non-discrimination laws.⁴⁵ The EPA's Office of Civil Rights investigates complaints of racial discrimination by recipients of Agency funds and seeks informal resolutions when possible.⁴⁶ However, if attempts to seek voluntary compliance fail, the EPA refers the matter to the Department of Justice, which can begin the process of withholding federal funds from the recipient if compliance is not achieved.⁴⁷

2 Non-discrimination Laws

Although the majority of people living in the U.S. have access to safe water, inequalities exist among the poorest and most marginalized groups.⁴⁸ These individuals can use the protections and enforcement mechanisms that are available under constitutional and statutory provisions on non-discrimination and equal protection under the law to ensure equal access to safe water. However, without an explicit right to water to ground such claims, the prospects for success of such claims remains uncertain.⁴⁹

Furthermore, many constitutional provisions and civil rights laws are only triggered if complainants can show intentional discrimination. The Supreme Court defines "intent," not merely as knowledge of a policy's discriminatory impacts, but as "deliberate government action or inaction motivated by or pursued 'because of' the discriminatory impacts on a protected class."⁵⁰ Not all non-discrimination laws require a showing of intent. For example, the Fair Housing Act, described below, does not strictly require proof of intent.

A Constitutional Protections

i. *Equal Protection*

Under the Equal Protection Clauses of the Fourteenth and Fifth Amendments, all classifications in statutes and government policies must at least be rationally related to a legitimate governmental end. Race-based classifications are subject to the highest standard of review under the strict scrutiny test and will only be upheld if they are narrowly tailored to a compelling government interest. Sex-based classifications are subject to intermediate scrutiny and must be

substantially related to an important governmental end. Most other classifications fall under the rational review test.

Although water is one of the most important human needs, the Constitution does not require the government to ensure its availability to all, but simply to avoid actively discriminating in its administration.⁵¹ The Supreme Court has found generally that discriminatory government *action* is needed for a successful equal protection claim.⁵² However, in circumstances such as those that occurred in Flint, Michigan, a case can be made that equal protection also guarantees protection against government *inaction* in the form of discriminatory underenforcement of protective laws.⁵³

ii. Procedural Due Process

Constitutional due process protections do not create a fundamental right to water but may help avoid water shutoffs to allow time to pursue alternative methods of paying bills.⁵⁴

B 42 U.S.C. § 1983

Section 1983 protects individuals from constitutional deprivations made under color of state law. The statute could support a claim challenging discrimination by a municipal water service based on equal protection and due process violations.⁵⁵

C 42 U.S.C. § 1981

Section 1981 prohibits discrimination on the basis of race in the making, performing, modification and termination of contracts. The majority of federal circuits hold that the provision is limited to private contracts, however, the Ninth Circuit holds that it may be applied to public contracts.⁵⁶

D Title VI of the Civil Rights Act of 1964

Title VI bars race discrimination by recipients of federal funds.⁵⁷ The anti-discrimination provisions apply to a fund recipient's entire operation, not solely to the funded program or activity. Thus, water service providers that receive federal funds, even if those funds are used for non-water related activities, may be held accountable for race discrimination under Title VI.

Individuals can bring a private cause of action in federal court for intentional discrimination under Title VI. Title VI regulations go further, barring disparate impacts based on race. However, no private cause of action

exists to enforce those regulations. For a disparate impact claim, only the funding agency or the Department of Justice may challenge a federal fund recipient's actions.⁵⁸

E Fair Housing Act

The Fair Housing Act (FHA) is broader than Title VI as it prohibits a wider range of discrimination than Title VI and is not limited to recipients of federal funding, but applies to both public and private housing.⁵⁹ Section 3604(b) has been interpreted to apply to municipal services such as water provision.⁶⁰ Furthermore, the FHA permits a private cause of action for both intentional discrimination and disparate impact claims.⁶¹ However, the Supreme Court found “that a plaintiff must plead more than a mere ‘statistical disparity’” and developers and government actors must be given an opportunity to show that their policy is necessary to achieve a valid interest.⁶²

In sum, even when intentional discrimination cannot be shown, if particular households are targeted for termination of water services, those who are affected may still bring an FHA claim if they can show a causal relationship between the water provider's termination policies and a disparate racial impact.⁶³

F Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act

Recipients of water services who are disabled are also protected by civil rights laws designed to accommodate individuals with disabilities. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on disability under any program or activity receiving federal financial assistance.⁶⁴ Title II of the Americans with Disabilities Act (ADA) extends those provisions to all activities of state and local governments, regardless of whether they receive federal funding.⁶⁵

Under these acts, plaintiffs must show discriminatory intent, which may be established indirectly by providing evidence that government officials failed to adequately respond to disability discrimination complaints.⁶⁶ Plaintiffs may also bring disparate impact claims under the Rehabilitation Act or the ADA. However, while these acts require that covered entities make reasonable accommodations that enable meaningful access to provided services, the acts do not require those services to be adequate.⁶⁷

3 State Laws

Although no federally recognized right to safe drinking water exists, some states

have recognized this right in their state constitutions and laws. For example, the constitutions of Massachusetts and Pennsylvania recognize the right to water, as does California's recent Human Right to Water Bill.⁶⁸ Although these state laws lack enforcement mechanisms, they influence state agencies and policy makers when revising or establishing policies and regulations that affect the use and delivery of water.

4 Local Laws – Human Rights Cities

Human Rights Cities are emerging around the world as a mechanism to create an infrastructure for realizing and implementing international human rights on the local level. These cities adopt human rights norms as a framework for substantive and procedural aspects of governance and develop new practices aimed at bringing about global urban justice.⁶⁹ Human Rights Cities uphold the principles of democracy, nondiscrimination and participation regardless of race, sex, cultural background or economic status.⁷⁰ Washington, D.C. was the first Human Rights City in the U.S.⁷¹ The movement is growing and includes cities such as Boston, Massachusetts; Pittsburgh, Pennsylvania; Mountain View, California; and Eugene, Oregon.⁷²

III OBSTACLES TO THE REALIZATION OF THE HUMAN RIGHT TO WATER IN THE U.S.

Because of the relatively plentiful water resources that exist in the U.S. and the economic resources available for developing and delivering that water to the population, the U.S. faces fewer challenges to the realization of the human right to water than many countries. Nonetheless, significant obstacles to the realization of this right remain.

Some of these obstacles include:

Geographic Challenges: Fresh water sources are relatively plentiful in the U.S., but these sources are not always located in convenient proximity to the population or industrial and agricultural centers where demand for water is highest. This creates technical challenges related to water delivery and can significantly raise the cost of water, especially in urban areas.

Water-Intensive Production Models: Highly-developed economies, such as that of the U.S., have developed production systems in which agricultural and industrial production use large amounts of fresh water and contaminate much of the water they use. In fact, irrigation for agriculture and the production of electricity are by far the largest uses of water in the U.S.⁷³ Such models of water use limit the amount of water available for domestic use, thereby affecting the realization of the human right to water.

Lack of Government Recognition: The U.S. federal government does not recognize a human right to water in this country. In this context, water “rights” are essentially a special form of property rights, accruing to property holders, municipalities or other entities. An elaborate legal infrastructure for the adjudication of such rights exists, but there is little or no legal basis for claims based on the human right to water. Some states and municipalities have recognized residents’ human right to water (see the California Human Right to Water Bill case summary below), but in the absence of a federal recognition of the right, implementation at the state or municipal level right has been difficult.

Discrimination in Service Delivery: The right to water requires that an adequate supply of clean water be delivered to everyone, free of any form of discrimination. While it is very difficult to prove discrimination in water service delivery in a legal sense, there is strong circumstantial evidence that, in some cases, water authorities deny or limit services to certain social groups on a discriminatory basis.⁷⁴ While water rates vary considerably across the country, evidence suggests that members of racial minority groups pay higher rates than white consumers with similar incomes.⁷⁵

Increasing Cost of Water Services: In the U.S., it is generally accepted that the vast majority of water consumers will pay for water services. Such payments do not, in and of themselves, constitute an automatic challenge to the human right to water. However, when the price of water increases to the point that payment for the service becomes an economic burden to an individual or a family, the human right to water is in question.⁷⁶ Local water authorities generally hold the power to withdraw individuals’ access to water for nonpayment of water bills. In cities such as Detroit and Baltimore, authorities have exercised that power on a grand scale, depriving tens of thousands of families of their right to water, and often affecting other closely connected rights, such as the right to housing.

Some economists and environmentalists note that, given aging water delivery infrastructure and the high cost of delivering water in urban environments, few urban residents are paying the full cost of delivering their water. For such analysts, artificially low water pricing discourages conservation and invites greater supply problems in the long run.⁷⁷ Paradoxically, such concerns are leading to legal cases and policy proposals that end up raising the cost of water to those residents least able to pay the increased rates. Studies have shown that it is possible to construct water pricing mechanisms that both recognize the cost of supplying water and the human right to water of urban residents.⁷⁸

Water Contamination: The highly-publicized case of lead contamination of the public water supply in Flint, Michigan highlighted the problem of water quality in the U.S. Flint is not the only area of the country where this is an issue, and government action, or inaction, is a determining factor in many of these cases.⁷⁹ Under the Trump Administration, the EPA is moving in the direction of weakening existing regulations regarding the allowable amounts of lead and other contaminants in drinking water.

Lack of Access to Water: While access to drinking water in the U.S. is not as severe of a problem as it is in many other countries, significant pockets exist in the U.S. where

residents lack convenient access to reliable piped water.⁸⁰ Recent studies have found that households in U.S. counties with large non-white populations, especially those with higher percentages of American Indian and Alaska Native residents, are significantly more likely to lack access to complete plumbing facilities. Although American Indians and Alaska Natives make up less than 2% of the U.S. population, thirteen of the top twenty counties in the country in terms of population without adequate access to water have a population of more than 50% American Indian and Alaska Native households. In eighteen of those twenty counties, at least 15% of the population is from those groups.⁸¹ Such a lack of access to water in a country with the resources possessed by the U.S. is a human rights violation, regardless of the number of people affected, or the percentage they represent of the total population.

Water Privatization: While public or quasi-public water authorities continue to deliver water services to the majority of U.S. urban locations, private corporations are playing an increasingly important role in the municipal water sector. Although the human right to water does not include a clear preference for one form of delivery of water services over another, the nature of incentives in the system matter.⁸² Evidence shows that the introduction of commercial incentives into water delivery can negatively affect the delivery of the right, and civil society organizations around the world oppose the privatization of water services on a human rights basis.

IV U.S. WATER ADVOCACY: CASE SUMMARIES & LESSONS LEARNED

Studies have found that communities of color suffer disproportionately from water shutoffs, water hazards and unsafe drinking water.⁸³ Unaffordable water and shutoffs may also disproportionately impact populations with special needs such as those who are disabled; women who may have greater water needs due to pregnancy or menstruation; and children.⁸⁴

Civil rights laws are unable to fully respond to the human rights issues raised by the denial of water to low-income individuals. Further, not all terminations of service can be attributed to prohibited discrimination even when human rights and human dignity have been violated.⁸⁵ The following examples illustrate the nature of water disputes in the United States and examine the efficacy of using the human rights framework as part of a strategy to address inequalities in water services in the U.S.

A Discriminatory Water Service Delivery in Zanesville, Ohio

Facts and Outcome:

Along with the Fair Housing Advocates Association and the Ohio Civil Rights

Commission, sixty-eight individual plaintiffs alleged that for over fifty years, the City of Zanesville, the county and the local water authority refused to provide them public water service because they lived in the one predominantly African-American neighborhood in an almost all-white county.⁸⁶ The ground water in their neighborhood was unsafe for residential use after years of contamination from nearby mines.⁸⁷ The plaintiffs lived within one mile of public water lines, yet they were forced to buy bottled water, collect rainwater and store it in cisterns, where it often became unsafe for drinking. White residents living on the same street, however, were provided with water.⁸⁸ Plaintiffs' repeated requests for access to public water service were rejected.

In July 2008, a federal court jury returned verdicts totaling nearly \$11 million against the defendants for illegally denying water service to a predominately African-American community on the basis of race. The jury also awarded \$80,000 to the Fair Housing Advocates Association, which had conducted an investigation and assisted the plaintiffs with their administrative complaints before the Ohio Civil Rights Commission.⁸⁹ The case ultimately settled for \$9.6 million.

Legal Strategy:

Plaintiffs alleged six federal and state civil rights causes of action: (1) Unlawful Discrimination under the Fair Housing Act, 42 U.S.C. § 3601; (2) Unlawful Discrimination Under 42 U.S.C. § 1981; (3) Unlawful Discrimination Under 42 U.S.C. § 1982; (4) Unlawful Discrimination Under 42 U.S.C. § 1983; (5) Unlawful Discrimination Under Title VI of the Civil Rights Act, 42 U.S.C. § 2000d; and (6) Unlawful Discrimination Under Ohio Revised Code § 4112.02(H).⁹⁰

Lessons Learned:

The petitioners chose to use civil rights rather than human rights arguments. While they were successful, the clear-cut data that revealed the geographic racial divide show the high standard necessary to succeed in many civil rights nondiscrimination claims.

B California's Human Right to Water Bill

Facts and Outcome:

As many as 2 million Californians face water-related challenges, with water that is contaminated, unaffordable and inaccessible and water policies that are undemocratic, unsustainable or that violate the cultural heritage of California tribes. Individuals spend as much 15-20% of their income on water.⁹¹

After an aggressive grassroots campaign, California became the first U.S. state to adopt a law explicitly recognizing the human right to water. However, the law does

not create an obligation to provide water and it lacks enforcement and financing provisions.⁹² The law requires state agencies to consider the new state policy that every human being has the right to clean, safe, affordable and accessible water that is adequate for drinking, cooking and sanitary purposes in all policy, programming and budgetary activities affecting those uses of water.⁹³ The law could also influence judicial assessments of statistical evidence in water discrimination cases.⁹⁴

Legal Strategy:

California communities joined in a grassroots campaign to publicize their water struggles and create public water companies to democratize both access to water and the decision-making process around water services. In 2008, a coalition came together with the ambitious goal of passing a state law recognizing the human right to water. Highlighting the impact on low-income, homeless and tribal communities, the coalition emphasized safety, sufficiency, affordability and accessibility as the four components of the human right to water.⁹⁵

In 2009, the legislature approved the first attempt to pass the new bill, but Governor Arnold Schwarzenegger vetoed it. The coalition tried again in 2011, with a new governor and more allies.⁹⁶ Members of the coalition facilitated the 2011 official U.S. country visit of the U.N. Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation. The visit was an important step in passing California's new law.⁹⁷ Facing tremendous opposition from powerful agricultural, business and water associations, the coalition mobilized communities to show legislators the realities of scarce and contaminated water. The coalition refused to give up, protesting on the capital steps and delivering contaminated water from their own taps to legislators' offices saying, "if you don't want to pass the human right to water, then go ahead and drink this water."⁹⁸ With one more vote needed to pass, State Senator Michael Rubio walked out of the room, sparking an immediate flurry of grassroots organizing. His constituents called his office to tell him they were watching. With public pressure, and Senator Rubio's vote, the coalition achieved the 2012 passage of California's Human Right to Water Bill.⁹⁹

Lessons Learned:

While passing California's Human Right to Water Bill was a tremendous step forward, the law does not set a clear framework of standards or timelines to achieve its goals. The current challenge is implementing this groundbreaking legislation. The International Human Rights Law Clinic at the University of California Berkeley School of Law produced an implementation plan as a guide to state agencies and a foundation for the Governor's office to issue a guidance directive to state agencies on how to implement the legislation.¹⁰⁰ The Governor's office has not yet taken such action.

The Environmental Justice Coalition for Water (EJCW) helped draft the state

water board’s 2016 resolution adopting the human right to water as a core value and instructing the Water Board’s staff to follow best practices in all programs and activities—including water rights administration—which were not originally covered in the bill.¹⁰¹ The Office of Environmental Health Hazard Assessment is creating a new Human Right to Water Indicators Project to develop metrics for determining who is affected by right to water violations and how to measure progress in realizing the right. This project will ultimately be a complement to the State Water Board’s Human Right to Water website portal, which currently displays some data and highlights gaps in available information.¹⁰²

Colin Bailey, Executive Director of EJCW, stresses the importance of relationships and cultivating leaders to assume positions of authority, such as seats on local and regional water quality boards. He believes that finding champions in state agencies is critical to supporting the bill’s implementation. His experience of working to pass California’s Human Right to Water Bill affirmed the importance of “being super scrappy, well-connected, not taking no for an answer and having a compelling message... EJCW showed up at every debate and state water board meeting to champion the right to water, taking every chance to speak publicly to define what the human right to water meant and foster a dialogue that is reiterated again and again to cultivate supporters in the legislature and on the water board.”¹⁰³ He recommends building on the power of such relationships and taking advantage of every opportunity to pursue implementation of the human rights framework.¹⁰⁴

C Flint’s Drinking Water

Facts and Outcome:

The economy of Flint, Michigan was closely tied to jobs in the auto industry for most of the 20th century. After the closing of factories and the departure of tens of thousands of manufacturing jobs, Flint became one of the poorest cities in the country with nearly 42% of residents living below the federal poverty line. The population of the city was 57% African-American.¹⁰⁵ Based on state legislation legalizing the imposition of Emergency Managers in Michigan with almost complete control over local decisions, in 2011 Governor Rick Snyder appointed an Emergency Manager to take financial control of Flint. The law granted the Emergency Manager broad powers to rewrite city contracts and liquidate city assets to pay down debts, regardless of public opinion and without local accountability or control.¹⁰⁶ In April 2014, officials turned to the Flint River as a temporary drinking water source in order to cut costs while a new water system was being completed. They took this step despite years of warnings about the dangers of using this water source.¹⁰⁷ Officials chose not to enforce rules designed to keep residents safe from toxic hazards and, to save a small amount of money, avoided corrosion control treatments despite Flint’s aging water infrastructure.¹⁰⁸ Failure to carry out those treatments resulted

in chronic toxic exposure of Flint residents, who unknowingly consumed lead-contaminated water over the next 18 months.¹⁰⁹

The EPA, the Michigan Department of Environmental Quality, the state Department of Health and Human Services, the Governor's office, the county health department and many others failed to uphold their responsibilities to the citizens of Flint. "The clear picture that emerges is one of systemic disregard for the city's residents—again, residents who are disproportionately poor and predominantly African-American."¹¹⁰

Dozens of lawsuits were filed on behalf of Flint residents in both state and federal courts. Class action suits alleged violations of the Federal Torts Claims Act and the Safe Water Drinking Act by the EPA and city and state officials.¹¹¹ A U.S. District judge dismissed roughly 60 cases filed in connection with the Flint water crisis and remanded others to state court.¹¹² Many of the dismissals were based on preemption by the Safe Water Drinking Act and lack of subject matter jurisdiction.¹¹³ Some of these cases are being appealed. In March 2017, a federal judge approved a \$97 million settlement of a class action lawsuit, in which the state of Michigan agreed to replace lead or galvanized steel water lines for at least 18,000 Flint households by 2020.¹¹⁴ In June 2017, five Michigan officials, including the head of the state's health department, were charged with involuntary manslaughter, bringing the number of current and former state and local officials facing criminal charges related to Flint's tainted water supply to fifteen.¹¹⁵

Legal Strategy:

Litigation surrounding the Flint water crisis has not yet employed the human rights framework. However, U.N. experts have called on the federal and state governments to take action to address the serious human rights concerns surrounding Flint's water contamination and the devastating consequences for its residents. Three U.N. Special Rapporteurs urged government officials to use President Obama's May 2016 visit to Flint as an opportunity to map out a human rights-compliant strategy to ensure that similar disasters do not occur in other parts of the country.¹¹⁶

Lessons Learned:

Deborah LaBelle, a member of the Flint Water Class Action Legal Team, notes that the numerous class action cases in Flint are still in the beginning stages, with advocates fighting hard to win procedural and legal issues in several different courts. The team has tried to craft claims that parallel constitutional issues but has not yet raised specific human rights claims in federal cases. Ms. LaBelle believes human rights arguments are important to raise in Flint, but that advocates must first clear the procedural hurdles focused on jurisdiction, venue, standing and preemption before they can be clearly heard on some substantive issues and avoid having their cases dismissed out of hand.¹¹⁷

Ms. LaBelle believes that “the human rights framework is essential for organizing and advocacy and is especially important in areas where people can get lost in the deep weeds of science, engineering and blame.”¹¹⁸ She explains that water as a human right is a mantra used at town meetings with citizens because it resonates with residents across diverse communities. Ms. LaBelle notes the struggle to address the race and class issues that are inherent in what happened in Flint and are endemic to water and human rights issues. She believes the human rights framework is particularly important in Michigan where there is a lack of remedies available for Flint residents due to strong government immunity laws and the degradation of environmental protection laws. The legal team is “battling for the soul of the issue,” focusing on widespread community trauma and fighting to push constitutional claims through the beginning legal stages.¹¹⁹ Ms. LaBelle hopes that once the cases get through the procedural issues, the legal team will gain stable ground to be able to incorporate the human rights framework in its claims.

D Detroit’s Water Shutoffs

Facts and Outcome:

Like Flint, Detroit’s economy was closely tied to the auto industry in Michigan. The decline of that industry initiated a decades-long process of economic decline from which the city still struggles to recover. As happened in Flint, citing Detroit’s dramatic financial plight, Governor Snyder appointed an Emergency Manager to take control of the city in 2013. A few months later, Detroit filed for bankruptcy in the face of \$18 billion of debt.¹²⁰ Much wealth and many businesses had long since fled the city, draining its tax base and eliminating much of the revenue base of public utilities. These changes left the burden of paying for the rising costs of city services on the shoulders of the mostly African-American residents who stayed in Detroit. Water advocates assert that these residents have seen water rates increase by 119% over the last decade and insist that much of the population cannot afford to pay their water bills.¹²¹ Detroit’s poverty rate is over 40% and unemployment rates remain high.¹²²

The press reported that, in the face of intense pressure to increase revenue, the water and sewer department began mass water shutoffs in mid-2014, cutting off water service for up to 3,000 customers per week.¹²³ Two-thirds of the water shutoffs occurred in homes with children, leading parents to fear that child-protective services would intervene, as a lack of running water is grounds for child welfare authorities to immediately remove children from their parents’ care.¹²⁴ Even when residents made efforts to pay a portion of their water bill, they faced unnecessary administrative barriers and financial obstacles to the restoration of water service. The City government placed liens on properties with overdue water bills, resulting in large numbers of homeowners losing their homes.¹²⁵ While the Detroit water

department readily cut off residents' water service, large-scale water consumers who owed millions of dollars in arrears did not suffer the same fate.¹²⁶

In November 2016, the U.S. Court of Appeals for the Sixth Circuit upheld the dismissal of a class-action lawsuit filed by a group of Detroit citizens seeking to stop the water shutoffs.¹²⁷

Legal Strategy:

Facing a social crisis rooted in the withdrawal of water services, Detroiters responded with a variety of strategies, from community organizing to unauthorized reconnection, to litigation. Advocates established an impressive network of mutual support in Detroit communities, dozens of public protest actions and intense lobbying of legislators around proposals to oblige municipalities to prioritize water affordability for their customers. In October 2014, the U.N. Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation and the U.N. Special Rapporteur on Adequate Housing visited Detroit in response to civil society requests. Criticizing the shutoffs, they stated that “[i]t is contrary to human rights to disconnect water from people who simply do not have the means to pay their bills.”¹²⁸

In August of that year, a group of Detroit citizens filed *Lyda vs. City of Detroit*, a due-process class-action lawsuit seeking injunctive relief to stop the water shutoffs and restore services to customers who fell behind on their bills.¹²⁹ The plaintiffs also pursued City acceptance of an income-based water payment plan that would provide adequate revenue for the water department while ensuring that “all Detroit residents are guaranteed their fundamental human right to water.”¹³⁰ At the invitation of the plaintiffs' counsel, the International Network for Economic, Social and Cultural Rights submitted an amicus brief, urging the Court to consider relevant international human rights law in its application of domestic law and to ensure that the human rights obligations of the U.S., which extend to Detroit, were not outweighed by financial concerns.¹³¹ The judge dismissed the *Lyda* claim, making no reference to the human rights argument.

In response to public outcry and the lawsuit, Detroit implemented a temporary moratorium on water shutoffs, an assistance program for the lowest-income households and considered an affordability plan for the city.¹³² Still, according to advocates, over 56,000 accounts were shut off in 2014 and 2015.¹³³ Lawyers for the *Lyda* plaintiffs appealed the dismissal of the case and, in November 2016, the U.S. Court of Appeals for the Sixth Circuit upheld the lower Court's decision to dismiss, ruling that because Detroit had filed for bankruptcy, the Bankruptcy Code protected it from an injunction. The Court stated that granting the relief requested would interfere with the city's political and governmental power, its property and revenues and its right to use its income-producing property.¹³⁴ In April 2017, the Detroit water department threatened to shut off water for another 18,000 residential customers who remained in arrears on their payments.¹³⁵

Lessons Learned:

When water shutoffs began in Detroit, Maureen Taylor, State Chair of the Michigan Welfare Rights Organization (MWRO), viewed them as a temporary problem. In the past, advocates had always succeeded in pushing back against the water department to stop mass shutoffs and she assumed they would be able to do so in this instance, as well.¹³⁶ However, when MWRO started to learn about families who had been living without water for a long time, advocates went door to door to try to understand the depth of poverty that resulted in people living without this basic necessity of life.¹³⁷ When Ms. Taylor and her MWRO colleague, Sylvia Orduño, began to see the escalating water shutoffs against the backdrop of rising unemployment and declining incomes in their city, they began to view the actions of the Detroit Water and Sewerage department as full-blown human rights violations. That realization led them to engage with other water rights groups around the country who were using the human rights framework.¹³⁸

In Ms. Taylor's opinion, the U.N. Special Rapporteurs highlighted Detroit's tragedy around the world in a way that MWRO could not do, igniting intense domestic and international attention.¹³⁹ Ms. Orduño agrees that the Special Rapporteurs' visit to Detroit put the serious poverty issues in the U.S. on center stage and helped advocates raise awareness beyond a local audience.¹⁴⁰ The visit also put pressure on local officials who, until that time, insisted that the problem was that Detroiters simply did not want to pay their water bills. Detroit citizens' fight for their right to water has become "a rallying point around the world. That kind of recognition could not have come without the U.N., the *Lyda* case, the Special Rapporteurs, social media and news coverage. Each is a blow to help make this practice go away. Everyone knows now that it is a human rights issue that we must win," says Ms. Taylor.¹⁴¹

Ms. Taylor is not dismayed by court rulings. MWRO employs a three-pronged approach: advocating in the courts, the legislature and, their biggest weapon, organizing in the streets to increase pressure and return to the courts and legislature again and again. She is convinced that framing the issue within the human rights framework is the best tool to take this fight to the next level to improve water access for all.¹⁴² Ms. Orduño notes that raising human rights arguments in litigation is an uphill battle, but believes it is important to try to get visibility by bringing these arguments into the courts and documenting human rights violations. While she knew that politics in Detroit would make it very difficult to get traction on addressing the human right to water at the local level, she believes it is important to continue talking about it and highlighting that water struggles are not just about poor people but about a basic human right that everyone has, regardless of ability to pay.¹⁴³

E Philadelphia’s Water Affordability Ordinance

Facts and Outcome:

Low-income Philadelphians face growing water debts tied to their homes that date back over years or even decades and can amount to thousands of dollars that they are unable to repay.¹⁴⁴ The city of Philadelphia, like many local governments, files tax liens for overdue utility bills and sells off unredeemed liens, leading to an increase in tax lien foreclosures. The National Consumer Law Center reported that these foreclosures are highly concentrated in African-American and Latino communities and pose greater risks to elderly and disabled residents.¹⁴⁵ According to press reports, liens for water, sewer and stormwater bills in Philadelphia totaled \$255 million by the end of the 2014 fiscal year, which was nearly \$40 million more than the previous year.¹⁴⁶ The Philadelphia Water Department offered some discounts and payment plans, but expert consultant, Roger Colton, found the assistance program to be “fundamentally broken” with administrative barriers that unreasonably restricted access to the assistance program, resulting in a denial rate of over 40%.¹⁴⁷

In an effort to increase bill collections and prevent low-income residents from losing their homes to foreclosures because of unpaid water bills, the Philadelphia City Council passed legislation in November 2015, which went into effect in July 2017.¹⁴⁸ The ordinance increases protections for low-income residents by creating affordable income-based payment plans and providing referrals to connect homeowners to housing counselors.¹⁴⁹

Legal Strategy:

The Community Legal Services (CLS) of Philadelphia Energy Unit serves as the city’s Public Advocate in water-rate cases, representing the interests of residential customers. With expert consultant Roger Colton, CLS reviewed the city’s proposed 2013 water rate increase and entered into a two-year mediation to make substantial improvements to the water department’s failing assistance program. During that time, City Council member Maria Quinones-Sánchez, whose district included a disproportionate 20% of Philadelphia’s properties with outstanding water liens, introduced legislation with three co-sponsors that would relieve much of the unpaid water-bill debt and assist low-income families. CLS continued mediation with the city and worked with Councilwoman Sánchez’s staff to amend the bill to create an income-based water rate affordability program that would increase timely payments from low-income customers and reduce collection costs and shutoffs.¹⁵⁰ Although the final ordinance does not set specific percentage-of-income rates, it requires that monthly bills under the program “shall be affordable for low-income households, based on a percentage of the household’s income” and establishes three low-income tiers to receive reduced bills.¹⁵¹

Neither CLS nor city policymakers explicitly used the human rights framework in

the process of creating Philadelphia’s new water affordability law, but they did consult international standards in determining an appropriate percent-of-income range for the program.¹⁵² Howard Neukrug, the water commissioner, was not convinced that the new program would succeed, but he supported the change and acknowledged that water is “a basic human right.”¹⁵³ Councilwoman Sánchez also recognized the human right to water when she announced the City Council’s approval of the ordinance. She quoted the U.N. Special Rapporteur who investigated the mass water shutoffs in Detroit in 2014, stating that “[i]t is contrary to human rights to disconnect water from people who simply do not have the means to pay their bills.”¹⁵⁴ The Councilwoman noted that Philadelphia’s new legislation would put the city at the forefront of best practices related to water access.

Lessons Learned:

CLS Senior Attorney, Robert Ballenger, explains that his team did not use the human rights framework because Philadelphia has a strong body of law available to represent water customers for rate increase proceedings. However, CLS tries to be consistent with human rights principles by mobilizing customers to participate in public hearings on water rates and give testimony to create a record from which recommendations can later be made.¹⁵⁵ CLS pursued arguments under the common law duty to serve, which requires public utilities to serve on reasonable terms all those who desire its services.¹⁵⁶ The duty to serve requires the utility to adjust rates so that low-income consumers can afford to pay. Mr. Ballenger notes that “by creating a new program with a new benefit, you arguably create a new entitlement. Advocates can argue the city is violating due process in accessing that entitlement if it does not give consumers a hearing and ability to be heard.”¹⁵⁷ Thus, he asserts, “Philadelphia is creating a right to water that fits into a constitutional framework.”¹⁵⁸

Mr. Ballenger does not think that human rights arguments are the most convincing for his audience of policymakers and utility officials. Instead, he focuses on economic arguments within the legal framework of the utility industry. However, he believes that human rights arguments can fit into that framework, thus creating compelling arguments that utilities cannot deny.¹⁵⁹

F Discrimination in Boston’s Water?

Facts and Outcome:

The Color of Water is a grassroots group in Boston that has engaged the Boston Water and Sewer Commission (BWSC) for several years in an effort to gain access to the data necessary to determine whether or not there is discrimination in the delivery of the City’s water services. The group’s 2014 study of threatened residential water shutoffs in Boston revealed a strikingly persistent relationship between water

shutoffs and race. The study found that wards with higher populations of people of color received significantly more water shutoff notifications than wards with predominantly white populations.¹⁶⁰

Soon after the release of the report, in January 2015, Boston's mayor announced that the BWSC would increase water service discounts for all senior and disabled homeowners to 30 percent. The city's decision followed the Commission's declaration of a moratorium on winter water shutoffs. While these are positive trends, the discriminatory impact of shutoffs and water affordability in the face of rising water rates remain serious concerns.¹⁶¹

Legal Strategy:

The Color of Water and their allies have been advocating with Mayor Marty Walsh and the BWSC since 2006 to improve protections for low-income rate-payers and people of color. In 2011, the U.N. Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation included Boston in her official U.S. visit, drawing international attention to the city's water issues. The Color of Water Project produced their report as part of a campaign to raise awareness, provide reliable data to decision-makers and advocate for protections to ensure that vulnerable populations have access to basic municipal services.¹⁶² The report used human rights standards to highlight issues of affordability, access and racial discrimination in analyzing Boston's water shutoffs.

Lessons Learned:

Although the Color of Water Project found a close correspondence between water shutoff notices and race and income, it is difficult to establish actual causality. Thus, Suren Moodliar, a member of the Color of Water Project research team, finds the human rights framework to be more useful than traditional civil rights. "Human rights standards mean that, regardless of income or race, all should have access to water. ICERD does not require proof of deliberate discrimination on the basis of race; showing of unequal results that correspond to race is sufficient."¹⁶³ He notes the advantages of engaging in local dialogue while also drawing attention to the issue in human rights bodies, which may call on the U.S. to respond. Mr. Moodliar believes the human rights framework is among a number of useful frameworks, including racial justice and civil rights, depending on the political mood.¹⁶⁴

G Pipeline Battle at Standing Rock

Facts and Outcome:

The Dakota Access Pipeline is a \$3.7 billion oil pipeline project designed to transport over 570,000 barrels of fracked oil every day, traveling 1,170 miles through North Dakota, South Dakota, Illinois and Iowa. It now passes under the Missouri

River at Lake Oahe, just a half-mile upstream from the Standing Rock Sioux Tribe's drinking water source. Because of this proximity to a key water source and sacred tribal lands, the pipeline could impact millions of people. An oil spill would be culturally and economically catastrophic, polluting the Tribe's source of water and farmlands and destroying important cultural sites.¹⁶⁵ Energy Transfer Partners, the company building the pipeline, needed a final government permit to construct the section passing under the river, near the reservation. Members of the Standing Rock Sioux Tribe and allies from across the U.S. and around the world participated in mass protests at the construction site for several months and demanded that large institutional investors in the project divest their support. They cited the need to protect sacred waters against the pipeline threat. Mass protests took place at the construction site for a period of months, and protesters demanded that large institutional investors in the project divest their support. The National Guard joined police in a highly militarized law enforcement response to demonstrators, resulting in mass arrests and violence against Water Protectors.¹⁶⁶

In November 2016, the Obama administration halted construction to allow for tribal participation and consultation on an Environmental Impact Statement (EIS) that would consider alternative routes.¹⁶⁷ However, the Trump administration quickly reversed that decision, allowing the U.S. Army Corp of Engineers to cancel the EIS and fast track the final phase of construction to drill under Lake Oahe.¹⁶⁸ The final section of the pipeline was completed and the oil began flowing in June 2017, overruling the claims of the Standing Rock Sioux Tribe and their allies.

Legal Strategy:

The Standing Rock Sioux Tribe used both domestic and international legal systems to defend their right to water, citing violations of federal statutes, international treaties, human rights and the Rights of Indigenous Peoples.

Employing federal statutory law, the Standing Rock Sioux Tribe sued the U.S. Army Corp of Engineers in federal court in July 2016, alleging the Corps violated the National Historic Preservation Act, the Clean Water Act and the National Environmental Policy Act (NEPA) by failing to conduct a full EIS and adequately consult tribal members before approving the pipeline.¹⁶⁹ The Court denied the Tribe's request.¹⁷⁰ Due to public pressure, the Army Corps halted construction in December 2016 in order to conduct an EIS with full public input, but reversed that decision upon President Trump's executive memorandum calling on the Army Corps to expedite the approval process.¹⁷¹ In June 2017, the Court found that the Army Corps violated key aspects of NEPA and ordered a reconsideration of its environmental analysis. The Court did not determine whether pipeline operations should be shut down in the interim, but requested additional briefing on the subject.¹⁷²

Citing U.S. constitutional civil rights of free speech and free exercise of religion, Standing Rock Sioux Tribal Chairman David Archambault II requested in October

2016 that the U.S. Attorney General investigate civil rights violations by state and local law enforcement against peaceful demonstrators.¹⁷³ Violence escalated a few weeks later when law enforcement used tear gas and a high-pressure water canon against demonstrators in below freezing temperatures.¹⁷⁴

Engaging with U.N. mechanisms, the Standing Rock Sioux Tribe and the International Indian Treaty Council (IITC) asked four U.N. Special Rapporteurs to urge the U.S. to cease its treaty and human rights violations against the Standing Rock Sioux Tribe in August 2016. They alleged environmental racism in violation of ICERD, to which the U.S. is a party, pointing to the U.S. decision to permit the construction company to divert the pipeline's route from passing through the cities of Bismarck and Mandan, which are nearly 90% white, to disproportionately impact the Standing Rock Sioux Tribe. The Tribe and the IITC alleged these actions violate the nondiscrimination principle enshrined in human rights treaties, including the ICCPR and ICERD.¹⁷⁵ The following month, Chairman Archambault testified before the U.N. Human Rights Council in Geneva, Switzerland to encourage international opposition to the pipeline construction near the reservation and formally invite the U.N. Special Rapporteur on the Rights of Indigenous Peoples to visit the site.¹⁷⁶ Special Rapporteur Victoria Tauli-Corpuz visited Standing Rock in September and subsequently called on the U.S. government to halt construction of the pipeline due to the significant risk it posed to the Standing Rock Sioux Tribe's drinking water, sacred sites and burial grounds.¹⁷⁷ Two other U.N. experts also visited Standing Rock in January 2017 to conduct a hearing with representatives of the IITC and the ACLU Human Rights Program, taking testimonies on human rights violations resulting from the pipeline construction.¹⁷⁸

The Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe and the Yankton Sioux Tribe also filed a petition with the Inter-American Commission on Human Rights (IACHR) in December 2016. The Tribes requested that the Commission call on the U.S. government to deny the easement for construction, formally consult with the Tribes to complete a full EIS and immediately take actions to address grave human rights concerns by guaranteeing the safety of those engaged in peaceful prayer and protests.¹⁷⁹ At the hearing, U.S. representatives denied the Commission's power to enforce the U.N. Declaration on the Rights of Indigenous Peoples and other non-binding Declarations under the Commission's mandate.¹⁸⁰

Lessons Learned:

Although legal battles have yet to stop the Dakota Access Pipeline from moving vast quantities of oil near tribal lands, advocates' multi-level tactics have achieved important successes. Brandy Toelue, former President and volunteer attorney of the Water Protector Legal Collective (WPLC), the on-the-ground legal team at Standing Rock, believes it was important to get witnesses to observe the interaction between Water Protectors and law enforcement and to put international human rights arguments on the record. She notes that "indigenous rights in international

treaties are much higher than what is recognized in U.S. laws... WPLC looked to international bodies to expose how Indigenous Peoples are treated and the issues they face in the U.S.”¹⁸¹ Michelle Cook, a human rights lawyer and a founding member of the WPLC, believes “international law is incredibly important for advocacy for indigenous rights. It recognizes a more just set of rights and jurisprudence that reflects more precisely what is needed for the enjoyment of human rights by Indigenous Peoples such as the Right to Free, Prior and Informed Consent. Under current domestic law, federal Indian law does not require Indigenous Peoples’ free, prior and informed consent over the lands they traditionally have used and occupied. Because these rights are not guaranteed and because we often cannot get justice in our own territory, we must, in addition to domestic advocacy, appeal to the international community, international law and its mechanisms.”¹⁸²

Ms. Toelupe believes that what happened at Standing Rock was “so important for movements going forward because it brought so many Indigenous Peoples from around the world to come together and share what is happening to all of us.”¹⁸³ Ms. Cook agrees, stating, “while there were massive human rights violations, the other side of that story is the fearless love we have for our people, to protect and defend the lands, rights and lives of our relatives, to resist those harms, and continuing to be human in spite of all that excessive police violence, the mass arrests, harsh conditions and militarized violence. The people lived through that for each other and the sacredness of water.”¹⁸⁴

Ms. Cook emphasizes the importance of having a wide diversity of tactics, including thinking of ways to mobilize people around the world to contribute to the movement. She and other Indigenous Peoples and organizations are now focusing on divestment advocacy. Ms. Cook is a member of a delegation of Indigenous women from Standing Rock and their allies who are writing letters and meeting with European financial institutions to share their experiences of the human rights and indigenous rights violations they witnessed at Standing Rock.¹⁸⁵ She emphasizes the importance of understanding aboriginal title and how “Indigenous Peoples’ property rights are entangled with spiritual beliefs, cultural practices and subsistence. Banks don’t understand that U.S. laws are often in practice subpar in relation to international standards set forth in international law and human rights. Big companies that are funded by big banks often assume that the local laws relating to Indigenous Peoples living in developed nations are adequate. Therefore, their due diligence in nations like the United States, for example, can be less diligent for companies like Energy Transfer Partners. However, if those local laws are discriminatory and based on colonialist principles of land and resource dispossession, injustice continues.”¹⁸⁶ She notes that when the delegation appealed to banks with information about international law, “it pushed them to understand that they must divest because of human rights violations, including the lack of free and prior consent and consultation with the Tribe. This language of human rights and divestment is a powerful tool for grassroots advocacy and for Indigenous Peoples to push decision-makers.”¹⁸⁷

Reflecting on the work of the delegation, Ms. Toelupe says “banks are looking more closely at their investment policies now and [the delegation] is pushing for banks to consult with Indigenous Peoples before agreeing to invest... This all leads to more pressure to push decision-makers to create policies to prevent this from happening in the future and educate the public not to put their money where it harms people’s rights.”¹⁸⁸ According to defundDAPL.org, the divestment movement has led banks, cities and individuals to pull over \$4 billion in investments from the financial institutions connected to the Dakota Access Pipeline.¹⁸⁹

H Inter-American Commission of Human Rights (IACHR) Hearings on U.S. Government Obligations

Facts and Outcome:

As demonstrated by the case studies above, the lack of access to safe and affordable water disparately impacts low-income minority and tribal communities across the U.S., particularly effecting the elderly, the disabled, pregnant women, children and other vulnerable groups.¹⁹⁰

In October 2015, the newly-formed National Coalition on the Human Rights to Water and Sanitation, supported by the US Human Rights Network, successfully requested a hearing at the IACHR on alleged violations of the right to water in the U.S. During this regional hearing, which also included Latin American water activists, grassroots organizations from across the country testified about the direct effects of water violations on their communities.¹⁹¹ The Commission was sufficiently convinced by the testimony that they granted a second hearing in April 2016, which was focused exclusively on the situation in the U.S. At this hearing, U.S. government representatives were present to respond to the petitioner’s complaints.¹⁹²

Legal Strategy:

The April 2016 hearing was the first time the U.S. appeared before the IACHR on the issue of access to water. Government representatives highlighted the country’s role as one of the world’s largest donors to international water-related causes, yet insisted that because the U.S. is not a party to the ICESCR, it is not obliged to enforce rights under that treaty. The head of the Commission rebuked the government representatives, stating, “if you’re doing that outside of your borders, can’t you do it here?... I literally cannot understand the most powerful country in the world having these kind of stories about the lack of clean potable water and sanitation. It really blows my mind, quite frankly... If you ignore your most vulnerable... you are not a civilized society.”¹⁹³

Although the U.S. asserts that Commission decisions are non-binding and no mechanism for enforcing those decisions exists, because the U.S. is a member of

the Organization of American States, the Commission can continue to monitor U.S. government actions on this issue. However, given that the U.S. government failed to appear at multiple hearings addressing human rights concerns in the U.S. during the first months of the Trump administration, the possibility of using the Inter-American system to work toward solutions is uncertain.

Lessons Learned:

US Human Rights Network’s Rebecca Landy, who coordinates the National Coalition on the Human Rights to Water and Sanitation and helped organize the IACHR hearings, believes that wins for human rights movement issues require long-term solutions. She notes that, although the IACHR hearings have not yet led to notable changes, they brought advocates from across the country together in a powerful moment of solidarity to speak on water issues that span diverse communities. She points out that activists who “felt their voices were not heard in their local communities had a way to name and shame the government for human rights violations taking place.”¹⁹⁴

The government’s unwillingness to engage by focusing on global accomplishments instead of responding to petitioners’ complaints and denying enforceability of human rights obligations demonstrated to the Commissioners the gravity of what was happening in the U.S., even before the change in Administration. Advocates used the Commissioners’ strong critiques of U.S. government inaction to build traction around the issue and to open the door to continued conversations. Ms. Landy notes that having government officials in the room and participating in side meetings helped build relationships between officials and communities working on water issues across the country. Due to the lack of U.S. engagement under the Trump administration, she states that advocates are “now in a holding period” regarding continued engagement with the Commission on the human right to water.¹⁹⁵

V FUTURE DIRECTIONS FOR WORK ON THE HUMAN RIGHT TO WATER

The realization of the human right to water in the U.S. will require a variety of advocacy approaches targeting governmental, quasi-governmental (water authorities) and non-state actors (corporations, private associations, nonprofits, etc.) at local, state, national and international levels. In this complicated field of action, thoughtful selection of strategies and points of intervention will be critical, as will be the ability of advocates working at different levels and in different geographies to successfully coordinate activities. Strategies will vary over time as advocates adapt to changing conditions, but can be expected to include many of the strategies that have already been tested, such as:

- Coalition / Network-building among allies;
- Community capacity-building;
- Legislative advocacy at all levels;
- Strategic litigation; and
- Social Communications

1 Coalition / Network-Building

Aware of the complexity of their task and need for support from outside of their immediate communities, individuals and local groups working on water issues from a human rights perspective have, over the last few years, put additional energy into networking with each other with at least three objectives in mind:

- To learn from each other's experiences;
- To provide moral, logistical and political support for each other's efforts; and
- To begin to discuss the possibilities of coordinated advocacy agendas for implementing the human right to water, particularly at the national level.

With such objectives in mind, Colin Bailey of the Environmental Justice Coalition for Water, emphasizes the need for “a multi-scalar, multi-pronged strategy.” He believes that advocates must work collaboratively at the “international, national, multi-state, regional and local levels on litigation strategies, strengthening enforcement... and building the capacity of disadvantaged communities.” He notes that building relationships and coalitions is key to strengthening advocates' ability to create systemic change.¹⁹⁶

A number of national gatherings helped support this effort and, in February 2015, a group of key organizations and individuals formed the National Coalition on the Human Rights to Water and Sanitation. The Coalition is hosted at the US Human Rights Network and is made up of over 130 groups and individuals working on water and sanitation issues across the country, including the majority of case studies discussed above. They continue to come together to share knowledge and facilitate joint organizing and advocacy to create systemic change.¹⁹⁷

Sylvia Orduño of the Michigan Welfare Rights Organization (MWRO), believes “momentum is gained at the grassroots level by building a larger network of people engaged in this work and connecting those who are struggling with water in different areas of the U.S.”¹⁹⁸ In that vein, MWRO and their allies hosted the 2nd International Gathering of Social Movements on Water in Detroit in June 2017, bringing together people directly impacted by water struggles, social movement water groups, water rights policy makers and attorneys, scholars, researchers, social workers, youth and elders from across the U.S., First Nations and other countries.¹⁹⁹

Water rights advocates will continue to build formal and informal coalitions and networks as long as resources are available to make this work possible. Given the interdependence of human rights, water rights advocates work to escape the “silo” effect of working on a single issue. As they build stronger ties, these advocates also explore the connections between the right to water and other human rights, and seek to realize the strength that comes from coordinating with other human rights networks. The US Human Rights Network is an excellent platform for such coordination.

2 Community Capacity Building

Inherent in a people-centered conception of human rights is the principle that concerted actions by communities most affected by the denial of the right to water are indispensable to the realization of that right. To be effective in taking such actions, affected communities must develop a set of skills and capacities, beginning with a complete knowledge of their rights. Other essential skills include power analysis, action research, community organizing and a whole range of communications capacities. The communities themselves, must take the lead in identifying and developing these collective and individual skills and in deciding how to apply them. Donors, NGO partners and civil society networks, such as the National Coalition, will need to prioritize support for such work.

3 Legislative / Policy Advocacy

Government actions at all levels will be required to realize the human right to water in the U.S., and effective advocacy by civil society organizations, coalitions and networks will play an important role in motivating those actions. As suggested above, the leadership of affected communities will be critical to the success of such efforts. Such advocacy work can be challenging in a context where the federal government does not recognize a human right to water, or human rights in general, but some of the case summaries above provide important examples from which advocates have much to learn.

Like all human rights advocacy, activities designed to realize the human right to water uses a wide variety of tactics. These include lobbying, community organizing, public education, media work and the organization of public hearings and meetings with lawmakers and other key decision-makers. All effective advocacy rests on the foundation of strong action research on the issues and rigorous analysis of power relations among the various actors and decision-makers.

As we write, one year after the change in U.S. presidential leadership, U.S. advocates are still in the process of reviewing their advocacy strategies. While changes in federal legislation and policy remain critical to realizing the right to water, the dismissive attitude of the Trump Administration toward the entire human rights

framework, and its reticence to engage with appropriate international mechanisms is leading advocates to place more emphasis on work at the state and local levels. While advocates will continue to point out the deficiencies in the federal approach to human rights and advocate for national legislation and changes in national policy, real opportunities for change may present themselves more often outside of Washington, D.C.²⁰⁰

Local Human Rights Implementation:

The policies of local governments and local water authorities have a tremendous impact on access to clean, affordable water, especially in urban areas. The work to achieve a water affordability ordinance in Philadelphia provides a particularly powerful example of how to achieve important policy change in a difficult local environment. The Color of Water in Boston has yet to achieve all of its advocacy goals. Nonetheless, the group's persistent demands for access to data on shutoff notices and then careful analysis of that data provides a great example of how local groups, in collaboration with experts with specific technical skills, can use action research methods to uncover the human rights impact of government water policies and practices.

As water rights advocates have begun to build broader coalitions, a similar process has been underway among local advocates involved in Human Rights Cities projects. These projects, in cities such as Washington, D.C.; Jackson, Mississippi; Pittsburgh, Pennsylvania; Boston, Massachusetts; and Eugene, Oregon, have built local coalitions to work with local government officials to pursue implementation of the human rights framework at the city level. These advocates have constructed the National Human Rights Cities Alliance, also under the auspices of the US Human Rights Network.²⁰¹ To date, few of these local human rights projects have integrated concerns around the human right to water into their work, and few of the local organizations working on water issues have explored the use of the Human Rights Cities model to build alliances and strengthen their work. The Color of Water Project is an exception, having assumed an important leadership role in the Boston Human Rights City project. Rebecca Landy of the US Human Rights Network, emphasizes the importance of advocating at the local level “because water service is often a very local issue. Incorporating the human right to water into the Human Rights Cities model may be valuable, particularly considering the interdependence of rights.”²⁰²

Changing State Law and Policy:

While many state governments are no more open to engaging with the human rights framework than the Trump Administration, advocates still see advocacy at the state level as a potentially productive arena for the next few years. The achievement of the California Human Right to Water Bill is clear example in this area. Although California has faced challenges in implementing the new law, its passage has undeniably changed the conversation about water in that state.

Other states have taken important steps as well. In Michigan, home to both the Flint and Detroit water crises, a number of water affordability and water quality bills are before the legislature. In December 2015, Michigan lawmakers proposed a bill to enshrine access to clean, safe water in state law as a basic human right.²⁰³ While none of these bills has yet become law, the various initiatives have gained significant support and generated necessary debate, statewide. Given the impact of state policy on local communities, state-level advocacy will continue to be an important focus for right-to-water activists.

National Advocacy:

While it is unlikely that the human right to water will be recognized at the federal level under the Trump administration, advocates have worked to introduce legislation in Congress and are continuing to garner co-sponsors and support for its future passage. Water rights advocates at Food & Water Watch worked with former Congressman John Conyers, Jr. for over a year to draft and introduce the Water Affordability, Transparency, Equity and Reliability Act — the WATER Act — which would provide a dedicated source of funding for water infrastructure and clean drinking water by closing corporate tax loopholes.²⁰⁴ The Act calls for a study on affordability, discrimination and civil rights violations, looking at communities that are disproportionately impacted by water inequality issues.²⁰⁵ The Act would also provide program funds for nonprofits to provide technical assistance and training to rural and small municipalities and tribal governments to improve their water systems.²⁰⁶

Lynna Kaucke, the National Water Infrastructure Campaign Manager at Food & Water Watch, states that “human rights are the basis of everything we do. Affordable water service is a human right. It is the driving force behind many fights we take on... Using that framework changes the whole conversation about how you provide water service to people... If it is a human right, you can take steps to make sure that right is met.”²⁰⁷ In addition to continuing to promote the WATER Act and other positive legislative proposals, Food & Water Watch also fights damaging legislation and educates communities about the dangers of privatizing resources.²⁰⁸

Using International Human Rights Mechanisms:

One purpose of the system of international human rights mechanisms and Special Procedures is to allow, under certain conditions, non-state actors to gain direct access to the human rights system. The mechanisms provide the basis for international action on behalf of the human rights of such non-state actors. Right-to-water advocates have begun to access such mechanisms, and are likely to continue to do so, given the lack of responsiveness at the U.S. federal level.

Accessing such mechanisms can be particularly important for communities in which it is difficult to gain local traction on the human right to water. In both Sacramento,

California and Detroit, Michigan, the intervention of U.N. Special Rapporteurs brought national and international attention to local situations and helped create space for local human rights advocacy. The attention of these international experts also emboldened local advocates and demonstrated the potential value of the human rights framework to their work. The thematic hearings on the human right to water in the U.S. at the Inter-American Commission on Human Rights (IACHR) had a similar impact by bringing together water rights activists from around the country to learn from each other's experience and by focusing the Commissioners' attention on a problem, the scope of which they had not previously been aware.

Detroit activist Sylvia Orduño stresses the need to connect local level issues with the U.N. and the importance of trying to expand this work to other governing bodies, such as the Organization of American States (OAS) and the IACHR. For Orduño, "linking the right to water to the rights of women, communities of color, Indigenous groups, housing and education is necessary to promote a common language across issues." She believes such a common language can help create political unity on a basic human right to water that could then be tied to a legislative and legal policy framework.²⁰⁹

4 Strategic Litigation

Choosing and focusing energy on legal cases of strategic importance can help create a domestic legal framework for the human right to water. While there is a tremendous amount of litigation over property-related water rights in the U.S., the use of the human rights framework in litigation remains a rare phenomenon. Advocates must carefully consider how premature use of human rights arguments in water cases could lead to the establishment of negative case law that would be difficult to overcome in subsequent disputes.

None of the cases summarized above clearly establish the utility of human rights arguments in water-related disputes. By failing to address the human rights arguments in the Detroit *Lyda* case, the bankruptcy court implicitly found that they were insufficient to support the plaintiffs' claims. The Court went further to find that there is no fundamental right to water under the U.S. Constitution.²¹⁰ In the Flint case, both the lawyers and plaintiffs felt that they had more promising claims than the human rights arguments, and those claims have so far yielded mixed results. The Zanesville case summarized above demonstrates that civil rights law can be used to address discrimination in the delivery of water services, but only under special circumstances. Martha Davis, Professor of Law at Northeastern University School of Law, confirms this judgment in her analysis of the legal potential of water discrimination claims under civil rights law in Washington, D.C.²¹¹

Water advocates will continue to use the courts to press their claims, and human rights lawyers will continue to seek the right opportunities to insert human rights claims into such litigation.

5 Social Communications

Whether they are referred to as frames, narratives, stories or simply falsehoods, oft-repeated messages stand in the way of the realization of the human right to water. In Detroit, powerful narratives influenced the course of the public debate on mass water shutoffs and even impacted peoples' own perceptions of their situation. The notion that "those people" had the money but just did not want to assume responsibility for their water bills made it difficult to build public support for families denied water. This narrative also affected some media treatments of the crisis.

Activists such as Maureen Taylor of the Michigan Welfare Rights Organization (MWRO) recognized the power of these narratives and confronted them, head on. MWRO and other organizations in Detroit devoted time and resources to developing strategies to counteract the pernicious effects of such media framing. They also developed capacity in social media and other communications tools to make sure their side of the story was told and heard around the world.

By the time that the U.N. Special Rapporteurs on the Human Rights to Water and Housing visited Detroit to investigate reports of mass water shutoffs, people affected by the shutoffs were able to share a compelling alternative story of what was happening in the Motor City. Publicity around these visits reached a global audience and brought negative attention to Detroit and its Emergency Manager form of local government. The publicity did not resolve the situation, but it put officials on the defensive and animated opposition to the policy of mass denial of water services.

Detroit is only one example of the sophisticated use of communications strategies to support human rights advocacy around water. An equally compelling story could be told of the effort to win a Right to Water Law in the state of California. In Flint, those suffering from the effects of lead contamination struggled, with mixed success, to control the way their story was told to the U.S. public throughout the frenzy of national publicity around the water crisis there.

Those who deny an obligation to provide universal access to safe, affordable water will invest the necessary resources to frame the issue as a problem of disadvantaged people failing to take responsibility for their own situation. In this context, part of asserting the human right to water will be embracing the possibilities of modern communications tools to shift those stories to both recognize the nature of the problem and point the way toward possible solutions.

VI CONCLUSION

The U.S. has access to abundant fresh water resources. Over the past century, the country has created a water distribution network that delivers high quality water at a subsidized price to a large part of the U.S. population. There have always been and continue to be serious inequities in that distribution, with disparities working against low-income communities and communities of color, especially Indigenous Peoples. While new legal instruments have been developed to address the challenges of delivering safe water to all, the law has had a mixed record as an instrument for addressing disparities in access to safe, affordable water.

In the past quarter century, a combination of increasing social inequality and the escalating cost of maintaining and expanding an aging water infrastructure has accentuated the disparities and has created serious distributional issues for large parts of the water system. The scale and scope of these issues—as in the case of the Flint water crisis—have gained considerable public attention, to the point that analysts speak of an emerging water crisis in the U.S.²¹² The increasing impact of climate change on the water system can only serve to heighten this sense of crisis in the future.

Throughout this same period, the international human rights system has recognized a human right to water and begun to put in place mechanisms to promote its realization. Advocates and activists across the planet have begun to frame their water-related claims in human rights terms, and have achieved important successes in rights-based water advocacy.

Somewhat belatedly, the idea of a human right to water has made its way into water disputes and discourse in the U.S. Nevertheless, rights-based advocacy in the U.S. remains daunting for a variety of reasons. First of all, because the federal government does not recognize a human right to water, any appeal based on rights-related state obligations faces an uphill battle. Similarly, while courts in the U.S. are making increased use of human rights and other international law arguments, the courts have been slow to accept claims of a human right to water. Finally, many leading water advocacy organizations have yet to see the value of using the human rights framework to advance their demands for solutions to the water crisis. Despite such obstacles, many communities and organizations remain determined to claim their human right to clean, affordable water. The variety of voices represented at the 2nd International Gathering of Social Movements on Water, held in Detroit in June 2017 is clear evidence of the growth of this movement.

As a result, we expect that lawyers and community leaders across this country will continue to explore the use of the human right to water as a tool for addressing all sorts of water-related problems. We hope that this primer will support those efforts.

ENDNOTES

- 1 We appreciate the research assistance provided by Northeastern University School of Law students, Thomas Ayres, Tanisha Canty, Alicia Cook and Sandi van Orden. Professor Martha Davis read and commented on drafts of the document and Elizabeth Ennen provided indispensable editorial assistance. A number of water rights activists and advocates, including Robert Ballenger, Colin Bailey, Lauren Carasik, Michelle Cook, KT Crossman, Amanda Ford, Lynna Kauchek, Deborah Labelle, Rebecca Landy, Suren Moodliar, Sylvia Orduño, Maureen Taylor and Brandy Toelupe, consented to be interviewed for this project and provided invaluable insights that informed our conclusions. More importantly, their work and that of countless others to realize the human right to water in the U.S. made this project relevant.
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