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Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence

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DEFINING AND DEFENDING THE RIGHT TO WATER AND ITS MINIMUM CORE: LEGAL CONSTRUCTION AND THE ROLE OF NATIONAL JURISPRUDENCE

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Preliminary Remarks

> "The things which are naturally everybody's are air, flowing water, the sea and the sea shore."[1]
> "We never know the worth of water until the well is dry."[2]

Over the past several decades, people have begun to worry about water. From the academy to the sciences, from those toiling at the Bar to those formulating policy, increased attention to the ever-worsening plight of the world's most valuable resource has inspired the publication of edited volumes, the formulation of countless whitepapers and even the production of documentary films. This increased professional attention, however, is minimal when compared with the daily hardship water scarcity causes those one billion people worldwide who lack basic access. After all, the fundamentality of water to human dignity is difficult to understate. Water is a necessity for domestic life and hygiene, an agricultural element, an economic tool and even a spiritual symbol.

This essay attempts to contribute to the ongoing academic dialogue surrounding water and its centrality to human life. Its purpose is to provide insight into what may be the most notable water management innovation in human history: the universal human right to water. Specifically, this essay seeks to outline the source and content of the right to water and that right's "minimum core"—both

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[1] J. Inst. 2.1.1, *quoted in* J. GETZLER, A HISTORY OF WATER RIGHTS AT COMMON LAW 67 (2004).

[2] THOMAS FULLER, GNOMOLOGIA: ADAGES AND PROVERBS, WISE SENTENCES AND WITTY SAYINGS, ANCIENT AND MODERN, FOREIGN AND BRITISH 237 (BiblioLife 2010) (1732).

concepts that have reached the level of positive international law. It then summarizes the recent work of numerous national courts "giving content" to the human right to water, addressing the ways in which the international legal norm is strengthened or challenged by this jurisprudence. Without an international body capable of enforcement, the human right to water depends on the activity of national courts to make its philosophical "universality" a matter of legal fact.

Inevitably an effort like this one cannot stand alone, but instead takes its place in a history that governs its content and determines it persuasiveness. Many authors have attempted to define "water history" in recent years, and a study of the recent past may be helpful in contextualizing the arguments to come.[3] We begin, then, where others leave off.

I. Introduction: The Modern Age – "Water Bureaucracy and a New Human Right"

Urbanization, explosive consumption and resource pollution have forced human society to devise ever more ingenious ways to extract, treat and store water. The methods employed have become so complex that today, they can only be managed by an actor with the requisite technical capacity. Understandably, this intricate work involves a certain *cost,* which gives the modern period a powerful economic dimension.[4] The home government retains the primary responsibility for this burden. When the cost of infrastructural development becomes prohibitive, however, states may also delegate service delivery to private interests. For this reason, most individuals, once personally responsible for collecting the water required for daily life, must now petition a *bureaucracy* of state and non-state actors for access—a significant step in human development. In the economies of the Global North, most "consumers" secure access through payment. This model has been imitated by and in some places forced upon those developing countries seeking to mimic Northern growth.[5] In both hemispheres,

[3] The analysis below, while original, is based on the analytical models of authors like Fekri Hassan. Hassan breaks down the last 25,000 years into "thresholds in water history," demonstrating the co-development of early civilizations with their approaches to resource management and proving that water shortage has always been an engine of human innovation. FEKRI A. HASSAN, *Water Management and Early Civilizations: from Cooperation to Conflict, in* HISTORY AND FUTURE OF SHARED WATER RESOURCES 2 (PCCP Publications 2003), *available at* http://unesdoc.unesco.org/images/0013/001332/133286e.pdf. Other authors involved in the same historical analysis include Martin Reuss. MARTIN REUSS, HISTORICAL EXPLANATION AND WATER ISSUES, HISTORY AND FUTURE OF SHARED WATER RESOURCES 20 (PCCP Publications 2003), *available at* http://unesdoc.unesco.org/images/0013/001332/133286e.pdf. See Peter Gleick, *Water Brief Four: Water Conflict Chronology,in* THE WORLD'S WATER 2008-2009: THE BIENNIAL REPORT ON FRESHWATER RESOURCES 151 (2009) for an illustration of the evolution of water conflict across human history.

[4] *See* HASSAN *supra* note 3, at 2 ("[T]he cost of procuring water is a function of the combined cost of extraction/harvesting, transportation, treatment, storage, and delivery. There is thus inevitably an economic aspect of water availability.").

[5] The policies of lending institutions like the World Bank and IMF treated water as an economic commodity, hoping that by seeking full cost recovery they would disincentivize waste and preserve resources. *See* Erik B. Bluemel, *The Implications of Formulating a Human Right to Water,* 31 ECOLOGY L.Q. 957, 962 (2004). Resource privatization may be a legally viable model of provision in some circumstances, subject to a serious consideration of population needs and state capacity. *See infra* note 354

money is now the easiest, and sometimes the only way, to access the clean water necessary to sustain human life.[6]

At the basis of water bureaucracy exists a powerful and well-established legal structure founded on the organizing principle of state sovereignty.[7] For many years the normative focus of this legal system has been the development and management of national infrastructure, with an emphasis on efficiency and profitability achieved through the use of technology, planning and scientific data.[8] This strategy has been legally reinforced on a national level through the passage of water management laws, riparian schemes and consumer contracts. These laws govern "civil water rights"—domestic entitlements granted by the state with an acknowledgement that the state's resource interests remain preeminent.[9] Such a Westphalian focus more easily permits the expropriation of water rights to private corporations where seen as satisfying the national interest. This private cooperation, though arguably necessary for infrastructural growth in some circumstances, often further alienates individuals from resource management.[10]

At the international level, the definition of access rights has traditionally lagged behind other water concerns.[11] In the last several decades, however, international law has begun to consider the proper place for individuals and communities within water management. Initially, the international approach mirrored

("The choice by a state to involve private interest at some level of resource provision may be an appropriate one.").

[6] Water price has become a key economic indicator. *See, e.g.*, U.N. DEV. PROG. [UNDP], Human Development Report: Beyond Scarcity: Power, Poverty and the Global Water Crisis 53 fig. 1.15 (2006) [hereinafter REPORT 2006]; ARNAUD COURTECUISSE, AGENCE DE L'EAU ARTOIS-PICARDIE, WATER PRICES AND HOUSEHOLDS' AVAILABLE INCOME: KEY INDICATORS FOR THE ASSESSMENT OF POTENTIAL DISPROPORTIONATE COSTS – ILLUSTRATION FROM THE ARTOIS-PICARDIE BASIN (FRANCE) (2007), *available at* http://www.balwois.com/balwois/administration/full_paper/ffp-846.pdf.

[7] This focus is evidenced by the preponderance of national and local laws governing water usage, and the explicit protection of territorial integrity and sovereign state power by early water management law at the international level. See Thorsten Kiefer & Catherine Brölmann, *Beyond State Sovereignty: The Human Right to Water*, 5 NON-ST. ACTORS & INT'L L. 183, 183 (2005) for a discussion of the latter.

[8] *See* Bluemel *supra* note 5, at 957. *See generally* MAUDE BARLOW, BLUE COVENANT: THE GLOBAL WATER CRISIS AND THE COMING BATTLE FOR THE RIGHT TO WATER (New Press 2008).

[9] See Arjun K. Khadka, *The Emergence of Water as a 'Human Right' on the World Stage: Challenges and Opportunities*, 26 INT'L J. WATER RES. DEV. 37, 40 (2010) for a discussion of differences between civil and human resource rights. See STEVEN HODGSON, FAO LEGAL OFFICE, MODERN WATER RIGHTS: THEORY AND PRACTICE (2006), *available at* ftp://ftp.fao.org/docrep/fao/010/a0864e/a0864e00.pdf for a basic explanation of civil water rights and their national and regional variations.

[10] In the developing world those sources not directly controlled by governments were claimed or purchased by profit-taking private industry and secured with legal force. Government initiatives to reclaim those rights, thereby expropriating private interests and reintroducing democratic decision-making, continue to prove challenging. *See* Posting of Andrew Holland to The Transatlantic Dialogue on Climate Change and Security Blog, http://climatesecurity.blogspot.com/2010/01/chiles-constitution-water-to-be-matter.html (Jan. 26, 2010, 5:57 PM).

[11] Bourquain notes that the first logical place to look for rights protection would be the body of existing international law governing water management, but that this law—though developing principles of no harm and equitable, reasonable use—does not sufficiently protect a right to personal access. KURT BOURQUAIN, FRESHWATER ACCESS FROM A HUMAN RIGHTS PERSPECTIVE: A CHALLENGE TO INTERNATIONAL WATER AND HUMAN RIGHTS LAW 50-54 (2008). This is not surprising, however, as both customary and treaty laws have largely developed to maintain "international peace and security" and enhance "international cooperation"—both core objectives of the UN Charter. *See* U. N. Charter, art.1.

concerns for economic efficiency and profitability found on the domestic level. Such an emphasis was at the heart of the investment policies of major lending institutions developed in the Reagan-Thatcher era.[12] Inter-governmental declarations and professional opinion also initially supported this position. The 1992 "Dublin Statement," otherwise a progressive treatment of water management, notably held that "water has an economic value in all its competing uses and should be recognized as an economic good."[13] An economic treatment of water was argued at the time to encourage conservation by "disincentivizing" waste.

The extensive reach of water bureaucracy and its national/international legal structure has had a unique meaning for individuals, who have been moved to the periphery of resource management. The birth of a global, free-market economy with an emphasis on state sovereignty and economic efficiency has largely prohibited individuals and communities from a role in decision-making due to their comparative economic weakness. With a focus on cost recovery above human need and without the ability to incorporate people into resource planning, the modern system inadequately protects the poor. Infrastructural advancements once hoped for have failed to materialize, and the neglect of individual need has had dramatic implications for our "water age."

First, (a) poor infrastructure and the exacting price of water have taken an enormous toll on human health and productivity. In some developing contexts, over 50% of the population lacks basic access.[14] Globally, nearly one billion people cannot draw from an improved source of water,[15] a reality that costs the lives of over two million people every year.[16] Some estimate that water collection times alone cost Africa over 40 billion work-hours annually.[17] Of course, the burden is shouldered mainly by women and young girls who often hold the cultural responsibility for water collection.[18] All children, due to their develop-

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[12] It is commonly held that the neo-liberal policies of the Reagan and Thatcher governments created the impetus for market-based development lending generally, and that this impetus most clearly manifested itself in water management through the imposition of privatization schemes. *See* Barlow, *supra* note 8, at 36.

[13] International Conference on Water and the Environment, Dublin, Ir., Jan. 26-31, 1992, *The Dublin Statement on Water and Sustainable Development*, at 7 (1992) ("[W]ater has an economic value in all its competing uses and should be recognized as an economic good. . . . [It is] the basic right of all human beings to have access to clean water . . . at an affordable price. . . . Managing water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources."). The treatment of "the basic right" to water, while progressive, was undoubtedly meant to be read in light of the economic principle of cost-recovery. *See* Bluemel, *supra* note 5, at 963, 965.

[14] Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1, 6 (1992).

[15] World Health Org. & U. N. Children's Fund Joint Monitoring Programme for Water Supply and Sanitation, *Progress in Drinking-water and Sanitation: Special Focus on Sanitation* (2008), *available at* http://www.who.int/water_sanitation_health/monitoring/jmp2008/en/index.html.

[16] WORLD HEALTH ORGANIZATION ET AL., THE RIGHT TO WATER 6 (2003) [hereinafter WHO, RIGHT TO WATER], *available at* http://www.who.int/water_sanitation_health/rightowater.

[17] Report 2006, *supra* note 6, at 15.

[18] *Id.*; *see also* HENRY STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 266 (3rd ed., Oxford Univ. Press 2008).

mental vulnerability, are especially affected by water scarcity. Worldwide, 443 million school days are lost every year to water and sanitation related sickness.[19]

The threat to human development is compounded by over-extraction and pollution, certain environmental phenomena like climate change and a social inability to effectively respond to the crisis at hand.[20]

Pollution and over-extraction continue to stress resource availability for human survival, agriculture and economic activity.[21] Both stem from unsafe and unsustainable agricultural and industrial practices,[22] primarily at the hands of multi-national corporations involved in large-scale farming or commercial activities like bottling, mining and manufacturing.[23] Pollution and over-exploitation irreversibly degrade accessible, renewable resources for human consumption.[24]

Climate change has been predicted to have an enormous global impact on water resources. By 2020, for example, 75-220 million Africans are projected to experience climate change-related water stress.[25]

Finally, individuals and communities—once the primary decision-makers in water management—are now so alienated from the system that their social commons can no longer modify itself to changes in supply.[26] In the MENA region, an area in which most countries are classified "water scarce," social evolution allowed for the adequate distribution of resources for nearly 5000 years.[27] To-

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19 REPORT 2006, *supra* note 6, at 45.

20 The alternative model of "Human Development," developed primarily by Dr. Mahub ul Huq, has since become a commonplace term in development economics and will be used widely in this text. See U.N. Dev. Programme, *Human Development Report 1990: The Concept and Measurement of Human Development* (1990), for an explanation of its origins and content.

21 *See generally*, REPORT 2006, *supra* note 6.

22 Even in the developed world, agriculture is the primary source of pollution for aquifers, the largest sources of groundwater for domestic use. Industrial pollution mainly targets surface resources. JOAN GOLDSTEIN, DEMANDING CLEAN FOOD AND WATER: THE FIGHT FOR A BASIC HUMAN RIGHT 127 (Plenum Publishing 1990).

23 Multinational corporations involved in the pollution or over-extraction of resources were responsible for some of the first legal battles for water rights. *See, e.g.*, MAIKE GORSBOTH, FOODFIRST INFORMATION AND ACTION NETWORK, IDENTIFYING AND ADDRESSING VIOLATIONS OF THE HUMAN RIGHT TO WATER: APPLYING THE HUMAN RIGHTS APPROACH 10-13 (2006), *available at* http://www.fian.org/resources/documents/others/identifying-and-addressing-violations-of-the-human-right-to-water/?searchterm=identifying%20and%20addressing (outlining water rights struggles involving Newmont Mining Corp, Coca-Cola Corp. and Consorcio Hidroenergético del Litoral).

24 It should be noted that the world is not "running out of water" in a literal way. In fact, the global water supply far outweighs human consumptive needs by thousands of times. Today's disturbing trend involves the irreparable denigration of those accessible, renewable resources of ground and surface water (of which humans already exploit over 50%) through pollution, sinking, and desertification. See Peter Gleick, *Peak Water, in* THE WORLD'S WATER 2008-2009: THE BIENNIAL REPORT ON FRESHWATER RESOURCES 1, 5 (2009), for a discussion.

25 INTER-GOVERNMENTAL PANEL ON CLIMATE CHANGE [IGPCC], CLIMATE CHANGE 2007: SYNTHESIS REPORT 50 (Nov. 17, 2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

26 Water limitations in Hassan's model, for example, forced natural changes in population numbers, concentration, activity and migration. *See* Hassan, *supra* note 3, at 2-3.

27 *See* David B. Brooks, *Human Rights to Water in North Africa and the Middle East: What is New and What is Not; What is Important and What is Not,* 23 INT'L J. WATER RES. DEV. 227, 227-28 (2007). MENA is the Middle East and North Africa.

day, shortage is commonplace. The alienation of users through the imposition of bureaucracy, while necessary for growth, bypasses humanity's inborn coping mechanisms for resource scarcity. As available renewable and non-renewable resources have dwindled over the last century, global water consumption has risen six-fold, at a rate twice that of population growth.[28] Water use is projected to rise by 40% in the next two decades alone.[29]

The hope for the individual at the heart of "water bureaucracy" comes with the simultaneous development of a human rights paradigm. For the first time, individuals are offered a mechanism for the redress of those violations against their human dignity once committed with impunity. The human rights approach involves emphasizing state responsibility in the protection of natural entitlements—like basic access to drinking water—to the absolute extent possible without discrimination. This emphasis makes states both politically and legally accountable when they fail to meet their obligations.[30] As such, the human rights approach seeks to critically reform the relationship between the citizen-stakeholder and the state, and to enshrine this transformation into binding law. Human rights law is first developed at the international level—establishing entitlements that are essentially "universal"—and is then translated through treaty, custom and national legislation into locally binding standards of state behavior.

In the mid-1990s, the international community began to criticize the role of market economics in resource provision as inadequate for the equitable satisfaction of human need. It was believed that prior water management had made provisions to the poor cost-prohibitive, resulting in the immense human suffering outlined above. Slowly, there grew a general distrust of old development policies,[31] and this shift from market-based globalization to an emphasis on civil society culminated with calls for the recognition of a "new" human right to water.[32] As with any other human rights-based legal entitlement, the right to water required a foundation in international law before it could be domestically asserted. The legal enforceability of a universal human right to water remained

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[28] The global population stands at approximately 6.8 billion and is projected to increase upwards of 2 billion by 2050. *See* U. N. Dep't of Economic and Social Affairs, The World at Six Billion, U.N. Doc. ESA/P/WP.154 (1999), http://www.un.org/esa/population/publications/sixbillion/sixbillion.htm, *as modified by* United Nations Department of Economic and Social Affairs, World Population Prospects: the 2008 Revision U.N. Doc. ST/ESA/SER.A/287 (2008), *available at* http://esa.un.org/unpd/wpp2008/peps_documents.htm.

[29] *See* REPORT 2006, *supra* note 6, at 135-38. The United Nations estimates that by 2050, over 1.5 billion people could live in water scarce areas of less than 1,000 cubic meters per person, well below the 1,700 cubic liters required for agriculture, industry, energy and the environment. *Id.* at 135, fig. 4.3.

[30] Gorsboth, *supra* note 23, at 3.

[31] A consensus developed in the mid- to late-90s that allowing economics to determine water provision without consideration for human need was causing serious suffering, resulting in a general distrust of old development policies and a new focus on human rights. Bluemel, *supra* note 5, at 963-64.

[32] For authors like Jayyousi, the emergence of a human rights approach to water is evidence of the forces of civil society globalization balancing with the market-based globalization whose dominance to this point is demonstrated by the dominance of water issues by economic institutions. Odeh al Jayyousi, *Water as a Human Right: Towards Civil Society Globalization,* 23 INT'L J. WATER RES. DEV. 329, 330-31 (2007).

dubious, however, as water was not explicitly mentioned in the covenant enshrining similar socio-economic rights.

Research Problem, Significance, Inquiry and Methodology

Fortunately, a recent proliferation in the number of international declarations and instruments treating water as a human right now provides some legal challenge to this initial indeterminacy. In fact, state practice, legal opinion and treaty interpretation all currently point toward the existence of an independent, universal right to water in international law. The most helpful legal definition of this right is found in General Comment 15 of the U.N. Committee on Economic, Social and Cultural Rights (CESCR).[33] CESCR's authoritative interpretation, in clarifying state obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), sets requirements of quality, availability and accessibility. It also outlines the right's immediately enforceable "minimum core"—a conceptual tool distinguishing exigent state obligations from the otherwise progressive implementation of the right.[34]

Individuals and communities faced with a lack of access to sufficient, safe, accessible and acceptable sources of water for personal consumption require local access to this international legal standard developed for the protection of their dignity. The urgency of their need is proven by the seriousness of the human crisis outlined above. Legal experts have been busy adapting human rights to the work of water access protection in national courtrooms,[35] and recent cases from a variety of jurisdictions have proven that water rights are now justiciable.[36] Unfortunately, the benefit of a human right to water is limited by two interrelated factors. First, the legal standard—despite its normative development at the international level—face national enforcement challenges stemming from an absence of authoritative trans-national case law. For this reason, the human right to water often lacks the legal determinacy of civil water rights, even where explicitly incorporated into domestic law. Secondly, when choosing to assert a right to water based on international norms, national courts are left with an open, conceptual space for "content-giving," as water rights are not *explicitly* delineated in any

[33] Committee on Economic, Social and Cultural Rights [CESCR], General Comment 15: The Right to Water, ¶ 2, U.N. Doc. E/C.12/2002/11 (Jan., 20, 2003), http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94?Opendocument [hereinafter GC15].

[34] CESCR, General Comment 3: The Nature of States Parties' Obligations, ¶14, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (Dec. 14, 1990), http://www.unhchr.ch/tbs/doc.nsf /0/94bdbaf59b43a424c12563ed0052b664?Opendocument [hereinafter GC3].

[35] In national courts there has been a recent shift from an abstract, ideological stereotyping of socio-economic rights as injusticiable or less-enforceable toward an investigation of the technical and jurisdictional issues that would permit their litigation. *See generally* Tara J. Melish, *Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas,* 39 N.Y.U. J. INT'L L. & POL. 171 (2006).

[36] Ingla Winkler, *Judicial Enforcement of the Human Right to Water: Case Law from South Africa, Argentina and India* Law, 2008 L. SOC. JUST. & GLOBAL DEV. J. 1, 15 (2008), http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2008_1/winkler/ (Winkler's review of national water rights jurisprudence, though limited, is a helpful place to begin an investigation of jurisprudential standards and was seminal to the research for this essay.).

treaty.[37] This conceptual space exists alongside the interpretative problems of "progressive implementation" faced by all socio-economic rights. This dual limitation is the research problem the present essay seeks to investigate.

This essay will focus entirely on the universal human right to water, leaving a more thorough investigation of the state-centric water management paradigm and its legal structure to other authors.[38] The human right to water is the most notable water management innovation in modern history, as it seeks to place the individual back at the center of resource management. The goal of this essay is to clarify the legal content of this right—including its minimum core—and to explore the way in which national jurisprudence for the protection of "water rights" interacts with this international legal construct. An understanding of the interaction between domestic and international law should allow the reader to be more sensitive to the future work of national courts in water rights enforcement. Specifically, it should facilitate an increased understanding of the reader's legal entitlements at an international level, including the normative development of these entitlements and the various ways in which individual states are bound to respect them. Through the work of this essay, the reader should also come to understand how national enforcement has promoted or challenged the conceptual integrity of these entitlements in the recent past. This understanding is meant to benefit everyone—stakeholder, lawyer or judge—involved in water rights litigation by allowing the "contemporary history" of water rights to guide future enforcement efforts.

The *international* human right to water will find true meaning through the work of *national* courts in a way other, fully codified socio-economic rights have not. If the right to water is to be considered a universal right, the integrity of the international legal norm must be reinforced and not weakened in its national application. For this reason, the principle research question for the present essay asks, "What is the right to water as a construct of international law, and how has this concept been treated by national courts?" The inquiry is undoubtedly a complex one, and it may be helpful to outline several other questions underpinning the proceeding analysis.

First: What is the universal human right to water, both as a theoretical innovation in human rights and as a positive norm of international law? What is the source and content of such a right, and what enables it to withstand the challenge of progressive implementation faced by other, explicitly codified socio-economic rights?

Second: What is the concept of the minimum core? What is its legal function and character in socio-economic rights enforcement? More specifically, what is the minimum core for a universal human right to water, and what purpose does it serve within the larger water rights paradigm?

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[37] *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

[38] Various academic sources have investigated the history and legal structure of traditional, state-centric water rights. *See, e.g.*, Getzler, *supra* note 1; Hodgson's, *supra* note 9; Anthony Scott & Georgina Coustalin, *The Evolution of Water Rights*, 35 NAT. RES. J. 821 (1995).

Third: How do states access and promote this new international norm if it remains uncodified? How does the work of states in applying and interpreting the universal human right to water influence the position of stakeholders (both at home and abroad) and affect the conceptual integrity of the norm itself?

Finally: How have national courts treated the universal right to water in their domestic enforcement of state obligations vis-à-vis stakeholders? Has recent jurisprudence accessed or ignored the international standard? Is the international norm supported or challenged by this developing case law, and what will this mean for its future application?

Sections II and III of this essay will outline the legal norm surrounding the universal human right to water and its minimum core, tracing their sources and defining both their content and corresponding state obligations. This work is largely descriptive, a traditional exercise in international legal construction that attempts to qualitatively outline an existing rule of law by drawing from its legal sources and determining its content with a view toward the international consensus related to the right. "Consensus" is evidenced by states' use of national and international political declarations, agreements and laws in their treatment of human rights, underlying issues, or even related rights and obligations. Where dissent exists, it is noted with an understanding that a diversity of opinion may still support the legal existence of a right without achieving uniformity. Such a research methodology is common in human rights literature.

The work of Section II will draw from the four "traditional" sources of international law: binding convention, international custom, general principle of law, and the opinion of legal experts.[39] Although previous efforts to outline the global consensus surrounding water rights will prove indispensible, this consensus continues to develop significantly. Section II will therefore draw anew from the U.N. Treaty Series, the texts of recent development conferences, U.N. resolutions, state declarations and legislation, scholarly rights constructions, the reports of international law associations, and the media. Where necessary, texts will be partially reproduced. These sources will be academically analyzed for their legal content and the ways in which this content modifies or creates obligations by which states may become bound. A large number of expert academic analyses will be referenced in assessing this legal effect and importance. Due to the nature of a right to water as a "new" human rights entitlement, it is possible to consider all relevant legal sources pertaining to the right. This makes an objective and well-founded legal justification for the right—including a determination of the right's scope and content—possible here.

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[39] The four traditional sources taken from Article 38 of the Statute of the International Court of Justice are:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law

Statute of the International Court of Justice, art. 38, October 24, 1945, 59 Stat. 1031.

Section III will introduce the concept of a "minimum core" for socio-economic rights generally and explain the content of such a core for water. Much of this section's legal analysis will be based on a synthesis of General Comments 3 and 15—authoritative summaries of state obligations under the ICESCR. As in Section II, this basic framework will be fleshed out with reference to the current legal understanding of the "minimum core," including treaty law, custom, general principle and expert interpretation. Recent scholarly treatment of the minimum core will help orient the concept within the right to water, introducing both its purpose and limitations. Technical reports on water quantity and quality will also be considered, as these may give us a better idea of what a minimum core for water rights might mean in practice.

Finally, Section IV will review national case law for its recent treatment of the human right to water and the minimum core concept. The work of Section IV is both *descriptive*—a faithfully recreating the legal standards developed in national jurisprudence—and *evaluative*—comparing these legal standards to one another and to the international norm outlined in sections II and III. Through direct reference, descriptive explanation or footnote, Section IV considers nearly every recent, notable water rights judgment.

The analysis in Section IV is largely based on a theoretical framework of international norm creation and transmission, which seeks to understand the ways in which international norms find effective protection through their national enforcement, even when not directly transferrable. The research involved is qualitative, as both the relative paucity of water rights jurisprudence and the diversity of legal factors differentiating national systems limits effective data mining. It is not the goal of this essay however, to exhaustively outline the way national courts have treated these concepts in recent years. To do so would require an analysis capable of apprehending the motivations of each court in question, the placement of each court within its national legal order, the symphony of law, international commitments and political pressures exerting influence on the court's work, not to mention the vast amount of separate but related case law which may have an impact. Although none of these factors is ignored by the present essay, exhaustive consideration of these questions is better left to scholars analyzing the treatment of water rights by their national judiciaries *in particular.* At most, Section IV is restricted to considering questions of national enforcement in a much more limited way, drawing a few descriptive suggestions for further evaluation and research.

Section IV will begin with a theoretical overview of norm transmission from international law to national courtrooms. This analysis will draw heavily from human rights theory. Right-to-water case law from several jurisdictions will then be analyzed for the way in which it supports or challenges the international legal norms surrounding water rights. Many of these cases will be drawn from litigation guides prepared by legal aid NGOs, comparative law analyses, and the international media. Court reporters and electronic databases will also be consulted since litigation guides are often limited in detail or lack the most current jurisprudence. Case law will be analyzed with the help of secondary sources including law reviews and case briefs. In several places, the original litigators will be

asked to contribute by brief or supporting documentation. Other socio-economic case law will be considered where necessary to establish context.

In the end, it seems that the right to water and its minimum core may prove especially useful in moving human interest from the periphery of resource management back to its center. The success of this goal, however, hinges to a great extent on the practical universality of the norm in question. For the human right to water to exist as a legal fact, a Pakistani mother must be guaranteed the same standard of protection as a slum dweller in Johannesburg. We must know if national courts have been willing to adopt the full definition for water rights, including the minimum core, in their jurisprudence. When they have done so, we must ask if their use of the concept has reproduced or distorted the international standard.

II. The Human Right to Water in International Law: Source and Content

It is difficult to concisely define the international human right to water.[40] This difficulty is due to its omission from the major rights-protecting covenants of the last half-century. In fact, an investigation of treaty law reveals that "[t]here are no. . . instruments that guarantee accessible, good quality water in adequate supply as a fundamental human right."[41] Non-codification, however, does not imply that such a right does not exist, nor that it is unacknowledged or unprotected by international law in some other way.[42] On the contrary, an investigation of the relevant sources of international law—both treaty and custom—reveal that a right to water *does* in fact exist in positive law, and that both its normative content and related obligations can be outlined independently of other rights. This is the focus of the present section. The right to water is outlined below through the traditional activity of legal construction; the intellectual origin of the right to water in international relations, its legal basis, scope and obligations are all comprehensively treated.

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[40] It should be noted before proceeding that this paper uses the term "water rights," "right to water" and "human right to water" interchangeably. The use of these phrases to signify a human right to safe, sufficient drinking water is supported by their use in scholarly publications, General Assembly resolutions and CESCR General Comments. *See, e.g.*, The Right to Development, G.A. Res. 54/175, U.N. Doc. A/RES/54/175 (Dec. 17, 1999); *and* GC15, *supra* note 33. These terms should be distinguished from the traditional civil law definition of water rights—those state-granted rights for the use of resources to meet social needs. Where a distinction needs to be made between human rights and resource rights, this paper will use the term "civil water rights" to describe the latter.

[41] *Human Rights and Water,* IUCN WATER LAW SERIES (2009), *available at* http://cmsdata.iucn.org/downloads/fs9.pdf (last visited February 4, 2011).

[42] Many authors argue that the next logical step in the enforcement of water rights is their codification in an independent international convention; however, this assertion falls outside of the scope of this essay. *See, e.g.*, Bluemel, *supra* note 5, at 973 ("The recognition of a singular right which could satisfy the entirety of States' obligations under international law should provide greater clarity and consistency in interpretation, leading to greater State compliance and clearer complainant rights to remedies."). *See* Peter H. Gleick, *The Human Right to Water*, 1 WATER POL'Y 487, 487 (1998) [hereinafter Right to Water]; Maude Barlow, *A UN Convention on the Right to Water: An Idea Whose Time Has Come,* BLUE PLANET (November 2006), http://www.blueplanetproject.net/documents/UN_Convention_RTW_MBarlow_Nov06_000.pdf.

As noted in the introduction, recent decades have seen the struggles of the oppressed or neglected reformulated as human rights issues.[43] The fight for rights protection begins with the dispossessed reframing their claims as based in "rights entitlements." Human rights claims are less common when societies can solve new problems on their own. As Peter Donnelly suggests, "one needs human rights principally when they are not effectively guaranteed by law and practice."[44] For new rights, such as the right to water, this involves the creation of a legal identity for a claim based in a sociological reality. The support for such an endeavor comes from the "fundamentality" of the claim at the core of the right. Human rights claims rest on what is considered essential for a life with human dignity. In the words of the Universal Declaration of Human Rights (UDHR), "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[45] Water's fundamentality to human dignity is indisputable, and an international consensus has grown to reflect this fact.

A. The Development of an International Consensus

Nelson posits that two complementary factors enabled the claim of a human right to water: (a) a "receptive international environment," and (b) a set of external threats.[46] The threat to human development posed by water scarcity was outlined by the introduction. The receptiveness of the international community to water rights is demonstrated by its progressive embrace of such rights over the past 30 years. National and international political agendas began to reflect a growing concern for water issues in the mid-1970s.[47] By the early 2000s, the international focus on water began to shift from management, technology and economics to a more rights-based approach.[48] Today, recent polls suggest that

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[43] Clifford Bob, *Introduction: Fighting for New Rights*, *in* THE INTERNATIONAL STRUGGLE FOR NEW HUMAN RIGHTS 1, 1 (Univ. of Penn. Press 2009).

[44] JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 22 (3d ed., Westview Press 2007).

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

[46] Paul J. Nelson, *Local Claims, International Standards and the Human Right to Water*, *in* THE INTERNATIONAL STRUGGLE FOR NEW HUMAN RIGHTS 130, 133 (Clifford Bob ed., Univ. of Penn. Press 2009).

[47] *See* Asit K. Biswas, *Water as a Human Right in the MENA Region: Challenges and Opportunities*, 23 INT'L J. WATER RES. DEV 209, 211 (2007), *available at* http://thirdworldcentre.org/akbwaterhuman right.pdf [hereinafter Biswas MENA]; Asit Biswas & Cecilia Tortajada, *Changing Global Water Management Landscape*, *in* WATER MANAGEMENT IN 2020 AND BEYOND 1, 10 (A.K. Biswas et al. eds., 2006).

[48] *See* Report 2006, *supra* note 6 (until release of the 2006 Human Development Report, a lack of water access was thought to mean a lack of resources or technical capacity); *see* CENTRE ON HOUSING RIGHTS AND EVICTIONS [COHRE], HUMAN RIGHTS AND ACCESS TO WATER AND SANITATION: ACTING ON THE REPORT OF THE OHCHR 2 (2007), *available at* http://www.righttowater.info/pdfs/2007HRCweb.pdf [hereinafter COHRE]; Bluemel, *supra* note 5 at 963; Brett Walton, *Zafar Adeel: A Conversation With the New Chair of UN-Water*, CIRCLE OF BLUE, (Mar. 25, 2010), http://www.circleofblue.org/waternews/2010/world/zafar-adeel-a-conversation-with-the-new-chair-of-un-water/#more-13747 ("I think historically what we have done is stay focused specifically on water issues, water quality, on monitoring and doing research, but to relate it to people's lives and to relate it to policies is something we have not done very well before.").

the global freshwater crisis is the world's most pressing environmental problem, and international declarations have begun utilizing rights-based language as they shift to reflect this growing consensus.[49]

Several types of international documentation either explicitly or implicitly support a right to water. The outline of the resources grouped below is as follows: sources of binding treaty law are investigated first. Treaties enshrine commitments that states parties are bound by law to fulfill. They are, therefore, the most important sources in any investigation of international law. Next, sources of non-binding law developed both within and outside of the U.N. system are reviewed chronologically, demonstrating the development of the term "right to water." These international declarations and resolutions enshrine the political commitments of states within the international community. Although they are formally non-binding, they can be used as interpretative guides with respect to states' treaty obligations.[50] Finally, international customary law is considered. There are several other legal sources relevant to the growth of water rights that for reasons of clarity and brevity will not be addressed here. These include regional human rights treaties, declarations more generally relating to sustainable development and clean environment, and the concluding observations of the CESCR.[51]

Several international treaties—the most definitive sources of international law—explicitly reference duties related to water rights. Their definitions, however, fall short of protecting water resource adequacy, quality or accessibility. Article 14 of the Convention for the Elimination of Discrimination Against Women (CEDAW) requires that state parties protect the right "to enjoy adequate living conditions, particularly in relation to . . . water supply."[52] The Convention on the Rights of the Child (CRC), which came into force nine years later, protects the "highest attainable standard of health" for children including (inter alia) clean, adequate drinking water.[53] The U.N. Convention on the Law of the Non-Navigational Uses of International Water Courses,[54] though not in effect, asserts the priority of "vital human needs" when states are at odds over international

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[49] Keith Schneider, Nadya Ivanova & Aaron Jaffe, *Water Tops Climate Change as Global Priority*, CIRCLE OF BLUE (Aug. 18, 2009), http://www.circleofblue.org/waternews/2009/world/waterviews-water-tops-climate-change-as-global-priority/ (full survey results can be accessed by clicking download full report at the top of the page).

[50] CENTRE ON HOUSING RIGHTS AND EVICTIONS [COHRE], LEGAL RESOURCES FOR THE RIGHT TO WATER AND SANITATION: INTERNATIONAL AND NATIONAL STANDARDS, 41 (2nd ed. 2008) [hereinafter COHRE(c)].

[51] See COHRE(c), *supra*, note 50, at 7 *and* Patricia Wouters, *Universal and Regional Approaches to Resolving International Disputes: What Lessons Learned from State Practice?* RESOLUTION OF INTERNATIONAL WATER DISPUTES 111 (International Bureau, Permanent Court of Arbitration ed., 2003) for a discussion on these sources. Several concluding observations are included in Section IV as background information for the individual states surveyed.

[52] Convention on the Elimination of All Forms of Discrimination against Women, Art.14, ¶ 2, Dec. 18, 1979, 1249 U.N.T.S. 13.

[53] Convention on the Rights of the Child, Art. 24 ¶ 2, Nov. 20, 1989, 1577 U.N.T.S. 3.

[54] The body of law governing international watercourses may seem the first logical place to look for water rights. Generally, however, law is insufficiently developed there to protect a right to individual access. *See* Bourquain, *supra* note 11, at 50-54; Kiefer & Brölmann, *supra* note 7, at 183.

water resources.[55] Finally, the Convention on the Rights of Persons with Disabilities outlines "the right of persons with disabilities to social protection . . . including measures to ensure equal access by persons with disabilities to clean water."[56]

International conflict, humanitarian and criminal law also demonstrate some consensus on water rights by establishing related state obligations. The Geneva Conventions—which are almost universally ratified—ensure that both prisoners of war and civilians are guaranteed water for consumption and sanitation as part of an adequate standard of living for health and well-being.[57] Though less widely ratified, Additional Protocol I (1977) obliges parties not to attack or destroy "objects indispensible to the survival of the civilian population . . . [including] drinking water supplies."[58] The Standard Minimum Rules for the Treatment of Prisoners (1955) and the later United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), both ensure that "[d]rinking water shall be available to every prisoner whenever he needs it."[59]

Since the 1970s, the right to water as an independent human rights entitlement has garnered increased support in international declarations, resolutions and agreements. Though non-binding, these declarations serve as evidence of state practice and can indicate a state's own understanding of its legal obligations. The Vancouver Declaration from the U.N. Conference on Human Settlement (1976) identifies water as a basic human need, directing some of its recommendations for developing countries toward the protection of water supplies from pollution and the adoption of policies with "reasonable standards for quality and quantity."[60] The Mar del Plata Action Plan from the U.N. Conference on Water (1977) is one of the most oft-cited declarations, as it explicitly insists that all peoples "have the right to have access to drinking water in quantities and of a

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[55] Convention on the Law of the Non-Navigational Uses of International Watercourses, Art.10.2, G. A. res. 51/229, Annex, U.N. GAOR, 51st Sess., 99th mtg., UN Doc. A/RES/51/229 (*opened for signature* May 21, 1997), 36 I.L.M. 700. This convention is not in force.

[56] International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Art. 28, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (Dec. 13, 2006), 46 I.L.M. 443.

[57] Geneva Convention Relative to the Treatment of Prisoners of War, Art. 26, 29, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 85. 89, 127, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Third Geneva Convention].

[58] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts Art. 54, June 8, 1977, 1125 U.N.T.S. 3. See Ian Scobbie *Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict,* 14 J. CONFLICT & SECURITY L. 449, 455-56 (2009) for a recent analysis of the relationship between conflict law and human rights, including the right to water.

[59] U. N. Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990) ("Clean drinking water should be available to every juvenile at any time."); First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 22 – Sep. 3, 1955, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Annex I, 20(2), *available at* http://www1.umn.edu/humanrts/instree/g1smr.htm.

[60] *See* United Nations Conference on Human Settlement, Vancouver, Can. May 31 – June 11, 1976, *Vancouver Declaration on Human Settlements*, U.N. Doc. A/CONF.70/15 (June 11, 1976).

quality equal to their basic need."[61] After this declaration, the assertion of water rights became commonplace in development-related agreements. The Dublin Statement on Water and Sustainable Development (1992) states that there exists a "basic right of all human beings to have access to clean water . . . at an affordable price."[62] Agenda 21 from the U.N. Conference on Environment and Development in Rio de Janeiro (1992) acknowledges a "right to water" in line with the Mar del Plata plan.[63] In 1994, the Programme of Action of the International Conference on Population and Development included water among those elements of "the right to an adequate standard of living."[64] Finally, the right to water has found support in four recent development conferences: The Africa-South America Summit in 2006 (The Abuja Declaration),[65] the First Asia Pacific Water Summit in 2007 (Message from Beppu),[66] the Third South Asian Conference on Sanitation in 2008 (Delhi Declaration),[67] and the XV Summit of Heads of State and Government of the Non-Aligned Movement in 2009 (Final Document).[68]

The water rights concept developed in these declarations was first adopted by the U.N. system in 2000 with a General Assembly resolution on the Right to Development. That resolution acknowledges that "rights to food and clean water are fundamental human rights, and their promotion constitutes a moral imperative both for national Governments and for the international community."[69] Non-binding General Assembly resolutions are similar to international declarations as they indicate a state's evolving understanding of its international legal obligations. Resolutions also provide a conceptual framework for the activities of other

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61 U.N. Water Conference [U.N.W.C.], Mar del Plata, Arg., Mar. 14-25, 1977, *Rep. of the U. N. Water Conference*, (II)(a), U.N. Doc. E/CONF.70/29, U.N. Sales No. E.77.11.A.12, (Mar. 25, 1977).

62 Dublin Statement, *supra* note 13.

63 U. N. Conference on Env't. & Dev., Rio de Janiero, Braz., June 3-14, 1992, *Agenda 21*, ch. 18.47, U.N. Doc. A/CONF.151/26/REV.1 (Vol. II) (June 14, 1992), *available at* http://www.un.org/esa/dsd/agenda21/.

64 United Nations International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Programme of Action of the International Conference on Population and Development*, ch. 2, princ. 2, *available at* http://www.iisd.ca/Cairo/program/p00000.html.

65 First Africa-South America Summit, Abuja, Nigeria, Nov. 26-30, 2006, *Abuja Declaration, available at* http://www.eaclj.org/index.php?option=com_phocadownload&view=category&id=1&Itemid=21#.

66 *See* First Asia-Pacific Water Summit, Beppu, Japan, Dec. 3-4, 2007, *Message from Beppu*, ¶ 2, *available at* http://www.apwf.org/archive/documents/summit/Message_from_Beppu_080130.pdf ("people's right to safe drinking water . . . as a basic human right").

67 *See* Third South Asian Conference on Sanitation, New Delhi, India, Nov. 16-21, 2008, *The Delhi Declaration, available at* http://ddws.nic.in/infosacosan/ppt/Delhi%20Declaration%207.pdf (stating that access to safe drinking water constitutes a basic human right).

68 XV Summit of Heads of State and Government of the Non-Aligned Movement, Sharm el Sheik, Egypt, July 11-16, 2009, *Final Document*, ¶¶ 391-95, NAM2009/FD/Doc.1, *available at* http://www.namegypt.org/en/RelevantDocuments/Pages/default.aspx (via "final document" hyperlink) (stressing "the need to assist developing countries in their efforts to . . . provide access to safe drinking water and basic sanitation" while recalling the acknowledgement of a right to water in GC15).

69 The Right to Development, *supra* note 40, ¶ 12(a). GA resolutions guide the work of other U.N. offices and agencies. There are currently twenty-six U.N. offices working on the management of global freshwater.

U.N. offices and agencies. For this reason, the water rights concept has enjoyed various forms of support from U.N. organs and agencies in the last decade.

After the 2000 General Assembly resolution, water rights language was quickly adopted by documents like the Millennium Development Goals and General Comment 15 of the Committee on Economic, Social and Cultural Rights.[70] The Commission on Human Rights followed suit in 2005 with a resolution on the dumping of toxic wastes, acknowledging "rights to water" in three places.[71] The U.N. Sub-Commission on the Promotion and Protection of Human Rights released "Guidelines for the Realization of the Right to Drinking Water and Sanitation" the same year, supporting and clarifying the conclusions of other bodies, most notably the CESCR.[72] In 2007, the U.N. High Commissioner for Human Rights issued a report "On the Scope and Content of the Relevant Human Rights Obligations Related to Safe Drinking Water and Sanitation under International Human Rights Instruments," notably concluding that, "it is now time to consider access to safe drinking water. . . as a human right."[73] In 2008, the Human Rights Council (HRC)—the main body with human rights competency in the U.N. system—somewhat belatedly appointed an Independent Expert on the rights to water and sanitation to "further [clarify] the content of human rights obligations . . . in relation to access to safe drinking water and sanitation."[74] This appoint-

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[70] *See* The Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000). While the Millennium Development Goals [MDGs] adopt some human rights language and ideas, their implementation has been criticized for not integrating a human rights calculus. In August of 2010 the Independent Expert on the Right to Water and Sanitation transmitted a report to the U.N. General Assembly clarifying the way in which water rights relate to the MGDs. In her report, she described the two as "consistent and mutually reinforcing," while regretting the practical lack of "constructive synergy." Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *The MGDs and the Right to Water and Sanitation,* General Assembly, U.N. Doc. A/65/254, ¶ 62 (Aug. 6, 2010) (by Catarina de Albuquerque), *available at* http://www2.ohch.org/english/issues/water/iexpert/annual.htm (via hyperlink with the title of the document); *see generally* GC15, *supra* note 33.

[71] Human Rights Commission Res. 2005/15, Adverse Effects of the Illicit Moving and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, Mar. 14 – Apr. 22, 2005, U.N. ESCOR, 61st Sess., Supp. No. 3, E/2005/23, at 56 (Apr. 14, 2005).

[72] *See* U. N. Sub-Commission on the Promotion and Protection of Human Rights Res. 2006/10, Promotion of the Realization of the Right to Drinking Water and Sanitation, 58th Sess., Aug. 7-25, 2006, U.N. Doc. A/HRC/2/2-A/HRC/Sub.1/58/36, ¶¶ 29-30 (Sept. 11, 2006) (adopting Special Rapporteur on the Enjoyment of Economic, Social and Cultural Rights and the Right to Drinking Water Supply and Sanitation); *Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation*, U.N. Sub-Commission on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2005/25 (July 11, 2005) (by Hadji Guissé) [hereinafter Draft Guidelines]; see COHRE(c), *supra* note 50, at 244-50, for an explanation of the document's history and intent.

[73] U.N. High Commissioner for Human Rights, *Report of the U. N. High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation under Int'l Human Rights Instruments*, Human Rights Council, U.N. Doc. A/HRC/6/3 (Aug. 16, 2007) (by Louise Arbor).

[74] Human Rights Council Res. 7/22, Human Rights and Access to Safe Drinking Water and Sanitation, 7th Sess., Mar. 3-28, 2008, U.N. GAOR, 63d Sess., Supp. No. 53, A/63/53, at 136 (Mar. 28, 2008). The work of the Independent Expert, Catarina d'Albuquerque, is ongoing. See Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development,* Human Rights Council, U.N. Doc. A/HRC/10/6 (Feb. 25, 2009) (by Catarina de Albuquerque), for a preliminary report of her progress along with a summary of her mandate.

ment began what is informally referred to as the "Geneva Process," an ongoing collaboration between the Independent Expert and the HRC (in Geneva) to determine the legal status of the rights to water and sanitation. Recent months have seen an abundance of international support for a human right to water from both within and outside the Geneva Process.

In July of 2010, the General Assembly passed a resolution formally recognizing a human right to water and sanitation.[75] Resolution 64/292, which passed without dissent, cites many of the treaties and declarations noted above, as well as the standards developed by the CESCR in General Comment 15.[76] This resolution, which does not clearly define the scope or content of the right, was argued by some to be a dangerous distraction from the Geneva Process, by threatening to preempt its findings with an assertion of rights not based in international law. Others viewed the resolution as a helpful addition to the Geneva Process despite its vague language.[77] The Independent Expert herself described 64/292 as a "breakthrough."[78]

The following September, the HRC reasserted its control of the water rights agenda by adopting its own resolution on the right to water and sanitation.[79] Recognizing the General Assembly resolution of July 28, the HRC document establishes a more comprehensive legal basis for the right, exhaustively defining its major sources in international law.[80] Resolution 55/L.14 concludes that "[t]he Human Right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity."[81] The HRC resolution marks the first time that the Council has declared itself formally on the issue of a right to water.

At the national level water rights are protected by 17 constitutions, the most recent of which (Congo) explicitly recognizes "the right of access to water" as

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[75] The Human Right to Water and Sanitation, G.A. Res. 64/L.63, U.N. Doc. A/64/L.63/Rev.1 (July 28, 2010) [hereinafter The Human Right to Water and Sanitation].

[76] *Id.* ¶ 8.

[77] Many of the forty-one states abstaining from the vote—including the U.S., U.K. and Turkey—justified their choice as in deference to the Geneva Process. The U.S. went so far as to say that the Resolution described a right to water and sanitation believed not to exist in international law. Others, including Germany, believed the vote to be a part of the Geneva Process despite any imperfection or vagueness in its language. *See* Press Release, General Assembly, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as a Human Right, by Recorded Vote of 122 in Favor, None Against, 41 Abstentions; Delegates also Confirm Nominee to Head Office of Internal Oversight Services, Elect Belarus to UNEP Governing Council, U.N. Press Release GA/10967 (July 28, 2010) [hereinafter Press Release].

[78] *See* Office of the High Commissioner for Human Rights, *UN Expert Welcomes Recognition as a Human Right of Access to Safe and Clean Drinking Water and Sanitation,* (July 30, 2010), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10240&LangID=E.

[79] Human Rights Council, *Human Rights and Access to Safe Drinking Water and Sanitation*, U.N. Doc. A/HRC/15/L.14 (Sept. 24, 2010), *available at* http://daccess-ods.un.org/TMP/936430.171132088.html.

[80] *Id.* ¶ 2.

[81] *Id.* ¶ 3 (establishing a hierarchy of legal sources for the right to water that will be investigated more thoroughly below).

"guaranteed."[82] The right to water has also enjoyed recent recognition in the work of regional, inter-governmental organizations including the Council of Europe[83] and African Union,[84] statements by national executives supporting international recognition of water rights,[85] and the official policies of diverse non-state actors.[86]

This increasing acknowledgement of an international human right to water means that even before the adoption of the 2010 General Assembly resolution, every member-state of the U.N. had acknowledged the right to water at least once—whether by national legislation, independent declaration, treaty signature or membership in a supportive international organization.[87] This would seem to evince a developing law of international custom.[88] In 2004, the International Law Association revised its Helsinki Rules on International Water Resources by publishing the Berlin Rules. The document is meant to "express rules of law as they presently stands [sic] and, to a small extent, rules not yet binding legal obligations but which, in the judgment of the Association, are emerging as rules of customary international law."[89] Section 17 of that document is devoted to "the Right of Access to Water." Custom, however, remains insufficiently developed

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[82] Const. of Dem. Rep. Congo (2006), art. 48, cl. 18 ('Le droit à un logement décent, le droit d'accès à l'eau potable et à l'énergie électrique sont garantis.').

[83] *See, e.g.,* Council of Europe, *PACE President Calls for Access to Water to be Recognized as a Basic Human Right* (March 22, 2009), http://assembly.coe.int/ASP/Press/StopPressView.asp?ID=2146.

[84] *See, e.g.,* Organization of African Unity, African Charter on the Rights and Welfare of the Child art. 14(2)(c), July 11, 1990, OAU Doc. CAB/LEG/24.9/49. The right to water has also found some support in the judicial work of the African Commission. In its 45th Ordinary Session of 2009, the Commission protected access to safe and potable water with explicit reference to the standards of availability, accessibility, acceptability and quality set by the CESCR in General Comment 14 on the Right to Health. This recent decision also linked water rights to Articles 4 and 22 of the Charter. *See* Centre on Housing Rights and Evictions v. Sudan, African Commission on Human & Peoples' Rights Comm. No. 296-05 (July 29, 2010) [hereinafter COHRE v. Sudan]; Free Legal Assistance Group v. Zaire, Afr. Commission Hum. & Peoples' Rights, Comm. No. 25/89, 47/90, 56/91 & 100/93 (Oct., 1995); *see generally* CESCR, General Comment 14: The Right to the Highest Attainable Standard of Heath, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En.

[85] *See* International Water and Sanitation Centre, *Peru: Congress Approves Water Law,* (Apr. 3, 2009), http://www.irc.nl/page/47652 (noting Peru's passage of a new law in 2010 recognizing the right to water as a human right and ensuring that resources cannot be bought and used as private property); New Tang Dynasty Television Online, *Bolivia Pushes for a Universal Water Right* (Mar. 23, 2010), http://english.ntdtv.com/ntdtv_en/ns_sa/2010-03-23/306265251214.html (covering Bolivia's similar declarations this year recognizing the right); German Information Centre New Delhi, *Germany for Clean Drinking Water as a Basic Human Right,* (Mar. 23, 2010), http://german-info.com/press_shownews.php?pid=2374 (noting Germany's similar declaration).

[86] *See, e.g.,* Intel Corporation, *Intel Water Policy* (Mar. 2010), http://www.intel.com/Assets/PDF/Policy/Intel_Water_Policy.pdf (adopting the definition promulgated by the UN System: "people's right to safe, sufficient, acceptable, physically accessible and affordable water for personal and domestic use"). Generally, however, private interests have expressed concern for the codification of water rights, worried that they will restrict privatization and sometimes, the achievement of the full provision of clean water. *See, e.g.,* Global Water Intelligence, *Another Bad Idea Which We Need to Act On* (Mar. 18, 2010), http://www.globalwaterintel.com/insight/another-bad-idea-which-we-need-act.html.

[87] COHRE, *supra* note 48, at 2-3.

[88] *See* Statute of the International Court of Justice, *supra* note 39, art. 38 (showing that international custom is generally considered one of the principle sources of binding international law).

[89] International Law Association, Berlin Rules on Water Resources 4 (2004), *available at* http://www.cawater-info.net/library/eng/l/berlin_rules.pdf [hereinafter Berlin Rules].

to independently protect a human right to water for two reasons. First, the definition of the right developed at the international level, though greatly clarified by General Comment 15, still relies heavily on the "content-giving" function of national courts and legislation due to its novelty.[90] As if noting this, Chapter IV of the Berlin Rules outlines basic principles for a human right to water but avoids outlining the right's content in detail.[91] Secondly, the idea of a human right to water has triggered the outspoken refusal of some states to accept that right's enshrinement into binding law, a reality that may hinder the development of legal custom. Canada has declared that it does not believe such a right to exist in any way.[92]

B. Defining the Legal Source of a Right to Water

Although the international community has acknowledged the existence of a human right to water, the documentation outlined above does not effectively define the *legal content* of such a right. Initial efforts to do so, like those of Peter Gleick, began by considering the *obligations* related to water rights.[93] These somewhat unsophisticated endeavors aimed at answering questions about the scope of such a right, including how much water it would require and for what purposes. Attempts at "rights construction" have become increasingly elaborate over the last twenty years. The first of these were grounded in civil and political rights arguments in support of the right to life. More recent attempts, like those of Kiefer and Brölmann[94] or Irujo,[95] support the existence of an independent right to water as a derivative of states' *socio-economic* rights obligations. It is from this construction that we find the true legal shape of the right to water.

The UDHR, authored in 1948, guarantees everyone "the right to life, liberty and security of the person."[96] Water is not explicitly enshrined in the Declaration, though Article 25 notes that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including

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[90] *See* discussion *infra* Part IV, V (discussing an investigation of this role).

[91] Berlin Rules, *supra* note 90, at 23-24.

[92] THE COUNCIL OF CANADIANS, A National Disgrace, Canada's Shameful Position on the Right to Water, http://www.canadians.org/water/documents/WWD/2009/WWDFS-0309-RTW.pdf (last visited Mar. 25, 2008). Canada's position as a potential "persistent objector" is believed to stem from a perceived conflict between water rights and NAFTA. Depending on the global prevalence of such a position, the development of custom may be hindered. *Id.* ("In 2002 and 2003, Canada was the only country to vote against United Nations (UN) resolutions on the human right to water, stating, 'Canada does not accept that there is a right to drinking water and sanitation.'"). Canada's official position may be softening, however, as evidenced by their vote of abstention regarding the 2010 General Assembly resolution on the right to water and sanitation. The Human Right to Water and Sanitation, *supra* note 76. Canada's representative insisted on that occasion that no international consensus had been reached on the issue. Statement of the Representative of Canada to the U.N. General Assembly (July 28, 2010), *reprinted in* Press Release, *supra* note 78.

[93] *See generally* Right to Water, *supra* note 42, at 487.

[94] Kiefer & Brölmann, *supra* note 7.

[95] *See* Antonio E. Irujo, *The Right to Water*, 23 INT'L J. WATER RES. DEV. 267, 281 (2007).

[96] UDHR, *supra* note 45, art. 3.

food, clothing, housing and medical care and necessary social services."[97] The non-binding rights enshrined in the UDHR were split into two covenants, one protecting civil and political rights (ICCPR) and the other, socio-economic and cultural rights (ICESCR).[98] Common article 1(2) of both Covenants states that, "in no case may a people be deprived of its own means of subsistence." Such a "means of subsistence" has been held to necessarily include water.[99] The human right to water, then, can be "construed" from either of these documents to different conceptual ends, and arguments have been made for both interpretations. The origin asserted for water rights can have a large impact in national courtrooms, where rights protection may depend on treaty ratification.[100] Hence, it is important to distinguish the way in which the right to water is properly derived.

If one derives a universal human right to water from the ICCPR, water is asserted as a fundamental element of the right to life,[101] requiring mainly that states do not interfere in its enjoyment—a negative obligation.[102] Some have argued for this construction because the ICCPR permits no derogation and is immediately enforceable, and because the right to life may in some circumstances be considered a *jus cogens* norm.[103] In fact, certain authors have gone so far as to suggest that all socio-economic rights litigation in certain legal systems should be "reframed" as civil-political claims.[104] As Kiefer and Brölmann assert,

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[97] *Id.* art. 25.

[98] *See, e.g.*, President Franklin D. Roosevelt, Annual State of the Union Address to Congress (Jan. 6, 1941), *available at* http://americanrhetoric.com/speeches/fdrthefourfreedoms.htm (asserting four basic human freedoms—speech/expression, religion, freedom from want, freedom from fear—of which social and economic concerns form only a secondary part. The distinction was largely one caused by Cold War politics. The rights in the UDHR were considered to have no value relative to each other, yet many Western politicians, notably U.S. President Roosevelt, subordinated social and economic concerns to civil and political rights).

[99] Kiefer & Brölmann, *supra* note 7, at 185 ("[I]t is clear that access to adequate qualitative and quantitative water supplies is a fundamental precondition for the full realization [sic] of several of the rights explicitly guaranteed under the ICCPR and the ICESCR.").

[100] At the international level, such as in the inter-American system, rights origin is less important than the "lawyering" of those litigating the cases. *See* Melish, *supra* note 35, at 177.

[101] International Covenant on Civil and Political Rights, art. 6, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[102] Susan Moller Okin, *Liberty and Welfare: Some Issues in Human Rights Theory, in* NOMOS XXIII: HUMAN RIGHTS 230, 237 (J. Roland Pennock & John W. Chapman eds., 1981). The right to life is held by many also to include positive obligations. Whether or not one believes the principally "negative" right to life also includes positive obligations, the essence of ICCPR art. 6 seems to undoubtedly consist in the protection of the *right* to life itself, not the protection or creation of the circumstances in which life can be guaranteed. This second task is more akin to the work of socio-economic rights. *See* J.E.S. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 37 (1987) (insisting in the case of the right to life in the European Charter that, "it is not life, but the right to life, which is to be protected by law").

[103] Keifer & Brölmann, *supra* note 7, at 186.

[104] *See, e.g.*, James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217, 223 (2005). *See* Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, Health?* 98 AM. J. INT'L L. 462, 467 (2004) for a similar argument for the U.N. system; *see also* Melish, *supra* note 35.

"such a right would give rise to a very forceful set of immediate state obligations."[105]

The Human Rights Committee (CCPR) recently embraced a similar approach in its Concluding Observations to Israel's Third Periodic Report in 2010.[106] For the first time in history the CCPR held the denial of water to be a violation of the rights to life and equal protection under the law.[107] It is important, however, to fully understand the Committee's reasoning. The Observations do not indicate the legal basis for an independent right to water derived from the ICCPR, but only clarify the scope of other, well-established civil/political rights. In its four references to Israeli failures regarding water access, the CCPR refers only to situations in which access was *degraded* (e.g. through the destruction of existing infrastructure) or *hindered* (e.g. through restriction of the movement of goods and people essential to water provision or infrastructural improvement). As such, the Committee's reasoning ensures that any water-related obligation based on the right to life remains principally a "negative" obligation. It is doubtful whether the Committee will ever assert "positive" obligations, noting its previous treatment of such issues.[108] If the CCPR were to construe the right to life at the level of international law as *requiring the provision* of life-sustaining elements such as water,[109] such a conceptual stretch might weaken the integrity of ICCPR Article

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[105] Kiefer & Brölmann, *supra* note 7, at 187.

[106] Human Rights Committee, *Third Periodic Report of States Parties due in 2007 – Israel*, U.N. Doc., CCPR/C/ISR/3 (Nov. 21, 2008), *available at* http://unispal.un.org/UNISPAL.NSF/0/CF890DF7A2692B09852576A80056B757. The Human Rights Committee is the body charged with ICCPR enforcement. *See* ICCPR, *supra* note 101, art. 28, 41.

[107] The work of concluding observations requires subtle interpretation. A "recommendation" is made with explicit reference to an ICCPR article through parenthetical citation at the conclusion of the observation paragraph. Although the Committee never condemns Israel for contravening the law, the subsequent recommendation for action implies that the law pursuant to the articles referenced is not being adequately observed. In its observations related to water access, the Committee cites Articles 6 (Right to Life) and 26 (Right to Equal Protection) of the ICCPR repeatedly. *See* Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant (Israel), Concluding Observations of the Human Rights Committee*, ¶¶ 8, 17, 18, 24, U.N. Doc. CCPR/C/ISR/CO/3 (Sept. 3, 2010), *available at* http://unispal.un.org/UNISPAL.NSF/0/51410EBD25FCE78F85257770007194A8. A better understanding of the legal questions at hand can be found by reading the "List of Issues." *See* Human Rights Committee, *List of Issues to be Taken Up in Connection with the Consideration of the Third Periodic Report of Israel*, U.N. Doc. CCPR/C/ISR/Q/3 (Nov. 17, 2009), *available at* http://unispal.un.org/UNISPAL.NSF/0/92763C3E39D14024852576AA0053853C.

[108] Some of the Committee's General Comments, specifically No. 6, would seem to make it difficult to find a definitive violation of water rights if one were argued before the body. This is because although the Committee has viewed the right to life as "require[ing] that states adopt positive measures," it qualifies such an understanding with the statement, "in this connection, it would be *desirable* for states parties to take all possible measures to reduce infant mortality. . ." Human Rights Committee, General Comment No. 6: The Right to Life, July 12-30, 1982, U.N. GAOR, 37th Sess., Supp. No. 40, A/37/40, ¶ 5 (July 30, 1982), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, at 6 (July 27, 1994) (emphasis added), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/84ab9690ccd81fc7c12563ed0046fae3. "Desirability" is an obviously weaker standard of treaty enforcement than "requirement." See Kiefer & Brölmann, *supra* note 7, at 188-89, for an explanation of differing academic views on the positive or negative nature of the right to life as well as the import of the Committee's General Comment 6.

[109] The use of the phrase "in international law" is meant to distinguish this activity from the work of some national courts protecting water rights as a derivative of the right to life due to jurisdictional restriction. *See* Discussion *infra* Part IV.D.2.

6(1) and in turn, its domestic justiciability.[110] Such a risk is incompatible with the work of legal construction for a human right to water, as the international norm relies to a great extent on the character of its national use—the process explored in Part IV.

Today, water rights are more appropriately construed as necessary for the enjoyment of the "welfare" rights within the ICESCR. These rights are generally viewed as requiring both positive and negative state action for their full realization.[111] Previously, most scholars doubted their justiciability, as the ICESCR did not explicitly require judicial remedy.[112] Recent case law, however, has proven that state obligations for the respect, protection and fulfillment of socio-economic rights *are* judicially enforceable.[113] In fact, arguing that socio-economic rights are unenforceable may have been one of the greatest misconceptions in modern human rights advocacy.[114]

The socio-economic right to water is primarily derived from ICESCR Article 11(1)—"the central legal basis for the right"—but is linked to the fulfillment of other enumerated rights in 11(2)[115] and 12(1)[116] of the ICESCR.[117] Article 11(1) reads,

> [t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.[118]

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[110] *See* Kiefer & Brölmann, *supra* note 7, at 189 (arguing that "overtly positive interpretations of the right to life . . . carry the risk of blurring or over-stretching [its] normative content.").

[111] *See* Okin, *supra* note 102, at 237.

[112] The ICESCR does not provide for judicial remedy, noting only that legal methods are one appropriate means of implementation. *See* ICESCR, *supra* note 37, art. 2, ¶ 1. In General Comment 9, however, the ICESCR notes that Covenant rights are justiciable, and that states failing to offer judicial protection should justify why they haven't done so. *See* CESCR, General Comment No. 9: The Domestic Application of the Covenant, ¶ 8, U.N. Doc. E/C.12/1998/24 (Dec. 3, 1998), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/4ceb75c5492497d9802566d500516036?Opendocument.

[113] The justiciability of socio-economic rights is generally acknowledged. *See* COHRE(c), *supra* note 50, at 277; Melish, *supra* note 35, at 173; Winker, *supra* note 36, at 15.

[114] *See* Chisanga Pute-Chekwe & Nora Flood, *From Division to Integration: Economic, Social and Cultural Rights as Basic Human Rights, in* GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 39, 39 (Isfahan Merali & Valerie Oosterveld eds., 2001); Melish, *supra* note 35, at 207; *see also* Kiefer & Brölmann, *supra* note 7, at 191 (arguing that "[t]his dichotomy . . . is widely considered an unduly narrow understanding of the nature of these rights and corresponding state obligations.")

[115] ICESCR, *supra* note 37, art. 11, ¶ 2 ("The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed . . .").

[116] *Id.* art. 12, ¶ 1 ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.").

[117] *See* COHRE(c), *supra* note 50, at 7; *see also* Kiefer & Brölman, *supra* note 7, at 195 ("[A] traditional exercise in international legal construction [demonstrates] . . . that a human right to water is implied under articles 11(1) and 12(1) ICESCR.").

[118] ICESCR, *supra* note 37, art. 11, ¶ 1.

Water's omission from the list of elements essential for the "adequate standard of living" protected by Article 11(1) may stem from the way the preparatory committee formulated UDHR Article 25, from which the language is borrowed. Human rights historian Johannes Morsink insists that each right is really a layer of protection organized around a core phrase, which for Article 25 was the right to "security in the event of unemployment or sickness . . . or other lack of livelihood in circumstances beyond his control."[119] The "adequate standard of living" language was tacked onto the front of this core provision by several Latin American countries and protected from deletion by China. Social security was the focus of Article 25, not a delimitation of all the elements essential to life. For this reason water was presumably implied by the word "including."

The most powerful legal source to date for an understanding of an independent human right to water derived from the ICESCR is General Comment 15 (2003) of the CESCR. The purpose of a General Comment is "to make the experience gained . . . through the examination of those [treaty monitoring] reports available for the benefit of all States parties in order to assist and promote their further implementation of the Covenant."[120] The CESCR began drafting General Comments in its third session, after being invited to do so by the Economic and Social Council (ECOSOC) in 1988. Thereafter, that invitation was endorsed by the General Assembly.[121] ECOSOC confirmed its support in 1990, urging the CESCR to "continue using that mechanism to develop the fuller appreciation of the obligations of State Parties under the Covenant."[122]

General Comments are non-binding, and therefore, must find support for all of their conclusions within the accepted definition of each right to which they pertain. They may not create new entitlements and obligations. This restriction of the Committee's mandate, coupled with its expertise and the representation of member states, gives its Comments "considerable [legal] weight" as authoritative interpretations of the ICESCR.[123] General Comment 15(a) defines the normative content of the right to water, (b) establishes core obligations incumbent on states, (c) notes "special topics" to consider in Covenant application, and (d) establishes guidelines for state action in the realm of national water management policy. The definition for the right to water found within the Comment is explored below, as supported and further clarified by other legal sources like the Sub-Commission Report.[124]

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119 JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT, 191-92 (1999).

120 *See* CESCR, Introduction: The Purpose of General Comments, 3d Sess., Feb. 6-24, 1989, U.N. ESCOR, 1989, Supp. No. 4, E/1989/22-E/C.12/1989/5, at 87 (Feb. 24, 1989), *available at* http://www1.umn.edu/humanrts/gencomm/epintro.htm [hereinafter Purpose of General Comments].

121 See *id.* at 87, for an explanation of this historical process.

122 E.S.C. Res. 1990/45, ¶ 10, U.N. Doc. E/1990/70/Add.1 (May 3, 1990), *available at* http://www.apav.pt/portal/pdf/ResUN_ECOSOC_1990_22.pdf.

123 COHRE(c), *supra* note 50, at 6.

124 Promotion of the Realization of the Right to Drinking Water and Sanitation, *supra* note 72, at 39.

C. The Normative Content of the Right to Water and Responsibilities Related Thereto

The right to water entitles each person to sufficient, safe, acceptable, accessible and affordable water for personal and domestic use. This use includes the prevention of death from dehydration, the avoidance of disease, and water for personal consumption, food preparation, washing and hygiene. The elements of such a right "must be *adequate* for human dignity, life and health"—which means that the full scope of the right is broader than mere survival interests.[125] The normative content of the right when formulated in this way includes both freedoms and entitlements.

> The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.[126]

Each element of the right to water requires basic definition.[127] Availability refers to "sufficient and regular" quantities for personal use, as based in those guidelines for human health developed by the World Health Organization, but tailored to local contexts.[128] In quality, water should be free of contamination, and not negatively impact human health. Quality water is also "acceptable" in color, smell and taste, encouraging people to use safe sources.[129] Water's accessibility is the most complex of the right's elements. Accessible water is available to all individuals physically, economically, and on a non-discriminatory basis (a basic human rights tenet). Physical accessibility implies an ability to collect water without an unreasonably long wait, and proximity to every household, public institution and workplace. These requirements are also tailored to local contexts.[130] Economic accessibility is sometimes re-termed "affordability." Affordable water should not compromise the individual's ability to procure other

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[125] GC15, *supra* note 33, ¶ 11. The approach to fulfilling the right's full scope (as supporting human dignity) should be distinguished from the approach taken towards its minimum core (to ensure survival). See Discussion *infra* Part III.B, for a discussion regarding this distinction.

[126] GC15, *supra* note 33, ¶ 10.

[127] The standards of accessibility, affordability, acceptability and quality were originally developed by the CESCR in the context of access to health care. *See generally* GC15, *supra* note 33, ¶ 12.

[128] GC15, *supra* note 33, ¶ 12 explicitly references Guy Howard and Jamie Bertram's 2003 WHO report on water and health. GUY HOWARD & JAMIE BERTRAM, WHO, DOMESTIC WATER QUANTITY, SERVICE LEVEL AND HEALTH, (WHO Press 2003), *available at* http://www.who.int/water_sanitation_health/diseases/WSH03.02.pdf.

[129] GC15, *supra* note 33, ¶ 12(b). The Independent Expert's explanation, though too broad to be suitable for the *legal* definition, is helpful in clarifying requirement concepts, including the oft-confusing purpose of "acceptability." *See generally* Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *Questionnaire: 'Good Practices' related to Access to Safe Drinking Water and Sanitation* (Feb. 2010), *available at* http://www2.ohchr.org/english/issues/water/Iexpert/index.htm (follow "The Good Practices Questionnaire – English" hyperlink).

[130] GC15, *supra* note 33, ¶ 12(c)i-12(c)iii.

necessities (e.g. food, housing). For some of the poor, affordability may entail free provision.[131] Finally, as water rights are often asserted in a sustainable development paradigm, it should be noted that they are *usufructory* rights—limited to uses that do not waste, destroy or fully exploit available resources.[132]

The state obligations stemming from a right to water are often broken into three duties: to *respect, protect* and *fulfill.*[133] Respect for water rights requires that states refrain from interfering with the enjoyment of the right.[134] Individuals must also be protected from third party exploitation (for instance, from resource pollution by corporations).[135] Finally, states must expeditiously fulfill water rights by maintaining respect and protection while simultaneously promoting the full realization of the right through targeted efforts aimed at assisting individuals incapable of realizing the right themselves.[136] These efforts must involve stakeholder participation. States also have international obligations related to each of these three duties that they must subsume into their external relations.[137] Finally, a right to water requires that states coordinate internal efforts, clearly designate responsibilities, and when violations surface, provide effective remedy both nationally and internationally.[138] National institutions should be responsive to human need and accountable to stakeholders.

General principles of law, the fourth interpretative source from which "legal construction" must draw, have a large part to play in both the normative content and obligations related to water rights. The first, non-discrimination,[139] is both an element of "accessibility" and an "immediate and cross-cutting obligation"

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131 *Id.* ¶ 27.

132 *See* Berlin Rules, *supra* note 90, at 15. Etymologically, the word "usufructory" comes from the combination of the Latin *usus* (use) and *fructus* (enjoyment), deliberately omitting the third principle of absolute ownership, *abusus* (abuse).

133 The tripartite concept of state obligations comes from Eide (former Special Rapporteur on Food) and is based on earlier ideas by Shue. *See* HENRY SHUE, BASIC RIGHTS, SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY, 18-55 (Princeton University Press) (1981). See Special Rapporteur on the Enjoyment of Economic, Social and Cultural Rights and the Right to Adequate Food, *The Right to Adequate Food as a Human Right,* U.N. Sub-Commission on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/1987/23, ¶¶ 107–117, 169–181 (Jul. 7, 1987) for Eide's first employment of the tripartite typology.

134 GC15, *supra* note 33, ¶ 21. This obligation is most like those "negative" obligations associated with civil/political rights.

135 *Id.* ¶ 23.

136 *Id.* ¶¶ 25-26, 29.

137 *Id.* ¶¶ 30-36. See Special Rapporteur on the Right to Food, *Sixth Report on the Right to Food,* Commission on Human Rights, U.N. Doc. E/CN.4/2006/44, ¶¶ 28-38 (Mar. 16, 2006) (by Jan Ziegler) for a good explanation of extra-territorial obligations related to socio-economic rights.

138 GC15, *supra* note 33, ¶¶ 25-29.

139 Article 1 of the U.N. Charter and the UDHR form the basis of the principle of non-discrimination in international law. *See* U.N. Charter art. 1, para. 3, *and* UDHR, *supra* note 45, art. 2. Likewise, the ICESCR obliges states parties "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." This obligation has been reasserted throughout the Covenant. *See* ICESCR, *supra* note 37, art. 2, ¶ 2.

incumbent on states.[140] The second, effective remedy, has two components.[141] States are obligated to amend their domestic legal order as necessary to give effect to their treaty obligations.[142] Such action should guarantee "everyone the right to an effective remedy by the competent national tribunals for acts violating. . . fundamental rights."[143] The third general principle is legal equality, which defines the parameters under which an effective remedy is properly enjoyed. Equality includes a dual guarantee of equal and effective protection before and under the law.[144] It is important to assert each of these elements as general principles of international law, because although each is acknowledged by the ICESCR in some way, their most complete legal forms are found outside of that document.

As admitted by the CESCR in General Comment 9 (domestic implementation), "[t]he Covenant does not stipulate the specific means by which it is to be implemented into the national legal order,"[145] and "[t]he right to an effective remedy need not be interpreted as always requiring a judicial remedy."[146] A human right to water as derived from an ICESCR obligation, then, does not necessarily include a right to defend one's entitlement in court. Nevertheless, the failure of a state to guarantee the right to water through judicial remedy would have to be justified by an argument that such legal redress would be "inappropriate" or "unnecessary"—an especially difficult task when one acknowledges that most non-judicial remedies would be rendered ineffective without legal rein-

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[140] The CESCR considered the nature of non-discrimination in General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights. *See* CESCR, General Comment No. 20, ¶ 7, U.N. Doc. E/C.12/GC/20 (June 10, 2009), *available at* www2.ohchr.org/english/bodies/cescr/docs/gc/E.C.12.GC.20.doc [hereinafter GC20].

[141] Though both components exist as independent principles of international law, they are joined here to demonstrate their complementary functions. Both are used by the CESCR as principles conditioning the proper domestic application of the ICESCR. *See* CESCR, General Comment No. 9: The Domestic Application of the Covenant, ¶ 3, U.N. Doc. E/C.12/1998/24 (Dec. 3, 1998), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4ceb75c5492497d9802566d500516036? Opendocument [hereinafter GC9].

[142] This obligation is implied from the language of the Vienna Convention on the Law of Treaties specifying that "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331.

[143] UHDR, *supra* note 45, art 8. Many, if not all of the provisions of the UDHR are increasingly considered to form binding rules of customary law. This provision is not, however, presented here as a customary rule, but rather as an embodiment of a standing principle of law.

[144] The dual nature of legal equality comes from the ICCPR, which does not explicitly restrict the rule to the application of civil and political rights only. ICCPR, *supra* note 101, art. 26. This standard was not reiterated in the ICESCR, which only acknowledges "the equal and inalienable rights of all." ICESCR, *supra* note 37, pmbl. The ICCPR standard has been asserted by the CCPR, however, to "constitute a basic and general principle relating to the protection of human rights" and therefore applies equally to the protection of socio-economic rights. *See* Human Rights Committee, General Comment No. 18: Non-Discrimination, 37th Sess., Oct. 23 – Nov. 10, 1989, U.N. GAOR, 45th Sess., Supp. No. 40, A/45/40, at 173 (Nov. 9, 1989), *available at* http://www.unhcr.org/refworld/type,GENERAL,,,453883fa8,0.html.

[145] GC9, *supra* note 112, ¶ 5.

[146] *Id.* ¶ 9.

forcement.[147] In most cases, then, state obligations vis-à-vis water rights include an obligation to ensure at least some justiciability.[148]

D. Progressive Realization

Implementation of the right to water follows the same model of "progressive realization" that characterizes other socio-economic rights. It is perhaps this notion, and not the definition of the right itself, that makes its international enforcement so difficult. Generally, states are obligated under the Vienna Convention on the Law of Treaties to move as expeditiously and effectively as possible toward the full observance of treaty obligations, including the realization of human rights.[149] This general duty is qualified, however, by a resource "loophole" directly enshrined in Article 2(1) ICESCR.

> [A state must] take steps . . . *to the maximum of its available resources*, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[150]

Unlike the ICCPR, which obliges a state to immediately "respect and to ensure to all individuals within its territory and subject to its jurisdiction" the rights it enshrines, the ICESCR only requires that a state "take steps" to provide for rights-protection as best it can in the prevailing circumstances. This duty to progressively realize *should* require states to respect, protect and fulfill water rights "to the highest degree possible at any given moment," including the avoidance of any deliberately retrogressive measures.[151] Such an idea acknowledges the enormous time and resources that socio-economic rights implementation requires. The judgment of what constitutes "expeditious" action in the face of so many related but separate obligations, however, permits states a degree of freedom in their implementation of socio-economic rights that is often problematic. This is because the standards by which this action can be judged are so subjective that they often allow Convention protections to be effectively nullified.[152] This room for error is further complicated by restrictions on the authority of the implementing body, the CESCR.[153] Even when able to respond to an ostensible violation, the large amount of data required—including the ability to statistically analyze

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147 *Id.* ¶ 3.

148 It is clear from the work of CESCR General Comment Nos. 3, 9 and 15 that not all elements of the right to water would be subject immediate implementation and therefore immediately justiciable. *See* GC3 *supra* note 34, ¶ 14; GC9, *supra* note 141, ¶ 10; GC15, *supra* note 33, ¶ 6. This is the principle reason for the simultaneous explanation of the "minimum core" concept. *See* discussion *infra* Part III.

149 Vienna Convention, *supra* note 142, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

150 ICESCR, *supra* note 37, art. 2, ¶ 1 (emphasis added).

151 Gorsboth, *supra* note 23, at 7 (emphasis added).

152 Audrey Chapman & Sage Russell, *Introduction, in* CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 1, 5 (2002) (arguing that this subjectivity often opens a "loophole large enough . . . to nullify the Covenant's guarantees").

153 The CESCR may only "recommend" measures after the periodic review of state submissions.

it—makes the job of the CESCR "unrealistic and virtually impossible" in many places.[154]

Progressive realization, in its confusing content and common misappropriation as an excuse for insincere development efforts, has been called "[t]he single most complex and misunderstood dimension of economic and social rights."[155] This confusion has prompted the growth of an intellectual norm recognizing obligations of an immediate nature. The first half of this idea addresses states' actions themselves. In General Comment 3, the CESCR held that states must take steps toward the full-realization of rights. These steps must be as *deliberate*, *concrete* and *targeted* as possible toward the fulfillment of the Covenant's obligations.[156] The Committee then developed a correlating idea of each right's "core content" and the absolute minimum obligations relating to that core. When taken together, these two ideas should help states judge what actions are immediately required and what actions—though still required—may be temporarily deferred toward the progressive implementation of the right's full scope. The concept of a minimum core has been hailed by many for its ability to act as a benchmark for state compliance, because it can more clearly establish when states have breached their obligations prima facie. It is to this construct that we now turn.

III. Understanding the "Minimum Core" for Water

A. The Minimum Core Concept Generally

The idea of "core content" for socio-economic rights was first formulated outside of the U.N. system, but has since gained widespread support from human right practitioners and academics, culminating in its adoption by the CESCR.[157] Essentially, it posits that there are degrees of rights fulfillment, and that one of these degrees is a definable, basic threshold—or for our purposes, a minimum

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[154] Chapman & Russell, *supra* note 152, at 5.

[155] Craig Scott & Philipp Alston, *Adjudicating Constitutional Priorities in a Transnational Context, a Comment on Soobramoney's Legacy and Grootbloom's Promise*, 16 S. AFR. J. HUM. RTS. 206, 262 (2000).

[156] GC3, *supra* note 34, ¶ 2. Water-related obligations are implicitly included after their clarification in GC15. *See* GC15, *supra* note 33, ¶¶ 17-38.

[157] Philip Alston is sometimes credited with the development of the "core content" concept described and developed in this Section. *See* Philip Alston, *Out of the Abyss: the Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332, 333 (1987). By the early 2000s, the concept had achieved widespread support in both the Academy and the United Nations system. *See, e.g.*, Kiefer & Brölmann, *supra* note 7, at 194 nn.67-69. As evidence of international acceptance, Kiefer and Brölmann cite (among others) B.C.A. Toebes, *Towards an Improved Understanding of the International Human Right to Health*, 21 HUM. RTS. Q. 661, 671 (1999); *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691, 693 (1998); U.N. Commission on Hum. Rights., Note Verbale Dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles"), ¶ 25, U.N. Doc. E/CN.4/1987/17 (Jan. 8, 1987), *reprinted in* 9 HUM. RTS. Q. 122 (1987); *see also* Chapman & Russell, *supra* note 152, at 8 (noting that the concepts of "core minimum content" and "core minimum obligations" have become prevalent in academic literature since the 1980s and together form a "key concept" at the heart of their book).

legal content—for socio-economic rights.[158] The concept may have its origins in German Basic Law, where a right's "basic content" is protected from legal limitation.[159] Its most modern manifestation comes with General Comment 3, however, in which the CESCR attempts to clarify the nature of progressive realization as establishing concrete state obligations.

> [T]he phrase ["progressive realization"] must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.[160]

To clarify such obligations, the Committee introduces the two-part concept of a right's minimum core, first by distinguishing the immediate effect of the right from its full scope, and then by defining the nature of those steps that must be taken in the fulfillment of the right's immediate effect. The Committee begins,

> [the obligation] in article 2(1) to take steps'. . . is not qualified nor limited by other considerations. . . Thus while the full realization of the relevant rights may be achieved progressively, steps toward that goal must be taken within a reasonably short time after the Covenants entry into force. . . Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.[161]

This first clause outlines those immediate obligations incumbent on states as they begin efforts toward progressive realization. The language thus opens conceptual space for innovation by distinguishing between the "immediate effect" of the right and the realization of the right's full scope.[162] The Committee fills that new space by insisting that

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158 This essay considers the minimum core as more than simply a normative element or definitional aid for socioeconomic rights, but rather as a *legal standard* that binds states. Despite the fact that transnational, *non-judicial* actors have had the largest role in defining the concept's content, the concept relies on law for both its basis and effect. Like any institution attributable to international law, the practical enforceability of such a legal standard remains largely a question of context. Non-justiciability, however, does not signal a concept's legal non-existence. *See* Katharine G. Young, *The Minimum Core of Economic and Social Rights, A Concept in Search of Content,* 33 YALE J. INT'L L. 113, 113, 123, 125 (2008) (referring to the minimum core alternatively as "minimum legal content," "minimum legal threshold" and "minimum legal standard").

159 Young cites Grundgesetz für die Bundesrepublik Deutschland [Constitution] May 23, 1949, art. 19(2) (Ger.). Young, *supra* note 158, at 124 (stating that "[i]n no case may the essential content of a basic right be encroached upon").

160 GC3, *supra* note 34, ¶ 9.

161 *Id.* ¶ 2.

162 The only immediate obligation not subject to progressive implementation noted by the ICESCR is non-discrimination. ICESR, *supra* note 37, art. 2, ¶¶ 2-3. The broad language of General Comment 3, however, seems to define other immediate obligations while justifying itself as an authoritative interpretation of the Covenant. This is what is meant by "opening conceptual space."

> [A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party.[163]

The Comment does not exhaustively define the content of this "minimum essential level" for any of the socio-economic rights to which it pertains. This work is left to subsequent Comments on each individual right. General Comment 3 *does*, however, clarify how the breach of a minimum core obligation is to be recognized.

> Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary healthcare, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligation under the Covenant.[164]

The CESCR, in interpreting the duties enshrined in the ICESCR, confirms that the state is expected to meet certain obligations even in the most developmentally challenging circumstances. Minimum core obligations set an independent guideline aimed at closing the "loophole" within progressive realization by using situations of gross neglect as prima facie legal proof that a state has breached its treaty obligations. Theoretically, this would hold all states in to the same standard of protection regardless of political economy or resource availability.[165]

As its interpretation must reflect the spirit of the original Covenant, the Committee also places a resource limitation on the use of the minimum core.

> "[I]t must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned."[166]

On the surface, this limitation is similar to the "progressive realization" clause in ICESCR 2(1). When placed within the larger definition of the minimum core and its corresponding state obligations, however, it has a very different effect. Essentially, the Comment *reverses* the burden of proof for state compliance in the ICESCR. Aside from situations of deliberate retrogression, the Covenant never requires that a state justify its actions as utilizing "the maximum of its available resources."[167] General Comment 3, however, requires explicit state justification if the minimum of the right ever goes unsatisfied, as the breach is prima facie proof of non-compliance.

The entire construct of the minimum core, from its definition of a right's immediate effect to its reversal of the burden of proof, is justified as necessary for the conceptual integrity of the Covenant itself.

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[163] GC3, *supra* note 34, ¶ 10.

[164] *Id.*

[165] Young, *supra* note 158, at 121-22.

[166] GC3, *supra* note 34, ¶ 10.

[167] ICESCR, *supra* note 37, art. 2, ¶ 1.

> "If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'etre*."[168]

In reality, though, General Comment 3 is more novel than the Committee would let on, especially as it establishes a new judicial function: the determination of situations in which a state has breached its minimum core obligations by depriving a "significant" number of people of their rights, and the subsequent review of implementation "in the context of the full use of the maximum available resources." The minimum core not only makes it easier to judge the acceptability of state initiatives, it also strengthens the justiciability of socio-economic rights in national courts.[169]

B. The Minimum Core for the Right to Water

Following the clarification of the concept in General Comment 3, the CESCR began defining the minimum core for the rights to housing, food, education, healthcare, and finally, water.[170] The approach of the Committee in each of these documents has been to focus on core state *obligations* more than core right's *elements*.[171] This has led some to argue that the Committee's approach is flawed, especially because water rights are not exhaustively defined in any covenant.[172] Most human rights treaties, however, do not distinguish between rights and obligations,[173] and "[i]n theory, the core elements of a right should carry directly correlative obligations."[174] This allows us, much like the process of rights construction in Part II, to reconstruct the minimum core for water. First we will outline the international consensus defining water's minimum core as protecting "basic needs," then we will complete the legal definition by matching core elements to the obligations outlined by the Committee in General Comment 15.[175]

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168 GC3, *supra* note 34, ¶ 10.

169 Of course, this still depends on how states enshrine ICESCR obligations and CESCR General Comments into national law. This problem will be considered in the following section. *See* discussion *infra* Part IV.

170 The CESCR has now published 21 General Comments. *See* Committee on Economic and Social Rights General Comments, Office of the High Commissioner for Human Rights, cmt. 4, 12–15, http://www2.ohchr.org/english/bodies/cescr/comments.htm (last visited Nov. 8, 2010). The CESCR also regularly uses the minimum core concept in its Concluding Observations. Young, *supra* note 158, at 120.

171 *See, e.g.*, Audrey R. Chapman, *A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23, 24 (1996).

172 Malcolm Langford, *Ambition That Overleaps Itself? A Response to Stephen Tully's 'Critique' of the General Comment on the Right to Water*, 26 NETH. Q. HUM. RTS. 433, 458 (2006).

173 MALCOLM LANGFORD & AOIFE NOLAN, CENTRE FOR HOUSING RIGHTS AND EVICTIONS, LITIGATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS: LEGAL PRACTITIONERS' DOSSIER 21 (2006).

174 Amanda Cahill, *The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water*, 9 INT'L J. HUM. RTS. 389, 399-400 (2005).

175 The minimum core has met the recent criticism of several scholars noting its (a) conceptual adequacy as approaches to its definition lead to indeterminacy, (b) its conceptual inadequacy as it may confuse utility for principle in its protection of individual rights, and (c) its practical inappropriateness as a tool for judicial reasoning. All three criticisms overlap and lead their authors to argue that other approaches to enforcement—including the South African Courts' "reasonableness" test discussed in Part V—are more jurisprudentially appropriate. The minimum core approach is considered by this essay,

The core content of the right to water is an entitlement to support *basic needs*: "[a]s an absolute minimum, the right to water entitles everyone to essential quantities of safe freshwater for personal and domestic uses in order to prevent dehydration and disease."[176] With few exceptions, every sector of the international community involved in water rights has sanctioned this approach. General Comment 15 notes that while water is "required for a range of different purposes . . . priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease."[177] The prioritization of personal and domestic uses for survival is supported by the Report of the High Commissioner for Human Rights,[178] and by the concept's inclusion in many of the treaties reviewed in Part II. The Third Geneva Convention, for instance, requires that "[t]he Detaining Power shall supply prisoners of war during transfer with sufficient food and drinking water to keep them in good health."[179] In situations where water is scarce or provision limited, water for survival takes priority. The U.N. Convention on Water Courses insists that in periods of conflict over resources, priority be given to water to meet vital human needs.[180] The Bonn Conference on Freshwater (2001) states that "[w]ater should be equitably and sustainably allocated, firstly to basic human needs."[181] Many other declarations take a similar position.

Customary law also supports the idea of water's minimum core as based in basic needs. The Berlin Principles, in fleshing out fundamental elements of the right to water, insist that "[e]very individual has a right of access to . . . water to meet that individual's vital human needs."[182] Finally, the basic needs approach is generally supported by scholars in both law and human rights and by expert technical bodies.[183] The WHO, for instance, insists that the right to water at least

however, to form an essential part of existing legal duties related to water rights, though criticism of the concept may be worth considering further elsewhere. See Young, *supra* note 158; Karen Lehmann, *In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core*, 22 AM. U. INT'L L. REV. 163 (2006); *and* Mark S. Kende, *The South African Constitutional Construction of Socio Economic Rights, A Response to Critics*, 19 CONN. J. INT'L L. 617 (2003) for arguments against the minimum core; *see also* Marius Pieterse, *Eating Socio-Economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, 29 HUM. RTS. Q. 796 (2007); David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 119 S. AFR. L.J. 484 (2002).

[176] Kiefer & Brölmann, *supra* note 7, at 201.

[177] GC15, *supra* note 33, ¶ 6.

[178] *See* HOWARD & BARTRAM, *supra* note 128.

[179] Third Geneva Convention, *supra* note 57, art. 46.

[180] Convention on the Law of the Non-Navigational Uses of International Watercourses, *supra* note 55, art. 6.

[181] International Conference on Freshwater, Bonn, Germany, Dec. 3-7, 2001, *Recommendations for Action*, ¶ 4.

[182] *Berlin Rules*, *supra* note 89, art. 17(1).

[183] Bluemel notes this agreement but bemoans an inability to discuss access and quality requirements as fully. Bluemel, *supra* note 5, at 986. *See* Gleick, *Right to Water*, *supra* note 42, at 488-89; JULIA HÄUSERMANN, RIGHTS & HUMANITY, A HUMAN RIGHTS APPROACH TO DEVELOPMENT: SOME PRACTICAL IMPLICATIONS FOR WATERAID'S WORK 10 (Sep. 10, 1999), *available at* http://www.righttowater.info/wp-content/uploads/wateraid_lecture.pdf; Gorsboth, *supra* note 23, at 5 (safe access to a minimal supply must be provided "at all times").

"implies access to the minimum necessary for basic needs," which should be the first place for national policy emphasis.[184]

These same experts have devoted significant time to a determination of what *amount* of water the minimum core protects. Quantitative standards form part of a responsible formulation of the minimum core, because they permit national courts access to acceptable benchmarks that can inform their contextualized decisions. General Comment 15 references the amounts stipulated by both a WHO study (Howard and Bartram)[185] and the independent study of Peter Gleick.[186] Both authors concur that while 20-25 liters per person per day (l/p/d) is enough to ensure human survival, the amount poses a "high" health risk as hygiene cannot be assured.[187] As basic hygiene forms a part of the right's minimum core, however, it is generally agreed that somewhere between 25-50 l/p/d is sufficient to avoid an intolerable risk to human health across geographical and social contexts.[188] Although the number is somewhat imprecise and subject to contextualization, the amount of water to meet core "vital human needs" worldwide is thus generally determinable.[189] Rigid, context-blind reliance on these standards, however, is to be avoided.[190]

This initial determination of core content is somewhat modified by the longer definition of the core *obligations* related to water rights in paragraph 37 of General Comment 15. That paragraph outlines nine related state duties, which can be summarized into three action areas.[191] First, states must ensure that everyone has immediate access to the core content of the right.[192] Second, this access must be assured in a non-discriminatory way in line with articles 2(2) and 3 of the

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184 HOWARD & BARTRAM, *supra* note 128.

185 GC15 *supra* note 33, at 5 n.14. General Comment 15 deliberately avoids setting such a quantitative basis itself. *Id.* ¶ 6.

186 *Id.* at 5 n.14; *see also* Peter H. Gleick, *Basic Water Requirements for Human Activities,* 21 WATER INT'L 83 (1996) [hereinafter Gleick, *Basic Water Requirements*].

187 HOWARD & BARTRAM, *supra* note 128.

188 This is distinguished from other requirements, such as that of 100 liters set by Fallenberg and USAID ensuring "a decent and realistic *quality* of life . . ."—measures related to the *full scope* of the right. *See* Malcolm Langford, *Crossfire: There is no Human Right to Water for Livelihoods: A Debate with Melvin Woodhouse,* 28 WATERLINES 5, 5 (2009).

189 Most experts, including Howard and Bartram, caution about the "limited significance" of a numerical definition due to contextual differences. HOWARD & BARTRAM, *supra* note 128. Malcolm Langford insists that "[h]uman rights is not just about straightforward entitlements to minimum quantities; it provides a subtle and principled framework for ensuring that the allocation of goods and services is not based simply on the distribution of power and wealth but is made to respect human dignity." Langford, *supra* note 188, at 12. Water is perhaps unique because such a numerical level of provision is not as easily determinable for other rights, but these standards—while helpful in illustrating support for the right in some cases—still require contextualization. See discussion *infra* Part V for further discussion.

190 Gleick notes that without meeting basic water requirements, large-scale human suffering is projected to grow exponentially, creating potential for conflict. Gleick, *Basic Water Requirements*, *supra* note 186, at 83. Too much of a focus on quantity, however, may *also* cause conflict by ignoring equally important principles of non-discrimination and equality. Langford, *Crossfire*, *supra* note 188, at 7-8. A careful balance can be struck through appropriate contextualization.

191 Note that the core obligation relating to sanitation has been deliberately excluded. *See* discussion *infra* Part III.C.

192 GC15, *supra* note 33, ¶ 37(a).

ICESCR.[193] Finally, states must take deliberate, concrete and targeted steps toward the full realization of the right,[194] including recognition of the right,[195] the adoption and implementation of a national water strategy that addresses everyone's needs,[196] and the creation of a mechanism for water rights monitoring.[197] As noted above, these obligations are not subject to the "progressive realization" limitation clause in ICESCR 2(1).

It is possible to synthesize the "basic needs" element outlined above with the obligations of paragraph 37. The core content of a right to water can them be summarized in the following way:

> The "minimum core" of the right to water is an individual right to sufficient, safe, acceptable, physically accessible and affordable water to meet vital human needs at all times, distributed in a non-discriminatory way, acknowledged by the home government, and reinforced by deliberate, concrete and targeted state actions toward the enjoyment of the right's full scope, where a failure to do any of these things requires justification with reference to the maximal use of available resources.[198]

A careful reader will note that never does the minimum core explicitly require that water be provided for free. In fact, "[t]he right to water is no more the right for everyone to receive their water for free than the right to food is the right to receive one's food for free."[199] The core requirement of *accessibility*, however, may necessitate the free provision of the water required to sustain life if paying for water would at all impact an individual's ability to procure other essentials (e.g. basic food or shelter).

Finally, the minimum core should always be distinguished from the content and obligations related to the enjoyment of the *full scope* of the right to water. In its definition of the full right, the Committee adopts a "needs plus" approach to content.[200] The obligations related to the full scope of the right are comparatively broader than their core counterparts as well. Even when "core obligations" can be considered fulfilled, states retain the duty to "progressively realize" the full scope of the right to the maximum extent possible.

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193 *Id.* ¶ 37(b).

194 *Id.* ¶ 17.

195 Although not explicitly stated as an element in paragraph 37, recognition is implied by the entirety of the Comment and supported by findings of the Committee in some Concluding Observations. *See, e.g.*, CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Canada, ¶ 30, 64, U.N. Doc. E/C.12/CAN/CO/4, E/C.12/CAN/CO/5, (May 22, 2006), *available at* http://www.unhcr.org/refworld/docid/45377fa30.html ("[t]he Committee regrets that the state party does not recognize the right to water . . . strongly recommends that the state party review its position on the right to water in line with the Committee's general comment No. 15").

196 GC15, *supra* note 33, ¶ 37(f).

197 *Id.* ¶ 37(g).

198 *Id.*

199 *See* HENRI Smets, The Right to Water in National Legislations 15 (2006), *available at* http://www.worldwatercouncil.org/fileadmin/wwc/Programs/Right_to_Water/Pdf_doct/Smets_RTW_in_national_legislations.pdf; *see also* Gleick, *Right to Water*, supra note 42, at 4.

200 *See* Bluemel, *supra* note 5, at 986.

A. A Note on Sanitation

There is considerable debate within the international community over the proper place for sanitation within the water rights paradigm. While many human rights advocates argue for its full integration, others note the fundamental differences between the two entitlements and are satisfied to say that they are simply interrelated.[201] This initial lack of clarity was further complicated by General Comment 15, which cursorily addressed adequate sanitation as essential for the right to water and included a sanitation element among its core obligations without addressing it as a "right" itself.[202] Although there seems to be a consensus regarding the necessity of adequate sanitation for the full enjoyment of the right to water, there is no apparent consensus on whether sanitation forms a part of or exists independently of that right.[203] For this reason, the inclusion of a sanitation element somewhat complicates an understanding of the right's "core content" by creating a core obligation that does not directly refer to water itself. This may be explained by the fact that basic sanitation is necessary for the provision of clean drinking water at the core of the right,[204] and that it warrants inclusion because a right to sanitation is not protected by any international covenant.[205]

In the end, the justification or clarification of a right to sanitation is beyond the scope of this essay. Rather, this essay will treat the provision of minimally adequate *water for sanitation* as integral to the core obligation to provide access to adequate water for domestic and personal use. It is neither summarized as part of the right's core *content* above, nor considered in the proceeding investigation of

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201 *See, e.g.*, International Experts Meeting on the Right to Water, Paris, Fr., July 7-8, 2009, *Outcome of the International Experts' Meeting on the Right to Water*, 4 (Oct. 2009), *available at* http://unesdoc.unesco.org/images/0018/001854/185432e.pdf ("While the human right to water is increasingly recognized by the international community, sanitation is not yet widely perceived as a human right."). The Sub-Commission's draft guidelines also fail to define the term "sanitation," although they do more clearly define sanitation obligations. *See Draft Guidelines, supra* note 73, at 2, 6-10. *But see* Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *Report of the Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, Human Rights Council, U.N. Doc. A/HRC/12/24 (July 1, 2009) (by Catarina de Albuquerque), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-24_E.pdf (discussing a movement toward the recognition of an independent right to sanitation as a component of the right to an adequate standard of living and outlining existing legal obligations related to sanitation incumbent on state actors).

202 *See* GC15, *supra* note 33, ¶ 1 (noting that the lack of access to adequate sanitation "is the primary cause of water contamination and diseases linked to water."). *Id.* ¶ 37(i).

203 See Cahill, *supra* note 175, at 401-04, for a discussion of whether sanitation exists independently of the right to water or whether it is an element of the right to water.

204 GC15, *supra* note 33, ¶ 29 ("Ensuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources."). Water for sanitation is included in the four-fold concept of Basic Water Requirements (BWR), first developed by Gleick. *See* Gleick, *supra* note 187, at 83-92. Of the 25 liters required for human survival, only 3 are needed to replenish the body's natural sources. Twenty are reserved for sanitation.

205 *See* U.N. CECSR, 29th Sess., 46th mtg. ¶¶ 9, 10, 60, U.N. Doc. E/C.12/2002/SR.46 (Nov. 22, 2002) (J. Bartram, Representative of the World Health Organization, Oral submission to General Discussion on the Draft General Comment on the Right to Water). The language of GC15 would seem to indicate that there are multiple legal bases for the right, but no independent source of legal protection. GC15, *supra* note 33, ¶ 29 (citing the rights to health and housing).

national jurisprudence, because the author believes that a minimum core for water rights can be formulated, demonstrated and justified independently of this element.

IV. The Definition of the Right to Water and its Minimum Core in National Courtrooms

It is clear from the preceding sections that international law imposes a concrete set of obligations regarding water rights parties to the ICESCR. Developing custom has begun to extend responsibility for this legal norm to other states not explicitly bound by treaty provisions.[206] These obligations stem from the normative clarity of the concept of water rights itself, which is based in state practice (evinced by declarative consensus), the legal opinion of expert bodies like the CESCR and the International Law Association, and the teleological interpretation of human rights treaties explained in Sections II and III. As Kiefer and Brölmann correctly surmise, state failure with respect to water rights obligations may leave that actor in breach of international law. They are equally correct when they acknowledge, however, that such responsibility lacks tangible consequence in a socio-economic rights system without "authoritative" international case law.[207]

Originally, this weakness in international enforcement led many to doubt whether the standard would ever find domestic application. However, as the case studies below prove, domestic courts have begun to embrace the international definition of the human right to water of their own accord – sometimes even creatively "construing" water rights from seemingly unrelated entitlements. The work below outlines several examples of domestic water rights enforcement with differing levels of support for the posited international norm. The analysis of this section is conscious of the fact that if water rights are to be universally guaranteed, this international standard must be adequately reinforced and not undermined by national jurisprudence.

A. Norm Creation and Transmission at the National Level

The human right to water would be meaningless if not supported by States, which are the members of the international community uniquely capable of recognizing binding rules of international law.[208] In fact, because human rights pri-

[206] Custom, if not sufficiently developed to constitute a firm rule of international law, is at least sufficiently developed to require the consideration of the legal intent of water-related declarations, resolutions and related treaties—as well as non-objection to developing norms—to place some obligation on those states not yet parties to the ICESCR. The practical applicability of such law, however, is left to the discretion of a judicial body capable of establishing jurisdiction.

[207] Kiefer & Brölmann, *supra* note 7, at 207.

[208] Admittedly, problems of positivism complicate the philosophical definition of water rights in this context. Are water rights natural rights based on their fundamentality to a life in dignity, or are they legal entitlements based in their recognition by states? Positivism insists that laws are rules made by human beings, and that as constructs they can be separated from validity conditions of morality and ethics and based strictly on social fact. Human rights in this paradigm are those rules articulated by authoritative international bodies and widely accepted. This philosophical problem is especially pertinent to water

marily govern the relationship between a government and its citizens, the main reason for the codification of a new international norm is its national enforcement.[209] States are vital to the promotion of new rights for two reasons: first, because they hold the requisite power to actively implement rights protection; and second, because they alone have the authority to recognize or reject novel claims as stemming from rights violations.[210] The first reason derives from the legislative and executive functions,[211] and the last several decades have seen the birth of many laws (including constitutional amendments) that recognize the right to water.[212] The second reason stems from the power of the judiciary in its oversight of a state's behavior in relation to its citizens. This function is perhaps even more important than the first,[213] and it is the focus of this section.

Abromovich and Courtis note that,

> [t]he adoption of international human rights treaties at the highest level of the local normative pyramid and the acceptance of the jurisdiction of international bodies in the area of human rights, obliges the local judicial actors to recognize the interpretation of these treaties that has taken place at international venues.[214]

Local recognition of an international norm, like the consensus surrounding water rights explored in Part II, is more complicated, however, than this passage suggests. This is because international human rights standards are enshrined to varying degrees in local contexts. Furthermore, human rights are codified at the international level as universal principles, not contextualized entitlements. This means that even when locally recognized, they require a degree of judicial interpretation or "content-giving." As Bilchitz explains, "[i]n giving content to the

rights as they remain formally uncodified. The present essay avoids this conceptual dilemma with an explanatory definition of water rights that focuses on the recent *realization* of their fundamentality as *now requiring* the protection of human dignity through international recognition. In this way, the right to water demonstrates how human rights in their most perfect form simultaneously exist as both dignity-based entitlements and "posited" laws. As the WHO insists in its handbook on the right to water, "[h]uman rights are protected by internationally guaranteed standards that ensure the fundamental freedoms and dignity of individuals and communities." WHO, Right to Water, *supra* note 16, at 7. *See generally* JOHN AUSTIN, PROVINCE OF JURISPRUDENCE DETERMINED 157 (Cambridge Univ. Press 1995) (1832).

209 *See* Bob, *supra* note 43, at 12.

210 *See id.* at 7; *see also* Biswas *MENA*, *supra* note 47, at 219.

211 Although the author has distinguished them here, these functions are often hybridized outside of strict constitutional systems.

212 *See* MALCOLM LANGFORD ET AL., CENTRE FOR HOUSING RIGHTS AND EVICTIONS, LEGAL RESOURCES FOR THE RIGHT TO WATER: INTERNATIONAL AND NATIONAL STANDARDS 45 (2004) [hereinafter COHRE(b)].

213 The constitutional enshrinement of water rights is meaningless without judicial support. *See* David Zetland, *On My Mind: Water Rights and Human Rights*, FORBES.COM (Apr. 12, 2010), http://www.forbes.com/forbes/2010/0412/opinions-sanitation-haiti-human-rights-on-my-mind.html (noting that in 2006, access rose 7% in countries with rights enshrinement, but still rose 5% generally).

214 Victor Abramovich & Christian Courtis, *Towards a Demandability of Economic, Social and Cultural Rights: International Standards and their Application in Local Courts, in* THE APPLICATION OF HUMAN RIGHTS TREATIES FOR LOCAL JURISDICTIONS 324 (Martín Abregú & Christian Courtis eds., 1997); *see also* Bluemel, *supra* note 5, at 977 (noting international law regarding the right to water (although not legally binding) has pressured some states into legislative and judicial recognition).

right, a court engages in the process of specifying general principles that define the obligations placed upon the state . . . ."[215] Socio-economic rights are especially open to interpretation as their positive obligations allow for a degree of liberality in defining corresponding duties.[216] This means that the *way* socio-economic norms are nationally enforced is often just as important as enforcement itself.

For water, this process is especially precarious due to that right's status as a legal "derivative" of other obligations. Because water rights, though independently definable *as law,* are not yet independently enshrined *in law*, they require a degree of legitimization that can only come with their support in national jurisprudence.[217] Given ample space for "content-giving," a national court might assert water access as some "lesser obligation."[218] Worse, it might assert a "human right to water" devoid of any normative standard of quality, accessibility, or acceptability. If we are to understand the way in which the international norm is strengthened or challenged, it is important to consider *how* national courts enforce a right to water. This understanding should enable us to more adequately defend the human right to water as a universal entitlement based in human dignity.[219]

The importance of national courts in defining and defending the right to water is heightened by a high rate of judicial transmission. At the international level, the borrowing of one tribunal's reasoning as an authoritative standard is already commonplace.[220] Due to the relative novelty of the water rights concept, however, standards set by *national* courts are also being adopted elsewhere. International tribunals increasingly borrow from this jurisprudence,[221] and national courts have even begun to mimic each other. Young notes that this "transnational judicial dialogue" often builds upon the textual similarities states share in rights recognition.[222] States with similar constitutional systems or shared colonial histories, for example, often share jurisprudence. For water rights, recent

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215 Bilchitz, *supra* note 175, at 487.

216 *See* discussion *supra* Part II.C. For example, while the freedom of speech generally requires official policies respecting its exercise, the right to housing may require states (in some situations) to decide *what* housing is suitable to meet the right's requirements. Although there is no strict dichotomy between positive and negative rights, the differences in rights enforcement can occasionally be daunting in practice.

217 Bob, *supra* note 43, at 12 (the right to water is relatively well defined internationally, "compliance is primarily an issue of domestic politics."). Gorsboth and COHRE demonstrate the importance of national jurisprudence in rights definition. *See* Gorsboth, *supra* note 23; COHRE(b), *supra* note 212, § 7.

218 Not everyone agrees with the prevailing consensus. Biswas argues that inconsistencies in international opinion permit arguments that water constitutes a human right or only a "lesser obligation," as neither definition has been *definitively* agreed upon. *See* Biswas *MENA*, *supra* note 47, at 218.

219 In fact, one of the main reasons for the production of COHRE's litigation guide (nn.50, 206) is to influence future legal decisions by providing a resource for judges "in other jurisdictions who may be concerned about their ability or mandate to address right-to-water-and-sanitation issues." COHRE(c), *supra* note 50, at 278.

220 LANGFORD & NOLAN, *supra* note 174, at 11.

221 *Id.* (Langford and Nolan cite European case law on torture as used to inform the decisions of the Committee Against Torture (CAT)).

222 Young, *supra* note 158, at 124.

cases from states as diverse as South Africa, India and Argentina have significantly influenced jurisprudence abroad.[223] The borrowing of foreign standards is often instigated by the judiciary, but litigators may be just as instrumental in some cases.[224]

International norms, then, relate to national rights struggles in a symbiotic way. First, international norm legitimacy strengthens the position of rights holders in national courts.[225] A judge, litigator or stakeholder may now refer to the international definition of water rights (including the minimum core) in petitioning for national protection. In the reverse, the willingness of national courts to protect rights through the enforcement of international standards both clarifies and strengthens those standards for further use in other jurisdictions. The way Indian courts have interpreted and applied a right to water, for instance, has been mimicked by courts in Pakistan and Bangladesh. Finally, if the international definition is distorted or weakened, rights holders will in turn suffer a loss of protection. Rights advocates worry, for instance, that recent South African judgments will substantially weaken further enforcement of water rights, particularly regarding the minimum core. If this is the case, the practical universality of the standard may be compromised.

B. The National Enshrinement of Rights and an Introduction to the Case Law

Human rights take two forms in national contexts: first they can be re-expressed as laws directly enshrined in a state's constitution or other legislative instrument. This can happen in ways that imperfectly imitate or almost directly recreate the international standards on which they are based.[226] Secondly, states can enshrine human rights by signing international treaties they are then bound to implement domestically and respect in their external relations.[227] Some states do both, and the legal basis of a right argued in a national courtroom can be quite complicated. Fortunately, the "interpretative attitude" of the court with respect to water rights is more important to our work in this section than the national legal order itself.[228] In fact, we will note the similarity of the way diverse courts have: (a) allowed for the litigation of socio-economic and water rights cases; (b) recog-

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223 *See* discussion *infra* Part IV.D.

224 Litigators often reference other courts in their arguments or formulate international litigation strategies with their partners abroad. For example, the World Social Forum began to hold sessions on water rights advocacy in 2005. *See* JUAN MIGUEL PICOLOTTI, CENTER FOR HUMAN RIGHTS AND ENVIRONMENT, THE RIGHT TO WATER IN ARGENTINA 31-32 (2003), *available at* http://www.righttowater.info/pdfs/argentina_CS.pdf.

225 Bob, *supra* note 43, at 12.

226 *Cf.* Constitution of the Republic of South Africa, Act 108 of 1996 Feb. 4, 1997, art. 27(1)(b) ("everyone has the *right to . . . sufficient food and water* . . . ."), *with* Constitution of the Kingdom of Cambodia Sep. 21, 1993, art. 59 ("[t]he State shall protect the environment and balance of abundant natural resources and establish a precise *plan of management* of land, water . . . .") (emphases added).

227 *See generally* Louis Henkin, *International Human Rights as "Rights"*, 1 CARDOZO L. REV. 425, 426 (1979) (providing background as to the process of treaty signature and enshrinement).

228 The national legal order, while of practical importance, is only one factor to take into consideration here. The "interpretive attitude" of the court—capable of side-stepping jurisdictional issues in many

nized a minimum core approach; and (c) explicitly or implicitly applied a minimum core calculus to water rights . . . all *despite* legal differences. The legal order will only be briefly explained in each case to demonstrate context-specific constraints on the judiciary or to highlight the transmission of judicial principles. ICESCR ratification, the central legal basis of the right to water, will also be noted, as states-parties to this Covenant are the parties most clearly responsible for water rights enforcement in international law.

When compared to other socio-economic rights jurisprudence, the list of cases explored below is relatively short. This is because water rights remain "relatively weak as enforceable legal claims" due to both their novelty and their tendency to conflict with more well-established rights (e.g. property).[229] The explicit use of a "minimum core" concept by a national court is even rarer.[230] The body of case law "giving content" to the human right to water, however, is growing both in its recognition of international principles and support of a minimum core concept.[231] Cases from South Africa, India and Argentina are often cited as the most notable examples, but jurisprudence from many countries can be analyzed for support of the right to water or one or more of its key elements.[232]

Most jurisdictions have never explicitly referenced a minimum core for the right to water. Cases from these courts will be considered first. The judgments will be arranged by country and briefly summarized to demonstrate: (a) the application of international legal principles in support of the right's definition, (b) the development of a minimum core concept and (c) the relation of the minimum core to water rights, if any. The particular water-related issues, historical developments or political realities seen as influencing the court's decisions will be considered where relevant.[233] Several judgments from South Africa will be given special attention at the end of this section, as that country's constitutional enshrinement of socio-economic rights and explicit reference to a minimum core for water lend it special prominence.[234]

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places—has a more significant role to play in the protection of socio-economic rights. *See* LANGFORD & NOLAN, *supra* note 174, at 11-12.

229 Nelson, *supra* note 46, at 139.

230 Young, *supra* note 158, at 124.

231 Note the difference between the first COHRE litigation guide citing 10 water-related cases and the forthcoming draft which cites nearly seventy. *See supra* notes 213, 50, and accompanying text, respectively.

232 The reader should familiarize him/herself with the definition of the right to water and its minimum core. *See* discussion *supra* Parts II, III, as the remainder of the essay will depend on a strong understanding of these concepts.

233 Differences and similarities in the development-related problems faced by the countries cited sometimes govern differences and similarities in the case law. Service disconnection cases, for instance, have led to the clearest protection or rejection of the minimum core in diverse jurisdictions. Winkler first observed this in her piece on judicial enforcement of water rights. *See* Winkler, *supra* note 36, at 3. The case law summarized by this essay, however, is considerably more comprehensive.

234 While a focus on South African jurisprudence is common in academic literature, such an approach limits an understanding of the *international* status of water rights and the minimum core if it ignores water rights jurisprudence from other jurisdictions. *See* LITIGATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ACHIEVEMENTS, CHALLENGES AND STRATEGIES 95 (Malcolm Langford, ed., 2003) [hereinafter

C. A Note on Determining a Specific Number of Liters for the Minimum Core

As noted in Section III, Part B of this essay, the amount of water required for the fulfillment of basic needs is generally determinable. In several of the cases summarized below, national courts require their respective governments to provide a specific amount of free water to those dispossessed of their rights in emergency situations.[235] This is cited as implicit support for a minimum core approach to water rights as (a) it distinguishes immediate obligations from the more progressive realization of the right's full scope and (b) attempts to determine the amount of water required for survival, often with reference to international standards.[236] The use of this particular tool by national courts, however, should not be misunderstood.

First, quantitative standards are not formulated for direct application. Rather, they should be considered as helpful guidelines for the creation of appropriate, context-specific standards that help states meet universal legal obligations.[237] Secondly, while the determination of a specific threshold in national cases is often evidence of the implicit use of a minimum core calculus, the *failure* of a court to do so cannot be taken itself as *rejection* of the minimum core approach. Within the academy, certain authors insist that a court's failure to set a specific standard is evidence that the court has rejected the minimum core, or is proof of that standard's "arbitrariness" in contextualization.[238] To judge a court's intention from this action alone would be shortsighted, however, as neither the free provision of water nor the specification of a particular amount of water are required by international law. To say that the failure to set a threshold amounts to a rejection of the minimum core confuses the acceptance of a human right (and its minimum core) with the choice of policies to assist in its full realization. The latter are appropriately determined by the legislature and executive so long as the essential minimum of the right is fulfilled and its full scope progressively realized to the extent possible. In some contexts this may well require the full, free provision of a specific amount of water. In others, however, it may not.

LITIGATING], *available at* http://www.cohre.org/sites/default/files/litigating_esc_rights_-_achievement_challenges_and_strategies_2003.pdf (South Africa is often seen as a "litmus test . . . but this view obviously ignores decades of litigation in other jurisdictions.").

235 *See* discussion *infra* Part IV (discussing case law from Belgium, India, Argentina and South Africa).

236 Of course, implicit support for the minimum core lacks the determinacy of an explicit acceptance and is less helpful in establishing concrete legal responsibility.

237 This goes for any international development standard, including e.g., the Millennium Development Goals. The Millennium Declaration, *supra* note 71, § III.

238 *See generally* Young, *supra* note 158, at 158; *see also* Bluemel, *supra* note 5, at 985 (arguing that the standard set in the *Menores* case (Argentina) is not based on the human right to water as the numerical standard set by the court differs from the WHO standard set in Howard and Bartram); *see infra* note 359 and accompanying text; Howard & Bartram, *supra* note 128, at 3.

D. Review of National Case Law

1. Belgium

We begin our investigation of the case law supporting the right to water and its minimum core with a single judgment from Belgium. Because of the high level of development of both the water system[239] and the regional mechanisms for the protection of human rights,[240] water rights cases are rare in the national courts of Europe. Apart from limited case law in both Ireland[241] and France[242] enshrining water rights as an essential element of the right to life, the Belgian precedent is the most important European water rights case since the development of human rights and the only European precedent included here.[243]

In Judgment No. 36 of 1998, the Belgian Court of Arbitration (predecessor to the modern Constitutional Court) acknowledged a right to water of a specific minimum quantity supported in international law and protected by the Constitution.[244] The Court revoked the application of the Municipality of Wemmel, which contested the constitutionality of the Law Governing the Protection of Drinking Water (1933)[245] as interfering with the municipality's competence in determining water price.[246] That law, as amended by the Flemish Council in 1996, required the provision of 15 cubic meters of free tap water a year to every person in a household on the public grid.[247]

The Court of Arbitration found the law to be within the executive competence of the regional government. In its judgment the Court noted that the law protected the individual right to drinking water access as derived from the constitu-

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[239] The 2006 Human Development report only recognizes two countries in the European region as "developing" countries: Cyprus and Turkey. *See* Report 2006, *supra* note 6, at 416 (other countries are determined to be "developed" based inter alia in their HDI (Human Development Index), a composite number which serves as evidence of water infrastructure development as this is seen as integral to a strong life-expectancy).

[240] The European Human Rights system is often cited as the world's most effective. *See, e.g.*, STEINER, *supra* note 18, §§ 11(A)-11(B).

[241] Ryan v. Att'y Gen., [1965] I.R. 294 (Ir.), see also COHRE(c), *supra* note 50, at 280 (containing a minimally developed recognition of the human right to water).

[242] Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Avignon, May 12, 1995, 1492/95, Monsieur Guy Schub (Fr.), *available at* http://www.cace.fr/jurisprudence/rets/eaupression/tgi12051995.html (noting that the lack of water is an "important impediment and health risk" but failing to recognize a right).

[243] See CHIARA AMANI, INTERNATIONAL ENVIRONMENTAL LAW RESEARCH CENTRE, THE RIGHT TO WATER IN BELGIUM (2008), *available at* http://www.ielrc.org/content/f0802.pdf for a summary of the legal framework protecting the right to water in Belgium, including relevant case law.

[244] Court d'Arbitrage [Constitutional Court] Apr. 1, 1998, Moniteur Belge [MB] [Official Gazette of Belgium] 1998, No. 36 (Belg.) [hereinafter No. 36].

[245] *As amended by* Décret de la Communauté Flamande concernant diverses mesures d'accompagnement du budget 1997 [Decree of the Flemish Community Relating to Various Measures Accompanying the Budget of 1997] of Dec. 20, 1996, Monitieur Belge [M.B.] [Official Gazette of Belgium] Dec. 31, 1996, art. 3.1.

[246] No. 36, *supra* note 244, ¶ B.4.2.

[247] Décret de la Communauté Flamande, *supra* note 245, art. 34.

tional right to a life in dignity[248] and as informed by the standard in Agenda 21,[249] noting that water supply is a more *fundamental* human need than other public services.[250] The application of an international standard, especially a non-binding declaration, is notable for its early support of the international consensus surrounding the definition of water rights. Although Belgium had ratified the ICESCR in 1983, the Court did not cite this legal source as it had not yet been held by the CESCR to include a human right to water.[251]

The Court's stipulation that the right to water includes a definable minimum amount of water to be provided free of charge can be seen as implicit support for the right's minimum core, especially when one considers the intent of the law upheld. In its 1996 declaration, the Flemish Council recognized that "every customer is entitled to a basic uninterrupted supply of . . . water for household purposes in order to be able to live decently according to prevailing living standards."[252] The stipulation of 15 cubic meters per year was a minimum entitlement allotted to *individuals* and based in the WHO guidelines cited by General Comment 15 six years later.[253] Although the allotment of water for a "decent" life is broader than the water required for survival, the Council's rule still protected an *amount* of water that falls within the "basic needs" guideline.[254] The judgment therefore implicitly supported the idea of a minimum core for water even before the CESCR had applied it in such a way.

2. *India*

We next turn to India, where some judicial creativity has allowed for the protection of water rights, again with implicit reference to that right's minimum core. The largest water-related concerns in India are pollution and over-extraction. A 2003 study by the Indian government found that less than 35% of wastewater from the country's four largest cities was treated before returning to the ground.[255] Private corporations have a large role to play in the degradation of communal resources, and their actions have led to the litigation of numerous

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248 The Constitution enshrines economic social and cultural rights with the language: "A cette fin, la loi, le décret ou la règle visée à l'article 134 garantissent, en tenant compte des obligations correspondantes, les droits économiques, sociaux et culturels, et déterminent les conditions de leur exercice." LA CONSTITUTION BELGE Feb. 17, 1994, art. 23 (Belg.).

249 See discussion *supra* Part II.A for an explanation of article 2.

250 No. 36, *supra* note 244, ¶ B.6.2.

251 This excuse is easily (and often correctly) borrowed in other national contexts. It is important to note that General Comment 15 was not released until 2002, and even then, its ideas took time to fully disseminate.

252 Décret de la Communauté Flamande, *supra* note 245.

253 GC15 *supra* note 33, ¶ 12.

254 15 cubic m/p/y is approximately 41 l/p/d, well within the 35-50 l/p/d range noted above, *see discussion infra* Part II.B.

255 CIRCLE OF BLUE, WATER VIEWS: INDIA (Aug. 18, 2009), http://www.circleofblue.org/waternews/2009/world/waterviews-india/.

cases against private interests.[256] India's unique legal protection of socio-economic rights bears some consideration before proceeding with these cases.

Since its accession to the ICESCR in 1979, India has been chastised by the CESCR for not giving full legal effect to Covenant provisions in domestic law.[257] When asserting a right to water, Indians must rely on constitutional rights almost exclusively. The only socio-economic rights enshrined by the Indian Constitution form part of the Directive Principles of State Policy (DPSP)[258] which Article 37 restricts with the language: "shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws."[259] The national courts of India, however, have creatively avoided the justiciability restrictions on socio-economic rights. Both the Supreme and High Courts of India have pronounced "sophisticated" judgments built on the justiciable right to life,[260] enabling the protection of (inter alia) the right to a healthy environment and a right to water.[261]

These judgments were made possible through the use of public interest litigation: the acceptance of a petition from any individual, even if not directly a victim, relating to the violation of a constitutional right.[262] The practice of Public Interest Litigation was developed by the Supreme Court as a response to the atrocities committed during the internal emergency of the late 1970s.[263] Indian jurisprudence stemming from public interest litigation protects a right to water and has notably adopted international standards in its interpretation of that right's content, despite the failure of the Parliament to grant the ICESCR a legal character. Indian case law, though not explicitly mentioning a "minimum core" for water rights, has also referred to "minimum obligations" for other socio economic rights construed in a similar way.

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256 *See* GORSBOTH, *supra* note 23, at 13-14; FOODFIRST INFORMATION AND ACTION NETWORK, INVESTIGATING SOME ALLEGED VIOLATIONS OF THE HUMAN RIGHT TO WATER IN INDIA: REPORT OF THE INTERNATIONAL FACT FINDING MISSION TO INDIA (Sabine Pabst et al. eds., 2004), *available at* http://www.rainwaterclub.org/docs/report_komplett.pdf.

257 Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights, India*, ¶ 8-10, U.N. Doc. E/C.12/IND/CO/5 (Aug. 8, 2008), *available at* http://www.unhcr.org/refworld/docid/48bbdac42.html.

258 INDIA CONST. art. 36-50.

259 *Id.* art. 37.

260 *Id.* art. 21.

261 Winkler cites several sources as informative on Indian socio-economic litigation. *See, e.g.*, R. Pathak, *Public Interest Litigation in India*, *in* DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW, ESSAYS IN HONOUR OF NANI PALKHIVALA 125 (Venkat Iyer ed., 2000).

262 LITIGATING, *supra* note 235, at 30.

263 *Id.*; *see also Justiciability of ESC Rights: The Indian Experience*, *in* CIRCLE OF RIGHTS: ECONOMIC, SOCIAL AND CULTURAL RIGHTS ACTIVISM, A TRAINING RESOURCE (Sunila Abeyesekera et al., 2000), http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm ("The internal emergency that was in force between 1975 and 1977 and its aftermath contributed significantly to the change in the judiciary's perception of its role in the working of the Constitution.").

The *Fundamental Rights* case created the precedent for the justiciability of socio-economic rights (DPSP) through the right to life.[264] In that case, the Supreme Court held that what was considered "fundamental" to the governance of the country (as enumerated in the DPSP) could not be seen as less significant than what is "fundamental" to the life of the individual. Fundamental rights and DPSP, then, were considered complementary, "neither part being superior to the other."[265] This decision led to the protection of socio-economic rights as fundamental entitlements under Article 21, a practice that was defined and expanded by a series of Supreme Court cases beginning in 1981.[266]

In the case of *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*,[267] the Court held that detainees enjoy all fundamental rights apart from those duly restricted by imprisonment. Among these is the right to life, which the Court interpreted as including "the right to live with human dignity and everything that goes along with it, namely the basic necessities of life."[268] In *F.K. Hussain v. Union of India*,[269] the High Court of Kerala began detailing these "basic necessities," noting that life "is much more than the right to animal existence . . . the right to sweet water, and the right to free air, are attributes of the right to life . . . basic elements which sustain life itself."[270] The Supreme Court quickly followed suit in *Subhash Kumar v. State of Bihar* the following year. [271] The submission of this Public Interest Litigation to fight corporate pollution (though eventually dismissed), allowed the Court to declare that the right to life "includes the right of enjoyment of pollution free water and air for full enjoyment of life."[272]

In 1996, the Supreme Court placed what were previously vague references to water and air within the framework of socio-economic rights. In *Chameli Singh*

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264 *See* Kerala v. N. M. Thomas (*Fundamental Rights*), (1976) 2 S.C.C. 310 (India), *available at* http://www.rishabhdara.com/sc/view.php?case=5831.

265 *Id.* at 367.

266 The approach of the Court in protecting socio-economic rights through the right to life should be distinguished from the approach in Part II *defining* water rights as derivative of the right to life. See ICCPR, *supra* note 102, art.6 for the definition of water rights. The Indian national courts are functionally restricted in their ability to recognize independent socio-economic rights, the judgment in *Fundamental Rights Case* and subsequent cases, however, seem to indicate that the courts believe that socio-economic rights *do* exist independently of civil and political rights ("neither part being superior to the other"), although they require protection through arguments of *fundamentality* tied to the right to life. This reality within the Indian legal system does not challenge the assertion in Section II that water rights are most appropriately constructed as a socio-economic entitlement stemming from the ICESCR.

267 Francis Coralie Mullin v. Union Territory of Delhi, (1981) 2 S.C.R. 516 (India), *available at* http://www.indiankanoon.org/doc/78536/.

268 *Id.* ¶ 6.

269 F.K. Hussain v. Union of India, A.I.R. 1990 Ker. 321 (India), *available at* http://www.elaw.org/node/2497. The judgment by J. Sankaran Nair is identical to his judgment in the related case Attakoya Thangal v. Union of India W.P. in the same Court just one month before. Both are cited interchangeably, though the Hussain decision is included by COHRE in their litigation guide. *See* COHRE(b), *supra* note 212, at 116.

270 *F.K. Hussain*, A.I.R. 1990 Ker. 321 ¶ 7.

271 Subhash Kumar v. State of Bihar, A.I.R. 1991 S.C. 420 (India), *available at* http://www.ielrc.org/content/e9108.pdf.

272 *Id.* ¶ 7.

v. State of Uttar Pradesh,[273] the Court held that "[the] right to life guaranteed by any civilized society implies the right to food, water, shelter, decent environment, education, medical care and shelter."[274] Finally, in *A.P. Pollution Control Board-II v. Prof. M.V. Nayudu,*[275] the Supreme Court recognized that not only is drinking water an independent, fundamental component of the right to life, but that the definition of the right should be guided by international standards like the Mar del Plata Action Plan signed by India in 1977.[276] The Court directly quoted the Plan, which states that "[a]ll people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs."[277] The *Pollution Control Board* case also demonstrates the transmission of judicial principles related to socio-economic rights. The Court noted that the concept of a right to a healthy environment (as developed by the Court and again informed by international standards) had gained widespread acceptance in both regional and national courtrooms abroad.[278]

Unfortunately, no Indian court has ever explicitly referenced any right's "minimum core." This is perhaps unsurprising, however, as the idea of a minimum core (as such) is typically linked to rights-definition through the ICESCR, which the above judgments notably ignore as a legal source. On several occasions, however, the Court has used language like "the essential minimum of the right"[279] or "what is minimally required"[280] in cases relating to other socio-eco-

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[273] Chameli Singh v. Uttar Pradesh, A.I.R. 1996 S.C. 1051 (India); *see also* Gorsboth, *supra* note 23, at 14 (partially reporting the case).

[274] *Singh*, A.I.R. 1996 S.C. ¶ 7 1051, at 1053.

[275] A.P. Pollution Control Board-II v. M.V. Nayudu, 2001 I.L.R. 4 S.C. 657 (India), *available at* http://www.ielrc.org/content/e0010.pdf.

[276] *Id.* ¶ 43 ("Exercise of such a power in favour of a particular industry must be treated as arbitrary and contrary to public interest and in violation of the right to clean water under Article 21 of the Constitution of India.").

[277] *Id.* ¶ 3. In the case *Perumatty Grama Panchayat v. State of Kerala*, the High Court of Kerala also referenced international standards when defining the legal limits of water extraction. The Court referenced Principle 2 of the Stockholm Declaration, noting that the natural resources of the earth must be safeguarded for the benefit of present and future generations. *See* Perumatty Grama Panchayat v. Kerala, 2004 K.L.T. 1 (Ker.) 731, ¶ 13 (India), *available at* http://www.elaw.org/node/1410.

[278] A.P. Pollution Control Board-II, 2001 I.L.R. 4 (S.C.) 657 ¶ 9 (citing the European Court of Human Rights, Inter-American Commission, Constitutional Court of Colombia, and the Constitutional Court of South Africa).

[279] Paschim Banga Khet Mazdoor Samity v. West Bengal, A.I.R. 1996 S.C. 2426, 2429 (India), *available at* http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=401236.

[280] The cited language is reported in Joie Chowdhury, *Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights – A Comparative Perspective*, 9 (Cornell Law Sch. Inter-Univ. Graduate Working Paper, Paper No. 27, 2008). The language is taken from a difficult-to-find commentary on an interim order from 2001. People's Union for Civil Liberties v. Union of India, Writ of Pet. No. 196/2001 S.C. (Nov. 28, 2001) (order granting preliminary protection). Though a published source is not readily available, the case is well-known in socio-economic rights circles as litigation targeting the right to food is quite rare. *See Case Law: People's Union for Civil Liberties v. Union of India and Others*, ESCR-NET, http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=401033 (last visited Nov. 8, 2010). A final decision for the case was delivered in 2007, in favor of the People's Union. People's Union for Civil Liberties v. Union of India, (2007) 1 S.C.C. 719 (India), *available at* http://indiankanoon.org/doc/411836/.

nomic rights like food and healthcare. When taken together, these phrases demonstrate support for both "halves" of the minimum core concept: minimum content and minimum obligations.[281] Furthermore, the minimum obligations, as established in *People's Union for Civil Liberties v. Union of India & Others*, included the *free* provision of a *specific amount* of food to both children and adults incapable of affording it, a judgment concurrent with CESCR guidelines and easily translatable to water rights.[282]

The only implicit hybridization of water rights with a minimum core approach comes from the High Court of Allahabad in the Uttar Pradesh state. In its 1999 judgment in *S. K. Garg v. State of Uttar Pradesh,*[283] the Court not only recognized water rights but also considered the positive legal obligations relating to water, implicitly supporting an idea of the minimum core.[284] This public interest litigation targeted the insufficiency of the water system in the region as the root cause of a local water shortage and therefore a rights violation. Although the Court did not itself specify a remedy, it established a committee to consider how to best solve the infrastructural problems in the region. The most interesting element in the Court's decision was its instruction to the committee that it consider both urgent, remedial steps to provide basic access to drinking water while also developing long term solutions.[285] Support for a minimum core in this approach was limited, however, as the Court neither referenced a "core" nor addressed the minimum content of the right alongside its minimum obligations. It may be a small conceptual step from such a judgment to an explicit mention of a minimum core for water, especially noting the willingness of the Supreme Court to use similar language in related cases. Such a step, however, has yet to be made. Barring further judicial initiative, Indian progress hinges on legislative incorporation of the ICESCR, to which the country remains bound in international law.

3. Bangladesh and Pakistan

Bangladesh and Pakistan are included here to demonstrate the transmission of judicial principles from Indian courtrooms to their Bangladeshi and Pakistani counterparts. None of the cases below fully protect a right to clean, adequate water access of a specific quality or quantity to ensure human survival. Nor do these cases reference the minimum core concept. They only extend limited pro-

281 The Indian Court's language is not directly interchangeable for the idea of a "minimum core." Even a subtle change in the words used can have a great effect on what is meant when referencing the minimum core. *See* Chapman & Russell, *supra* note 152, at 9.

282 *See* Writ of Petition, People's Union for Civil Liberties v. Union of India, S.C. 2003 (No. 196/2001) (second order granting preliminary protection), *available at* http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=401033 (select "download" hyperlink in left-hand panel); *see also* GC15, *supra* note 33, ¶¶ 4, 6.

283 S. K. Garg v. Uttar Pradesh, A.I.R. 1999 All. 41 (India), *available at* http://indiankanoon.org/doc/898522/. See Winkler, *supra* note 36, at 14, for a partial report of the case.

284 The analysis of this case is borrowed from Winkler, *supra* note 36, at 14.

285 *Garg* A.I.R. 1999 All. 41, ¶ 9-13. The Court itself also ordered the immediate repair of hand-wells and the testing of water quality to ensure speedy, basic access. *Id.*

tection to fight resource pollution, similar to the Indian Supreme Court's judgment in *Subhash Kumar* above.[286] The cases below, however, all demonstrate a real judicial attempt to more adequately protect socio-economic rights – an effort that may develop further in the future with legislative change.

Bangladesh is often commended for well-integrated water management, including its strategies for climate change compensation and poverty alleviation.[287] Due to its level of development and geographical situation, it faces many of the same resource problems as India, of which it used to form an integral part.[288] Pollution—especially stemming from unsafe industrial practices—is a prominent concern in Bangladesh, where over 1000 industries have been identified since the 1980s as unsafely discharging waste into the water and air.[289] Again, socio-economic principles are constitutionally enshrined as non-justiciable "principles of state policy," and the ICESCR, though acceded to, is largely ignored in domestic law and jurisprudence.[290] Similar approaches have been taken by both Pakistan and Nepal.[291] In a 2010 report following her visit to the country, an Independent Expert on the right to water and sanitation expressed concern over the government's failure to issue a preliminary report to the CESCR and to sign its Optional Protocol.[292]

In the 1990s, the Supreme Court of Bangladesh began to permit the protection of otherwise non-justiciable socio-economic rights through the right to life.[293]

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286 *See* Kumar, *supra* note 271, ¶ 7.

287 *See* IGPCC, *supra* note 25, at 56.

288 Bangladesh (formerly East Pakistan following partition) seceded from India as a result of the Bangladesh War of Independence that began in March of 1971. The internal conflict caused by this war created social turmoil in the mid-1970s prompting the invention of "Public Interest Litigation" in India. *See generally* JONA RAZZAQUE, PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN INDIA, PAKISTAN AND BANGLADESH 5-7 (Kluwer Law International 2004).

289 COHRE(c), *supra* note 50, at 281.

290 Interview with Dr. Kamal Hossain, Advocate, Former Minister of Bangladesh and UN Special Rapporteur on Afghanistan, *in* LITIGATING, *supra* note 235, at 42.

291 Winkler, *supra* note 36, at 15. In its accession to the ICESCR, Pakistan reserved the right to interpret the Covenant within the framework of its Constitution, which does not give equal weight to socio-economic rights. Nepal, though not making any such reservation, has been criticized by the CESCR for its non-implementation of socio-economic rights. *See* Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Nepal, ¶ 24, U.N. Doc. E/C.12/NPL/CO/2 (Jan. 16, 2008), *available at* http://www.unhcr.org/refworld/docid/47985c202.html. Nepalese courts have also begun to protect water rights through the justiciable right to life. Nepal, however, is not included in this analysis as the jurisprudential standard there has not yet acknowledged or protected an independent human right to water, nor has it developed protection for any right's minimum core. COHRE notes two relevant Nepalese cases in their upcoming guide. *See* COHRE(c), *supra* note 50, at 292, 304; *see also* Surya Dhungel v. Godavari Marble Industries, (1995) 2052 N.K.P. 37 (Nepal); Prakash Mani Sharma v. Nepal Water Supply Corporation, (2001) WP 2237/1990 S.C. (Nepal), *available at* http://www.elaw.org/node/1383.

292 Human Rights Council, *Joint Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Magdalena Sepúlveda Cardona, and the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque: Mission to Bangladesh*, ¶ 8, U.N. Doc. A/HRC/15/55 (July 22, 2010) [hereinafter *Bangladesh Report*], *available at* http://www.reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDocUnidFilename/SNAA-88P9WX-full_report.pdf/$File/full_report.pdf.

293 BANGLADESH SHONGBIDHAN [CONSTITUTION] Nov. 4, 1972, art. 32 (Bangl.) (right to life).

As in India, the trend in Bangladesh began at the instigation of the judiciary. In the *Radioactive Milk Powder* case of early July 1996, the High Court Division of the Supreme Court exercised special original jurisdiction to enforce a Writ of Protection against the State on behalf of the Bangladesh Environmental Lawyer's Association (BELA). In its decision to prohibit the government from releasing potentially radioactive milk powder onto the open market, the Court held that "[s]ince the right to life has not been interpreted in our domain . . . we may see what meaning was given by the superior courts of other countries to the right to life."[294] The following judgment quoted seven foreign cases—six from India and one from the United States. The Court expanded protection for the right to life to (inter alia), "enjoyment of pollution free water and air, bare necessities of life . . . [and] maintenance and improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity."[295] The innovative standard embraced by the Indian Supreme Court in *Subash Kumar* was quoted in the judgment, only four years after it was delivered. Later in the same month, the High Court Division reiterated its position in the *Flood Action Plan* case.[296] That judgment was again upheld in the Appellate Division, which put forth a similar interpretation of the right to life.[297]

In 1999, Bangladesh acceded to the ICESCR and the Ministry of Water Resources published a National Water Policy acknowledging that the "availability [of water] for sustenance of life, in both quantitative and qualitative terms, is a basic human right."[298] For their part, Bangladeshi courts continued to borrow foreign standards as they extended socio-economic rights protection even further. In some cases this innovation came from the bench itself; in others it was adopted at the suggestion of the applicant. In *Ask Ain o Salish Kendra v. Government of Bangadesh,*[299] claimant attorney Dr. Kamal Hossain insisted that the Supreme Court extend protection to slum dwellers in a way similar to the Indian Court's judgment in the *Olga Tellis* case.[300] The Court complied. In its 2001 judgment

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294 Farooque v. Bangladesh (*Radioactive Milk Powder*), (1996) WP 92/1996 S.C. ¶20 (Nepal), *available at* http://www.elaw.org/node/1323.

295 *Id.* ¶ 36.

296 Farooque v. Bangladesh (*Flood Action Plan: High Court*), (1996) 48 D.L.R. (H.C.) 438 (Bangl.), http://www.elaw.org/node/1300; *see also* COHRE(c), *supra* note 50, at 307.

297 Farooque v. Bangladesh *(Flood Action Plan Case: Appellate)*, (1997) 49 D.L.R. (A.D.) *1 (partially reported in Razzaque, Access to Environmental Justice: Role of the Judiciary in Bangladesh*, 4 BANGL. J. L. 1, 7 nn.3-4 (2000), *available at* http://www.biliabd.org/blj/content1.htm ("Article 31 and 32 . . . encompass within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto would be violative of the said right to life.")).

298 MINISTRY OF WATER RESOURCES OF THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH, NATIONAL WATER POLICY 1 (Jan 30, 1999), *available at* http://www.warpo.gov.bd/nw_policy.pdf.

299 Ask Ain o Salish Kendra v. Bangl. (1999) 19 B.L.D. 488 (Bangl.) (*summarized in* Ask Ain o Salish, Human Rights in Balgladesh 2001, ESCR-NET (2001), *available at* http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=400920).

300 *Id.*; *see also* ENVIRONMENTAL. LAW ALLIANCE WORLDWIDE, *Olga Tellis v. Bombay Mun. Council*, (July 10, 1985) (India), http://www.elaw.org/node/2830; *see also*, Interview with Dr. Kamal Hossain, in

in the *Industrial Pollution* case,[301] the Supreme Court forced the government to implement laws aimed at controlling industrial pollution and protecting environmental health. The judgment again referenced Indian jurisprudence to assert that the right to life "includes everything which is necessary to make it meaningful and a life worth living, such as, among others maintenance of health . . . lack of which may put the life of the citizen at naught."[302] Unfortunately, neither water rights nor a minimum core were explicitly protected in either of these judgments.

Socio-economic rights jurisprudence has failed to develop beyond these initial landmark cases, and there is substantial concern over the future of judicial protection for these rights. The National Human Rights Commission, created by presidential order in 2009, still lacks the requisite financial and human resources to commence work. When the Commission becomes functional, its mandate will remain restricted by the constitutional differentiation between fundamental rights and directive principles.[303] A prompt legislative solution to water rights recognition seems improbable, as the most recent draft of the Water Act fails to explicitly recognize a human right to water despite the earlier stance of the 1999 National Water Policy.[304] With a judiciary seized "only rarely" of alleged violations of water rights, Bangladesh will continue to lag behind India in effective water rights protection until legislative innovation can "operationalize" existing rights with mechanisms for their enforceability.[305]

Pakistani Courts began to develop water jurisprudence in the 1990s, again with reference to Indian judicial standards. Although Pakistan has more explicitly embraced the international consensus surrounding resource protection, it too has fallen short of significantly supporting the international definition of the right to water.

In the 1993 *Salt Miners* case, the Supreme Court found that "[t]he word 'life' has to be given an extended meaning and cannot be restricted to a vegetative life or mere animal existence. "[T]he right to have water free from pollution and contamination is a right to life itself."[306] The decision referenced an earlier judgment in *Shala Zia v. WAPDA*[307] in which the Court found that the rights to life

LITIGATING, *supra* note 234, at 43 ("I was also able to say to the court [in the Olga Tellis Case]: look, even in neighboring India they use the right to life as a basis, a plank, on which to give limited rights.").

301 ENVIRONMENTAL. LAW ALLIANCE WORLDWIDE, *Farooque v. Bangladesh (Industrial Pollution)*, (High Ct. July 15, 2001), http://www.elaw.org/node/2578; *see also* COHRE(c), at 282.

302 *Industrial Pollution*, *supra* note 301, ¶ 17. The standard here was developed in an earlier instance of the same case, but the language was notably adopted by the High Court Division of the Supreme Court.

303 *See* Bangladesh Report, *supra* note 292, ¶ 11.

304 *Id.* ¶ 50. The most recent draft is dated December 2008.

305 *Id.* ¶ 54. The Independent Experts' final recommendation addresses the "claimability" and enforceability of water rights and the institution of accountability mechanisms.

306 General Secretary v. The Director (*Salt Miners*) (1994) SCMR 2061, *as reported in* COHRE(c), *supra* note 50, at 291.

307 Shala Zia v. WAPDA, PLD 1994 SC 693 (1994) (Pak.). This case also lead to many similar decisions. See Parvez Hassan, United Nations Environmental Programme, *Environmental Rights as Part of Fundamental Rights: the Leadership of the Judiciary in Pakistan* (2003), *available at* http://www.elaw.org/system/files/Environmental.Rights.Pakistan.doc for an extensive analysis.

and dignity include a right to a healthy environment, despite the fact that the environment enjoyed no legal protection at the time. The *Salt Miners* case seems to be the only time the Supreme Court has explicitly mentioned a right to water, and as such, the standard remains as similarly limited as in Bangladesh.[308]

There may be some hope for future improvement, however, noting the willingness of the Pakistani Supreme Court to reference Indian judicial standards. In *Sindh Institution v. Nestle Milkpak and Others,*[309] the Supreme Court found that Nestlé's plans to bottle a local water source violated Section 12 of the 1997 Pakistan Environmental Protection Act.[310] The judgment referred to both previous Indian environmental cases,[311] and certain international declarations relating to the use of natural resources.[312] The opinion also referenced "genuine needs" as the basis for protection of local water access, issuing an interim order banning the construction of the bottling plant.

Further protection for socio-economic rights in Pakistan is faced by two challenges: (a) a preponderance of civil and political rights abuses for which there is more constitutional protection;[313] and (b) questions over both the formal and real independence of the judiciary.[314] Until these problems are solved, the creative protection of socio-economic rights in that country can be expected to lag behind the Indian example.

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308 Although the judgment is only limitedly applicable here, it is interesting to note that a High Court in the *Lahore Air Pollution Case* insisted on water's fundamentality to the right to life with reference to its protection in both U.S. law and the Koran. *See* Anjun Irfan v Lahore Dev. Auth (*Lahore Air Pollution*), PLD 2002 Lahore 555, ¶¶ 13-17 (Pak.), *available at* http://www.elaw.org/node/2390.

309 Sindh Institute of Urology and Transplantation v. Nestlé Milkpak Ltd., (2005) CLC (Sindh, Karachi) 424, (2004) (Pak.), *available at* http://www.shehri.org/subpages/nestle.pdf.

310 Pakistan Environmental Protection Act, No. 34 of 1997, §12, The Gazette of Pakistan Extraordinary, Dec. 6, 1997 (Pak.).

311 *Sindh Inst. of Urology and Transplantation* (2005) CLC 424, (citing Tamilnadu v. Hind Stone, (1981) (2) SCMR 205 at 212 (India), *available at* http://www.rishabhdara.com/sc/view.php?case=7511).

312 *Id.* at 4 ("The natural resources of the earth, including the air, water, land, flora and fauna especially representative samples of natural eco-systems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.").

313 International Human Rights watchdogs and the U.S. State Department continue to publish reports regarding human rights concerns related to extrajudicial killings, terrorism, militancy, security operations and freedom of the press. *See, e.g., January 2010 Country Summary: Pakistan*, HUMAN RIGHTS WATCH (2010), http://www.hrw.org/en/world-report-2010/pakistan [hereinafter HRW]; Bureau of Democracy, Human Rights and Labor, United States Department of State, 2009 Human Rights Report: Pakistan (2010), *available at* http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136092.htm. The Pakistani Constitution directly protects related "fundamental rights" including the security of the person, safeguards to arrest and detention, and freedom of speech. PAKISTAN CONST. art. 9, 10, 19, respectively. The Judiciary has already begun hearings related to the worst of these disappearance cases.

314 The judiciary should be ensured legal supremacy over the other organs of the state apart from the ability to issue orders directly contrary to a presidential decree, but has only recently reclaimed that ability in 2009. PAKISTAN CONST. art. 176-91. In March of that same year, the Supreme Court restored ousted Chief Justice Iftikhar Chaudhry to the bench along with many other judges dismissed by Musharraf. *See* HRW, *supra* note 314.

4. *The Philippines*

Although its Constitution also enshrines socio-economic rights as "directive principles" in a way similar to India's, the Philippines is considered separately as its courts have interpreted these principles more conservatively.[315] Recent judgments have challenged both the transmission of judicial principles and the effective protection of water rights for Filipinos.

The Philippines has had a "mixed and ambivalent history with socio-economic rights" due to certain historical and political realities.[316] Human Rights in the Philippines are often conflated with civil and political rights, and those working to protect human rights are often branded as leftists, communists or even terrorists.[317] Some suggest that this sentiment is reflected in Supreme Court judgments, which have failed to respect international rights standards, often by making blatantly inaccurate legal assumptions. In the 1996 case *People v. Leo Echegaray*,[318] for example, the Court held on a motion for reconsideration that "the Philippines cannot be deemed irrevocably bound" by the provisions of the ICCPR and its Protocol "considering that these agreements have reached only the Committee level."[319] The judgment was delivered over ten years after the second of those documents entered into force.[320] In other cases, courts have problematically denied the peremptory nature of international legal obligations,[321] arguing that municipal or domestic law can trump established international standards, even where the state's international obligations are being explicitly considered.[322]

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315 LITIGATING, *supra* note 235, at 48; Saligang Batas ng Pilipinas [Constitution] Feb. 11 1987, art 2, §§ 7-28.

316 LITIGATING, *supra* note 235, at 48.

317 Interview with Ma. Soccoro "Cookie" Diokno, *in* LITIGATING, *supra* note 235, at 50-51.

318 Philippines v. Leo Echegaray y Pilo, G.R. No. 117472 (June 25, 1996) (Phil.), *available at* http://www.chanrobles.com/cralaw199617.htm.

319 *Id.*

320 The Protocol entered into force in 1976 and the Philippines ratified it in 1989.

321 As a general rule, international law holds international legal principles and agreements over national legal constructs, no matter the way international commitments are incorporated into the national legal order. In practice, this means that states cannot rely on gaps in domestic law as a justification for a failure to meet an international obligation. This standard was perhaps best explained by the P.C.I.J. in the *Free Zones Case*, where it held "certain that France cannot rely on her own legislation to limit the scope of her international obligations." Case of the Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, at 96, 168 (June 7, 1932). See Peter Malanczuk, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 63-65 (Routledge, 7th ed. 1997) (1970) for an explanation. Admittedly, this legal principle is less likely to be utilized in domestic judicial bodies with more state-centric ideas about the applicability of international law. Still, the deliberate disregard for established international standards in the cases below remains problematic from an international standpoint. *See* discussion *infra* note 323.

322 *See, e.g.*, Philip Morris v. Court of Appeals, G.R. No. 91332, 224 S.C.R.A. 576 (July 16, 1993) (Phil.), *available at* http://www.lawphil.net/judjuris/juri1993/jul1993/gr_91332_1993.html. In this case, the Court held that "the fact that international law has been made part of the law of the land does not by any means imply the primacy of international law over national law in the municipal sphere . . . . [R]ules of international law are given a standing equal, not superior, to national legislative enactments." *Id.* para. 21. The Court then proceeded to place municipal law *over* international law, arguing that it "must

One of the only positive examples of rights enforcement in the Philippines came with the 1993 Supreme Court judgment in *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources.*[323] In that case a group of minors were given standing to challenge the destruction of national rainforests with a claim based in the constitutional rights to a "balanced and healthful ecology" and to "self-preservation and self-perpetuation" (both directive principles).[324] The Court found that the rights to a clean environment, to exist from the land, and to provide for future generations are "fundamental."[325] It also held that the Constitution requires that the government "protect and promote the health of the people."[326] The original claim was based in part on a concern for water shortage stemming from deforestation.[327] The case, however, did little to define or defend water rights.

Social reticence related to human rights has meant that the management of water in the Philippines is carried out in a state-centric way, with limited (if any) acknowledgment of human dignity, inherent entitlement or state obligation. The 1976 Water Code, for instance, places all water resources under state control and requires that "[p]reference in the development of water resources . . . consider security of the State, multiple use, beneficial effects, adverse effects and cost of development."[328] Although the Code exempts drinking, bathing, cooking and other domestic uses from a permit requirement, human need and livelihood are notably ignored from the calculus of appropriate use, and the document has never been amended to include such a reference.[329] In its Concluding Observations of 2008, the CESCR remarked that despite enshrinement of the ICESCR as national law,[330] "Covenant provisions are seldom invoked before or directly enforced by national courts, tribunals or administrative authorities."[331] Judicial protection for water rights will most likely continue to stagnate until both Filipino stakeholders

subordinate an international agreement inasmuch as the apparent clash is being decided by a municipal tribunal." *Id.*; *see also* Kuroda v. Jalandoni, 83 Phil. Rep. 171 (1949) (Phil.) (with a similar ruling).

323 Oposa v. Fulgencio S. Factoran Jr., G. R. No. 101083 (July 30, 1993) (Phil.), *reprinted in* 33 I.L.M 173 (1994); *see also* COHRE(c), *supra* note 50, at 292.

324 CONST. (1987), art. II sec. 16 (Phil).

325 *See* CHILD RIGHTS INFORMATION NETWORK, *Philippines: Minors Oposa v. Secretary of the Department of Environmental and Natural Resources 1993,* http://www.crin.org/Law/instrument.asp?InstID =1260 (last visited Oct. 19, 2010) (summarizing the case).

326 CONST. (1987), art. II sec. 15 (Phil).

327 COHRE(c), *supra* note 50, at 292 (citing concern over a "host of environmental tragedies, such as (a) water shortages resulting from the drying up of the water table . . . [and] (b) salinization of the water table").

328 Water Water Code of the Philippines, Presidential Decree No. 1067, art. 38 (1976) 73 O.G. 3554 (May 11, 1977) (Phil.).

329 *Id.* art. 6, 10, 22 (including a reference to the priority of domestic and municipal use over other uses. "[D]omestic and municipal purposes shall have a better fight over all other uses").

330 CONST. (1987), art. II sec. 2 (Phil).

331 U.N. Committee on Economic, Social and Cultural Rights. (CESCR), Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant [on Economic, Social, and Cultural Rights]: concluding observations of the Committee on Economic, Social and Cultural Rights: Philippines, U.N. Doc. E/C.12/PHL/CO/4, ¶ 12 (Dec. 1, 2008), http://www.unhcr.org/refworld/docid/493f948 80.html.

and courts can overcome the social stigma surrounding international human rights standards like the ICESCR.

5. *Indonesia*

Although Indian jurisprudence is usually noted for its unique protection of water rights, one case from the Constitutional Court of Indonesia may be the strongest example of South Asian support for the right to water.[332] In 2004 a group of legal aid organizations and NGOs challenged the Law on Water Resources,[333] worried that it inadequately acknowledged, defined and prioritized the human right to water *vis-à-vis* civil water rights for commercial exploitation.[334] The law was meant to replace the 1974 Law on Irrigation[335] and was seen by critics as an attempt by the World Bank to pressure acceptance of a privatization scheme.[336]

Although it does not explicitly enshrine a "right to water," the Indonesian Constitution protects water as a derivative of other entitlements.[337] The Constitution also regulates water's use as a natural resource in its economic chapters.[338] This dual protection for a human right to water and civil right of exploitation, however, was not mirrored in the Water Resources Law. Although the law placed an obligation on city/regency governments to meet "everyone's right to obtain water for their minimum daily basic needs," the language describing this subsistence right was not distinguished from the language describing the separate right to exploit resources with a license.[339] The law may never have been in-

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[332] *See* COHRE(c), *supra* note 50. Indonesia, although included in the second draft of the COHRE guide, has largely been ignored by scholars reviewing national implementation of water rights or international acceptance of a minimum core concept for socio-economic rights.

[333] Law on Water Resources, No. 7 of 2004, The Official Gazette of Indonesia, 2004, No. 66.

[334] *See* discussion *supra* Part II; Judicial Review of the Law No. 7 of 2004 on Water Resources, Judgment of 13th July 2005, No. 058-059-060-063/PUU- II/2004. (C.C.) (Indon.), *available at* http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_eng_Putusan%20058-059-063%20PUU-II-2004.%20008-PUU-III-2005%20(UU%20SDA).pdf (applicants challenged Articles 9, 10, 26, 45, 26, 80, 91, 92, 39(2), 6 (3) and (2), 38(2), 48(1), 29(5) and 49(4), although the Court decided to review the law in its entirety).

[335] Law Concerning Irrigation, No. 11 of 1974, The Official Gazette of Indonesia, 1974, No. 65; *see* Mohamad Mova Al'Afghani, *Constitutional Court's Review and the Future of Water Law in Indonesia,* 2 L. ENV. & DEV. J. 1, 4 (2006) (the law was drafted at a time of water abundance and did not effectively protect water sources nor provide for management).

[336] Al'Afghani, *supra* note 335, at 3.

[337] CONST. (1945) art. 28 (Indon.) (naming right of children to develop and be nurtured (at art. 28B(2)), the right toward the fulfillment of basic needs (at art. 28C(1)), the right to a life of well-being in body and mind and for the enjoyment of a healthy environment (at art. 28H(1)), the right to obtain social security (at art. 28H(3)) and the right to cultural identities and the acknowledgment of the rights of traditional communities (at art. 28I(3))).

[338] *Id.* ch. XIV.

[339] *See* Al'Afghani, *supra* note 335, at 8 (discussing confusion between *hak guna pakai air* (use for daily subsistence) and *hak guna usaha air* (commercial use). The first term is especially difficult to understand as translated it means roughly ("water use right in utilizing water") and does not specify water use for exploitation of for daily subsistence).

tended to define or protect human rights.[340] Nevertheless, in practice this lack of distinction led to a lack of accountability when companies were given permits to extract resources that then hindered the enjoyment of subsistence rights by local communities.[341]

The Indonesian Court eventually found the law conditionally constitutional, meaning that it was presumed to be constitutional when appropriately interpreted.[342] Concurring justices, however, used the Court's opinion to further define the human right to water as derived from the Indonesian Constitution – an exercise in legal construction that almost perfectly supported the definition of water rights at the international level. The Court explicitly referenced the WHO Charter, Article 25 of the UDHR, Article 12 of the ICESCR, Article 24(1) of the CRC and both General Comments 14 and 15 of the CESCR. The Court held that these standards, when accompanied by the constitutional rights to life and well-being,[343] mean that the state has the duty to respect, protect and fulfill the right to water, and that the government is obligated to meet "the daily needs of every individual."[344]

In referencing almost every major legal source for the right to water at the international level—including General Comment 15—the Constitutional Court not only applied that standard to its own national context, it also implicitly embraced the right's minimum core. Furthermore, the decision adopted a "basic needs" approach to immediate state obligations while requiring that the government continue to progressively respect, protect and fulfill water rights. Although concerns for the desirability of the Water Management Law persist, the Court's work at "content-giving" provided concrete support for a human right to water. This standard, if transmitted abroad, would greatly strengthen the position of stakeholders internationally.

6. *Argentina*

Concerns over water provision in Argentina stem from industrial pollution and the failed privatization reforms of the early 1990s. Provincial courts have responded to these challenges by asserting a right to water through a section of the

340 *Id.* at 17 (suggesting that the fact the law references constitutional article 33 (regarding natural resources) and not article 28H(1) (the right to life and well-being) may indicate that the law was never meant to be anything more than resource management legislation); *see also* CONST. (1945) art. 23, 28H(1) (Indon.).

341 Al'Afghani, *supra* note 335, at 12 n.52 (citing a demonstration in the *Polanharjo* District, in which residents picketed a water bottler for extracting too much water from local aquifers, thereby affecting irrigation); *see also* Beta Terjajah Tuan-Tuan, *Gentlemen, We are Colonised!* GATRA MAGAZINE (Apr. 18, 2005), http://www.gatra.com/2005-04-18/majalah/beli.php?pil=23&id=83676.

342 *See* Prof. Dr. Jimly Asshiddiqie, S.H., Chairman, Constitutional Court, Mahkamah Konstitusi dalam Sistem Ketatanegaraan Republik Indonesia (Dec. 11, 2005), *as cited in* Al'Afghani *supra* note 335, at 3 n.5 (taken from the Statement of Chairman of the Constitutional Court, Prof. Dr. Jimly Asshiddiqie, S.H.).

343 CONST. (1945) art. 28H (Indon.).

344 *See* Al'Afghani, *supra* note 335, at 9.

Argentine constitution affording the citizens a right to a healthy environment.[345] Judicial activism in several provinces has led to claims that courts nationwide now have a legal basis (though non-normative) upon which to protect a right to drinking water.[346] Argentine courts have explicitly referenced international documentation in their jurisprudence, and have also developed strong implicit (if imperfect) support for water's minimum core. The Argentine cases below, often cited as international models, are also demonstrative of the general approach to water rights taken in many Latin American jurisdictions.[347]

From 1991 to 1999, World Bank and IMF-directed funding brought one of history's largest development investment programs to Argentina.[348] Agreements were brokered in all 23 provinces privatizing water utilities, accounting for the drinking water of over 60% of the population by 1999.[349] However, corruption and lack of infrastructure caused almost immediate problems. Inadequate oversight quickly led to pollution by both industry and major service providers as poor regions were left with incomplete renovations while water prices steadily increased. In some places tariffs grew by 70% for the poorest 10% of the population, while privatization failed to connect over 50% of potential clients to a water source.[350] With the onset of the 2001 economic crisis, bill collection rates

345 Art. 41, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). This approach is common in Latin America. Colombian courts have adopted similar judgments; several are summarized below.

346 PICOLOTTI, *supra* note 224, at 12.

347 Although only cases from Colombia and Argentina are cited here, case law on the right to water has reached a similar level of development elsewhere in Latin America. Costa Rican jurisprudence, for example, has required service extensions to those without access. Brazilian courts have begun to reverse disconnections. *See* COHRE(C), *supra* note 50, at 277. Brazil, Peru, Chile and Venezuela have also recently developed limited support for water rights. *See, e.g.,* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 25 noviembre 2009, "Alejandro Papic Dominguez con Comunidad Indigena Aymara Chuzmiza y Usmagama," Rol de la causa: 2840-08, recurso de protección (Chile), http://www.poderjudicial.cl/modulos/BusqCausas/BCA_esta402.php?rowdetalle=AAANoPAANAACuErAAC&consulta=100&causa=2840/2008&numcua=41242&secre=UNICA (the Court protected the indigenous water rights of a community from full exploitation by a bottling corporation. The judgment protected a specific amount of fresh water (9 liters per second) and applied international standards (ILO Convention) but in relation to *indigenous rights* in both national and international law, not to a human right to water as such.).

348 *See* Sebastian Hacher, *Worldwide Water Movement Wins Victories; Argentina Water Privatization Scheme Runs Dry,* MICH. Q. REV. (Mar. 13, 2004); *see also,* Greg Palast, *The Four Steps Which Destroyed Argentina*, PROSPERITY UK (Feb. 25, 2003), www.prosperityuk.com/prosperity/articles/argen.html. Private sector involvement, linked strongly to development banks, was first implemented in developing countries (1980s) and was only subsequently introduced to developed and transitioning economies like Argentina. *See* Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *Report of the Expert on the Issue of Human Rights Obligations Related to Non-State Service Provision in Water and Sanitation,* Human Rights Council, U.N. Doc. A/HRC/15/31, ¶ 6 (June 29, 2010) (by Catarina de Albuquerque) [hereinafter *Non-State Actor Report*], *available at* http://www2.ohchr.org/english/issues/water/iexpert/annual.htm (via hyperlink with the title of the document). The privatization was undertaken pursuant to Law No. 23696, Aug. 18, 1989, [XLIX-C] A.D.L.A. 2444 (Arg.).

349 Sebastian Galiani, Paul Gertier & Ernesto Shargrodsky. *Water for Life: The Impact of the Privatization of Water Services on Child Mortality,* 113 J. POL. ECON. 1, 9 (2005).

350 J Jason Bricker, *Privatization of Water Management in Argentina,* AMERICAN UNIVERSITY TRADE ENVIRONMENT DATABASE 2-3 (2001), http://www1.american.edu/ted/water-argentina.htm; *see also* Bluemel, *supra* note 5, at 984; Viviana Alonso, *Water and Sewage Privatisation Gone Sour,* INTER PRESS SERVICE (Aug. 15, 2003), http://ipsnews.net/interna.asp?idnews=19693.

dropped by 90% and shut-offs became routine. The self-financing capability of the market disappeared and any attempt at "cost recapture" was lost.[351] As Nelson suggests, "Profitability is the key to all the arguments for private sector provision: efficiency, incentives to improve infrastructure and incentives to conserve."[352] In privatization, however, water generally flows to money, not to need. Argentina proves that when profitability disappears, water stops flowing at all.[353]

Argentines enjoy unique water rights protection, which has helped redress some of these violations. The 1853 Constitution has been reformed six times, most recently in 1995 when eleven treaties (including the ICESCR) were incorporated, guaranteeing the justicability of the rights conferred.[354] The Argentine Supreme Court has held that lower courts should follow the authoritative interpretations of these treaties where applicable.[355] Constitutional rights (including those derived from international commitments) are often protected by class-action suit beginning with a court-ordered injunction or *acción amparo. Amparo* injunctions can also be placed by Public Defenders, subject to subsequent review.[356] As in India, anyone can initiate such a case in the public interest.[357]

The first notable water rights case, *Menores Communidad Paynemil*[358] arose from an injunction placed by a Public Defender upon learning that the government had not taken steps to stop the industrial contamination of drinking water. While drilling a new well, members of the Paynemil community encountered hydrocarbon, later confirmed by an independent report.[359] The provincial Court of Appeals found that the government was responsible for negligent oversight of a nearby oil company, a violation of the right to a healthy environment. The Court ordered the government to provide 250 l/p/d of clean water to Paynemil within 48 hours and to "ensure the provision of drinking water by appropriate

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351 Bricker *supra* note 350, at 3.

352 Paul J. Nelson, *Human Rights, the Millennium Development Goals, and the Future of Development Cooperation,* 35 WORLD DEV. 2041, 2049 (2007).

353 In her report on Non-State Service Provision, the Independent Expert notes that generally, human rights are "neutral as to economic models" and that the decision is left to the state as to the best way of implementing its human rights obligations. *Non-State Actor Report, supra* note 349, ¶ 15, 63. The present essay supports this legal position, noting that the choice by a state to involve private interest at some level of resource provision may be an appropriate one, always considering, however, that "[t]he State cannot exempt itself from its human rights obligations by involving non-State actors in service provision. Irrespective of responsibilities of the latter, the State remains the primary duty-bearer for the realization of human rights." *Id.* ¶ 18. Irrespective of this position, many important judicial claims considered in this chapter have arisen from the imperfect or improper privatization of water resources and a lack of state oversight.

354 CONSTITUCIÓN NACIONAL, *supra* note 345, § 75, ¶ 22 (Argentina ratified the ICESCR in 1986).

355 Winkler, *supra* note 36, at 9.

356 CONSTITUCIÓN NACIONAL, *supra* note 345, at 43 (Incorporated as part of the 1994 reform).

357 LITIGATING, *supra* note 235, at 60; CONSTITUCIÓN NACIONAL, *supra* note 345, at 43.

358 Cámara de Apelaciones en lo Civil y Comercial [Capel. CC Nqn.] [Neuquen Court of Appeals in Civil and Commercial Matters] 2/3/1997, "Menores Comunidad Paynemil / acción amparo (*Menores*) (Arg.), *available at* http://www.escr-net.org/usr_doc/sentencia_cámara_Paynemil.tif, *partially reported in* COHRE(b), *supra* note 212, at 111.

359 A segment of this report is reprinted in Picolotti, *supra* note 224, at 13.

means within 45 days."[360] The case, though not explicitly referencing an independent right to water, has been interpreted as strong judicial support for such a right.[361] Most importantly, it develops a two-pronged approach similar to the Indian court in *S. K. Garg v. State of Uttar Pradesh* requiring the immediate provision of a specific amount of clean drinking water to meet basic needs while also ensuring that the state move progressively toward the implementation of the right's full scope.[362]

The Paynemil ruling was echoed by a subsequent judgment in another *Menores* case, this time for the Valentina Norte Colony.[363] An early judgment in the case ordered the free provision of 100 l/p/d to every community inhabitant within 48 hours.[364] At the appellate level, this order was seen as effectively incentivizing the illegal occupation of land by requiring the provisions of water to those without title. The original ruling was therefore struck down. Fortunately, the Supreme Court overturned the appellate finding, again citing Articles 41[365] and 43[366] of the Constitution. This time, however, the Court explicitly mentioned the right to water, referencing relevant provisions of the CRC.[367] The Court also cited the pro homine[368] and erga omnes[369] principles of international human rights law as guiding its interpretation of state responsibility toward water rights.

Both the human right to water and its minimum core have been most clearly defined in cases stemming from the privatization woes of the 1990s. In *Usuarios and Consumadores en Defensa de sus Derechos v. Aguas del Gran Buenos Aires,*[370] a Court of First Instance held that the disconnection of water service, even for lack of payment, violates the constitutional rights to life and health, but

360 COHRE(b), *supra* note 212, at 111 (translating and discussing the *Menores* case).

361 *See* PICOLOTTI *supra* note 224, at 13; COHRE(b), *supra* note 212, at 111.

362 *See* discussion *supra* Part IV.D.2.

363 Tribunal Superior de Justicia de Neuquén [Trib. Sup. Nqn.] [Superior Tribunal of Justice] "Valentina Norte Colony, Defensoría de Menores N° 3 c. Poder Ejecutivo Municipal / acción amparo" (Arg.). *See* COHRE(b), *supra* note 212, at 113 (summarizing this case).

364 *Id.* The Court also required that a means for storing water be given to those too poor to be able.

365 Art. 41, CONST. NAC. (Arg.) (providing a right to healthy and balanced environment).

366 *Id.* art. 43 (right to contest the constitutionality of a state action).

367 The CRC and its protection of water access for children is among the eleven treaties constitutionally incorporated. *See generally* Convention on the Rights of the Child, *supra* note 53.

368 The pro homine principle has been defined by the Supreme Court of Argentina to hold that it shall always be preferable to opt for the interpretation that is less restrictive to such rights. Corte Suprema de Justicia de la Nación [CSJN], 25/8/2009, Sebastián Arriola y Otros / causa, ¶ 23 (Arg.), *available at* http://www.aidslex.org/site_documents/DR-0134S.pdf ("*Así cuando unas normas ofrezcan mayor protección, estas habrán de primar, de la misma manera que siempre habrá de preferirse en la interpretación la hermenéutica que resulte menos restrictiva para la aplicación del derecho fundamental comprometido.*").

369 Erga omnes, from the Latin meaning 'in relation to everyone,' is used in human rights law to reference obligations or rights held by or toward each person equally.

370 Juzgado Nacional de Primera Instancia de Moreno, Buenos Aires [1a Inst. M. B.A.] [Lower Court of Ordinary Jurisdiction], 21/8/2002, "Usuarios y Consumadores en Defensa de sus Derechos Asociación Civil c/ Aguas del Gran Buenos Aires S.A. / acción amparo," La Ley Buenos Aires [L.L.B.A.] (2002-1359) ¶ 1 (Arg.), *available at* http://www.legalmania.com.ar/derecho/fallo_asociacion_consumidor.htm.

also implies a violation of constitutional treaty obligations.[371] In enunciating a rule of general effect, the opinion recognized a right to freshwater held by *all citizens* regardless of their ability to pay.

In Córdoba several years later, the Court again protected water rights in two utilities cases, this time with clearer support for the minimum core and a more detailed reference to the right's source in international law. Córdoba is noted for its progressive constitution and water code, which protect water as a vital element and prioritize communal over private use.[372] In *Quevado Miguel Angel v. Aguas Cordobesas,*[373] the First Instance Court modified a contractual obligation between a private interest and consumers, increasing the free provision of daily water from 50 to 200 liters per household per day. The Court held that "the provision of a minimum quantity of potable water . . . because of its public utility character must be guaranteed to all individuals." Fifty liters was ruled insufficient to meet that minimum as it "cannot guarantee *basic conditions of hygiene and health.*"[374]

In *Marchisio Jose Bautista v. Ciudad de Córdoba,*[375] the applicants alleged that several poor, outlying neighborhoods suffered from an unconstitutional lack of access to the public water system and that existing resources were being contaminated by untreated sewage.[376] Although the finding was again principally based in the right to health,[377] the Court also referenced a right to water based in Article 25 of the UDHR, Articles 11 and 12 of the ICESCR and General Comment 15. The Court's detailed attention to the international definition mirrored the innovative *Minors Oposa* judgment from Indonesia.[378] The Court once again supported a minimum core for water by requiring the provision of 200 liters per household per day until it could ensure full access to public water service.

The standard set in Bautista has been upheld in other cases as recently as 2007, when the Special Administrative Chamber for Buenos Aires confirmed that the state is responsible for providing vulnerable segments of the population with adequate water access, even if this work requires costly measures. More significantly, the Court used its decision to condemn any "retrogressive" measures as

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371 *See* ICESCR, *supra* note 37; art. 11, *and* CRC, art. 24(2)(c).

372 Art. 66.2, CONSTITUCIÓN DE LA PROVINCIA DE CÓRDOBA (Córdoba, Arg.); Law No. 5589 *as modified by* Law No. 8928, Cba., May 28, 1973, B.O. 21/05/1973 (Arg.), *available at* http://www.tododeiure.com.ar/leyes/cordoba/5589.htm. *See* Picolotti, *supra* note 224, at 12.

373 Juzgado de Primera Instancia de Córdoba [1a Inst. Cba.] [Cordoba Lower Court of Ordinary Jurisdiction], 8/4/2002, "Quevado Miguel Angel y otros c/ Aguas Cordobesas S.A / acción amparo," (Arg.); *see* COHRE(b), *supra* note 212, at 113.

374 Quotation taken from a translation and summary of the case from Bret Theile, Director of Litigation for COHRE (June 21, 2010) (on file with the author) (emphasis added).

375 Juzgado de Primera Instancia de Córdoba [1a Inst. Cba.] [Cordoba Lower Court of Ordinary Jurisdiction], 19/10/2004, "Marchisio José Bautista / acción amparo" (Arg.). Winkler, *supra* note 36, at 10 (partially reporting the case).

376 *See* Gorsboth, *supra* note 23, at 16.

377 Winkler, *supra* note 36, at 11 ("The Court continued to point out that the right to health includes measures to be taken to prevent damages to health such as providing water and obliges [sic] the State to take positive measures.").

378 *See* discussion *supra* Part IV.D.5.

blatantly illegal, mirroring the language in both General Comments 3 and 15.[379] Although there are other rulings from several different provinces regarding water rights, the Argentine standard as developed in the cases above is illustrative of that country's laudable approach in recent years.[380]

7. *Colombia*

Colombia faces development concerns similar to Argentina's, including insufficient connection to public and private utilities. As in Argentina, Colombian courts have defended access to water for personal consumption as a fundamental right since the mid-1990s, deriving it primarily from other constitutional rights, but with definitional reference to the prevailing international consensus. Colombians litigate for rights protection through an *acción de tutela,* or writ for constitutional protection similar to an *acción amparo.*[381] Colombia is a party to the ICESCR, and its provisions must be used to interpret sections of the Constitution.[382] This gives some national weight to the General Comments of the CESCR. Colombia is recognized for its explicit support of the minimum core concept in other socio-economic rights cases, although the standard has never been applied to water rights.

The judicial standard for water rights protection was first developed in the *Carlos Alfonso Rojas Rodriguez* case,[383] where the Constitutional Court held the public service of water to be a fundamental constitutional right linked to the rights to life, and health.[384] "In principle," reasoned the opinion, "water is the source of life and a lack of service runs contrary to the fundamental, individual right to life."[385] That standard was further developed in a series of subsequent water rights cases, which specified: (a) that the right to water is based in human

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379 *See generally* Juzgado Nacional de Primera Instancia [1a Inst.] [National Lower Court of Ordinary Jurisdicton], 4/9/2007, "Asociación Civil por la Igualdad y la Justicia c. Gobierno de la Ciudad de Buenos Aires / accción amparo," ¶ XXI (Arg.), *available at* http://www.newsmatic.e-pol.com.ar/index.php?pub_id=99&sid=1046&aid=22936&eid=28&NombreSeccion=Jurisprudencia%20Ciudad%20de%20Bs.As&Accion=VerArticulo.

380 *See, e.g.,* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/9/2007, "Defensor del Pueblo de la Nación c. Estado Nacional / acción amparo" (Arg.) *available at* http://www.derecho-comparado.org/sentencias/argTobas.htm.

381 Literally, "trusteeship." Practice established by L. 2591, 19-11-1991, 40 Diario Oficial [D.O.] 165 (Colom.).

382 Colombia ratified the ICESCR in 1969. Constitución Political de Colombia [C.P.] 5-7-1991, § 93.

383 Corte Constitucional (C.C.) [Constitutional Court], Sala Cuarta de Rev., noviembre 3, 1992, Expediente 1992-1848 (*Carlos Alfonso Rojas Rodriguez*) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/1992/T-578-92.htm.

384 CONSTITUCIÓN POLÌTICA DE COLOMBIA [C.P.] art. 11, 49. The right to health is framed as an obligation. "[P]ublic health and environmental protection are public services for which the state is responsible. All individuals are guaranteed access to services that promote, protect, and rehabilitate public health." (Author's translation). Article 42 of the law establishing the practice of *tutela* is also commonly referenced as a source of a right to public utility services as it establishes legal recourse in cases of disagreement over provision. *See* L. 2591, Nov. 19, 1991 (Col.).

385 *Carlos Alfonso Rojas Rodriguez, supra* note 383, §6.

need as derived from Article 366 of the Constitution;[386] (b) the right to water is only enforceable in situations where actual human consumption is at stake;[387] and (c) the right to water is further based in the right to human dignity.[388]

Judgments of the last several years have begun to explore the particulars of such a constitutionally-derived right with explicit reference to international legal sources like the ICESCR, General Comment 15, and regional case law.[389] In *Flor Enid Jimenez de Correa v. Medellín Public Companies*,[390] the Constitutional Court ordered the service reconnection of a 56-year old woman suffering from a serious illness and incapable of affording her utility bill. Citing General Comment 15, the Court held that parties to the ICESCR, "have a special obligation to provide those who do not have sufficient means with the necessary water . . . [and] to ensure that water is affordable, states parties must adopt the necessary measures which may include, inter alia . . . free or low cost water."[391] General Comments of the CESCR were held to be part of the Colombian "constitutional block" and therefore authoritative in understanding constitutional rights.[392] Such an assertion implicitly embraces the minimum core (as part of the CESCR's interpretation) even if not explicitly referencing the concept.

In R*olfy Flórez v. la Alcaldía y Empresas Municipales* two years later, [393] the Court established the priority of children in water provision by quoting article 24(2) of the CRC.[394] Most recently, in *Carolina Murcia Otárola v. Empresas Publicas de Nieva E.S.P*,[395] the Constitutional Court carefully outlined the con-

386 *See, e.g.*, Corte Constitucional (C.C.) [Constitutional Court], Sala Séptima de Rev., 18-6-1993, Expediente 1993-9713 (*Ciro Edilberto Linares Bejarano*) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/1993/T-232-93.htm; Corte Constitucional (C.C.) [Constitutional Court], Sala Séptima de Rev., diciembre 9, 2009, Expediente 2009-2344512 (*Maria de Jesús Medina Pérez*) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/1994/T-523-94.htm.

387 *See, e.g.*, Corte Constitucional [C.C.],. [Constitutional Court], Sala Cuarta de Rev., agosto 1, 2002, Expediente 2003-697667 (*Jorge Hernan Gomez Ángel*) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2003/T-410-03.htm.

388 *See, e.g.*, Corte Constitucional [C.C.]. [Constitutional Court], Sala Séptima de Rev., abril 24, 2006, Expediente 2006-1266209 (*Alvaro Garcia Caviedes*) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2006/T-317-06.htm (a detention case asserting the right to water as non-derroguable in times of legal internment).

389 *See* discussion *supra* Part II.

390 Corte Constitucional [C.C.] [Constitutional Court], Sala Primera de Rev., abril 17, 2007, Expediente 2007-1426818 (*Flor Enid Jiménez de Correa*) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2007/T-270-07.htm.

391 *Id.* ¶ 4 ("tienen la obligación especial de facilitar agua y garantizar el suministro necesario de agua a quienes no disponen de medios suficientes" . . . los Estados Partes . . . la adopción de . . . "políticas adecuadas en materia de precios; como el suministro de agua a título gratuito o a bajo costo").

392 *Id.* ("(ii) El Pacto Internacional de Derechos Sociales, Económicos y Culturales hace parte del bloque de constitucionalidad, ampliando el espectro de protección por vía de tutela de los derechos fundamentales").

393 Corte Constitucional [C.C.] [Constitutional Court], Sala Séptima de Rev., diciembre 9, 2009, Expediente 2009-2344512 (*Rolfy Flórez*) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/1994/T-523-94.htm.

394 *Id.* at 4.

395 Corte Constitucional [C.C.] [Constitutional Court], Sala Segunda de Rev., agosto 6, 2009, Expediente 2009-2259519 (*Carolina Murcia Otárola*) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2009/T-546-09.htm.

tent of the Colombian right to water by quoting Articles 11 and 12 of the ICESCR, the standards of availability, quality and accessibility from General Comment 15, CRC, CEDAW, case law from the Inter-American Court and even the Report of the OCHCR (2007).[396] By citing eleven previous water rights decisions from the Constitutional Court, the opinion effectively crowned the *Otorola* judgment as the culmination of those previous efforts.[397]

The minimum core was first explicitly referenced by the Constitutional Court in 1997,[398] and was used to identify the minimum core of rights like housing and health as recently as 2008.[399] In the case *Luz Mary Osorio Palacio v. Colpatria ESP*,[400] the Court embraced the CESCR's right to health framework by giving very detailed content to the minimum core, defining immediately enforceable aspects of the right from those subject to progressive realization and resource constraints.[401] Similar protection has not yet been extended to the right to water, probably due to the Court's standing case law requiring utilities payment even for the financially incapable. Service suspensions are often upheld in Colombia, and the Constitutional Court has asserted that "[p]overty does not exempt one from the social obligation to help finance government expenditure."[402] The Court demands "responsible use," requiring the poor to draw only what they can afford. Strangely, this position was reiterated in *Otorola* alongside that judgment's reference to international documentation in support of economic accessibility.[403] Al-

396 *Id.* at 3.1-3.3.

397 *Id.* at T-539/93, T-244/94, T-523/94, T-092/95, T- 379/95, T-413/95, T-410/03, T-1104/05, T-270/07, T-022/08, T-888/08.

398 Corte Constitucional [C.C.] [Constitutional Court], mayo 28, 1997, Expediente D-1644, ¶ 5 (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/1997/C-521-97.htm ("Los derechos humanos incorporan la noción de que es deber de las autoridades asegurar, mediante prestaciones públicas, un mínimo de condiciones sociales materiales a todas las personas, idea de la cual surgen los llamados derechos humanos de segunda generación o derechos económicos, sociales y culturales.").

399 *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], septiembre 25, 2003, Expediente T-733112 y 756609 (*Eduardo Montealegre Lynett*) (Colom.), http://www.corteconstitucional.gov.co/relatoria/2003/T-859-03.htm; Corte Constitucional (C.C.) [Constitutional Court], enero 22, 2004, Expediente T-653010 (*Manuel Jose Cepeda Espinosa*) (Colom.), *available at* http://www.corte constitucional.gov.co/relatoria/2004/T-025-04.htm; Corte Constitucional [C.C.] [Constitutional Court], julio 27, 2006, Expediente T-1192765 (*Marco Gerardo Monroy Cabra*) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2006/T-585-06.htm; Corte Constitucional [C.C.] [Constitutional Court], julio 31, 2008, Expediente T-1281247 (*Marco Gerardo Monroy Cabra*) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm.

400 Corte Constitucional [C.C.] [Constitutional Court], Sala Segunda de Rev., julio 31, 2008, Expediente 2003-1281247, T-1289660, T-1308199, T-1310408, T-1315769, T-1320406, T-1328235, T-1335279, T-1337845, T-1338650, T-1350500, T-1645295, T-1646086, T-1855547, T-1858995, T-1858999, T-1859088, T-1862038, T-1862046, T-1866944, T-1867317, T-1867326 (*Luz Mary Osorio Palacio*) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm.

401 *See* Alicia Ely Yamin & Oscar Parra Vera, *The Role of Courts in Defining Health Policy: The Case of the Colombian Constitutional Court*, (Harvard Law School Human Rights Program Working Paper, 2008), *available at* http://www.law.harvard.edu/programs/hrp/documents/Yamin_Parra_working_paper.pdf for an analysis of the case. See Chowdhury, *supra* note 280, at 8, for a basic explanation of the Colombian court's approach to the minimum core.

402 Corte Constitucional [C.C.] [Constitutional Court], Sala Tercera de Rev., agosto 1, 2002, Expediente 2002-583320 (*Jairo Morales*) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2002/T-598-02.htm.

403 *Carolina Murcia Otárola, supra* note 396, at 4.

though such judgments do not constitute a rejection of the minimum core approach, they defy an understanding of the minimum core as developed in Section III and as such, may make it harder to reconcile such an approach with current case law in the future.

8. *Continental Africa, MENA, North America and the Pacific*

Before considering the South African cases, it should be noted that the protection of the human right to water in other regions of the world has met with varying degrees of success. Water rights have found increasing support in the African Commission, as national judicial structures across Africa sometimes cannot lend effective remedy.[404] The Commission has recently delimitated state obligations toward water access, including conditions of accessibility, availability, acceptability and quality based in CESCR General Comment 14.[405] Water rights are protected as a derivative of the right to the highest attainable standard of health under Article 16 of the African Charter.[406] These cases, while notable for their protection of water rights in the face of national failure, do not, however, posit such a right as explicitly based in international law.

The "vast majority" of governments in MENA have largely ignored the growing consensus on water rights. Through a series of interviews in 2007, Aswit Biswas found that "policy makers in the majority of water-related institutions [in MENA] appear to be either unaware, or somewhat superficially aware, of this declaration and how it may affect their work."[407] This exists despite the fact that the region—particularly the Nile and Jordan River basins—is home to some of the world's most troubling water conflicts.[408] As it happens, the CESCR first mentioned a "right to water" in reference to Israel's treatment of Palestinians in 1998.[409] The CCPR has also treated Israel's water policy with special attention,

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404 Water rights have been most explicitly asserted in the 2009 judgment in *COHRE v. Sudan* released to the public in July 2010. *COHRE v. Sudan, supra* note 85. The admissibility of the submission, contested by the Sudan, was permitted as Sudanese courts were held to fail the test of effective remedy consisting in availability, effectiveness and sufficiency as developed in the *Jawarda* case. Dawda Jawara v. Gambia, Afr. Comm'n Hum. & Peoples' Rts., Comm. No. 147/95 & 149/96 ¶ 31 (May 11. 2000). The water rights standard was previously elaborated in Free Legal Assistance Group v. Zaire, Afr. Comm'n Hum. & Peoples' Rts., Comm. No. 25/89, 47/90, 56/91 & 100/93 (Oct., 1995). In this case it was similarly "impractical or undesirable for the complainant to seize the domestic courts" as Zaire would not even acknowledge the complaint before the Commission. *Id.* ¶ 37.

405 *Id.; see also* U.N. CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 (Aug. 11 200), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4ceb75c5492497d9802566d500516036?Opendocument.

406 This jurisprudential standard was first set in *COHRE v. Sudan* and then reiterated again later in this case. *See COHRE v. Sudan, supra* note 85, ¶¶ 47, 206-12.

407 Biswas *MENA*, *supra* note 47, at 215-16.

408 *See, e.g.*, AMNESTY INTERNATIONAL, TROUBLED WATERS: PALESTINIANS DENIED ACCESS TO WATER 1-5 (2009), *available at* http://www.ngo-monitor.org/data/images/File/Amnesty_water_112.pdf (insisting that some Palestinians under Israeli control lack basic access to water even below 20-25 l/p/d). The report may have some shortcomings in its interpretation of international legal obligations incumbent on the Israeli state, however. See Jason Brozek, *Review of Amnesty International's 'Troubled Waters: Palestinians Denied Access to Water'* 3 WATER ALTERNATIVES 161 (2010) for a critical analysis.

409 Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights, para. 42, U.N. Doc. E/C.12/1/Add.27 (Dec. 4, 1998) ("The

specifying in its 2010 Concluding Observations that the denigration of water access for Palestinians constituted a violation of the ICCPR rights to life and equal protection.[410]

In North America, water rights remain largely a matter of civil privilege and not a human-rights entitlement. The staunch unwillingness of Canada to recognize the right to water is noted above.[411] Similarly, The United States has a long history of ignoring all socio-economic rights, stemming from a Cold War disagreement with the USSR. In 1979, The U.S. government signed the ICESCR, but has yet to ratify the Covenant due to both a lack of political will as well as the official positions of several subsequent Presidents who considered socio-economic rights as only "desirable social goals."[412] In *Lindsey v. Normet*, the U.S. Supreme Court notably held that "the [U.S.] Constitution does not provide judicial remedies for every socio-economic ill."[413] Furthermore, in a speech before the adoption of the General Assembly resolution recognizing a human right to water in 2010, a U.S. Representative stated that there is no "right to water and sanitation" in an international legal sense as described by the resolution.[414] The U.S. then abstained from voting.

The constitutions of several U.S states enshrine socio-economic rights (including water rights) more clearly.[415] Certain cases such as *Campaign for Fiscal Equity v. State of New York* have even limitedly supported the idea of a minimum core.[416] It is unlikely, however, that state jurisprudence will ever affect federal standards without the explicit assent of the legislature or executive, noting concern over separation of powers.[417]

Finally, national courts in the Pacific region have been completely silent regarding a human right to water, despite low levels of access in some places.[418] Although most of these 16 states have ratified the ICESCR, CRC, and CEDAW, only Australia, New Zealand and Fiji have established national human rights in-

Committee urges the State party to recognize the existing Arab Bedouin villages, the land rights of the inhabitants and their right to basic services, including water.").

410 *See* discussion supra Part II.A for details regarding this case.

411 *See* discussion *supra* Part II.

412 DAVID SHIMAN, ECONOMIC AND SOCIAL JUSTICE: A HUMAN RIGHTS PERSPECTIVE (1999), *available at* http://www1.umn.edu/humanrts/edumat/hreduseries/tb1b/index.html.

413 Lindsey v. Normet, 405 U.S. 56, 74 (1972).

414 *See* Statement of the United States Representative to the General Assembly, *reprinted in* Press Release, *supra* note 85.

415 *See, e.g.*, C.A. Const. art. X, § 2.

416 Though neither uses the language "minimum core" nor references the CESCR, the Court notes a "constitutional minimum" for the right to education repeatedly. Campaign for Fiscal Equity v. State of N.Y., 801 N.E.2d 326, 339 (N.Y. 2003); Campaign for Fiscal Equity v. State of N.Y., 861 N.E.2d 50, 55 (N.Y. 2006). This analysis is borrowed from Chowdhury, *supra* note 280, at 10.

417 Concern for constitutional separation of powers as restricting the judicial enforcement of socio-economic rights in the United States mirrors that of the South African system considered below.

418 Vanatau and the Soloman Islands, the poorest areas in the region in terms of drinkable water, enjoy 70% and 60% water supply coverage for their populations, respectively. *See Data Mining Gateway, WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation*, World Health Organization, UNICEF, http://www.wssinfo.org/datamining/tables.html (last visited Oct. 18, 2010) (select "update table" link with default values to obtain this data).

stitutions.[419] Interestingly, neither Australia nor New Zealand has developed a body of law recognizing water as a human right, despite the fact that both countries have ratified the ICESCR.[420] In Australia, ICESCR provisions are not directly enshrined into national law,[421] and existing national legislation only partially protects water rights.[422] In New Zealand, concerns over privatization efforts begun in the early 2000s have yet to precipitate a rights-defining challenge in national courtrooms.

9. *South Africa*

South Africa has had its own dramatic struggle with development, suffering a post-colonial history of institutionalized oppression that continues to have socio-economic repercussions today. As recently as 2007, the country suffered from 40% unemployment and a 30% lack of access to suitable housing, including piped water.[423] The 1996 "post-apartheid" Constitution, heralded for its "redistributive"[424] and "transformative"[425] potential, sought to redress development woes by enshrining often overlooked rights such as the right to water.[426] In fact, nowhere in the world is the right to water more clearly protected by legislation where the minimum core has been explicitly referenced in jurisprudence and case law than South Africa, which may serve as a model for international replication. Unfortunately, the work of the South African Constitutional Court—the final arbiter for these decisions—has restricted direct access to socio-economic rights

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419 The Pacific Region (U.N. designation) includes Australia, New Zealand, Papua New Guinea, Solomon Islands, Vanuatu, Cook Islands, Fiji and Samoa, Federated States of Micronesia, Kiribati, Marshall Islands, Niue, Tuvalu, Tonga, Nauru Palau (arranged here by ratification rate for "core" U.N. Human Rights Treaties). *See* Office of the High Commissioner for Human Rights, Regional Office for the Pacific, *Ratification of Human Rights Treaties: Added Value for the Pacific Region*, at 4-7 (July 2009), *available at* http://pacific.ohchr.org/docs/RatificationBook.pdf.

420 Australia ratified the ICESCR on December 10, 1975 and New Zealand on 28 December, 1978.

421 Despite this fact, the High Court found in *Minister for Immigration and Ethic Affairs v. Teoh* that Australians have a 'legitimate expectation' that domestic laws will be implemented in a way consistent with the country's treaty obligations. *See Minister for Immigration and Ethic Affairs v. Teoh* (1995) 183 CLR 273 (Lee J. and Carr. J.) (Austl.), *partially reported by* CHILD RIGHTS INFORMATION NETWORK (Apr. 7, 1995), *available at* http://www.crin.org/Law/instrument.asp?InstID=1431.

422 Through water management and regulation. Among the most notable is the *Water Management Act 2000* (Austl.), *available at* http://www.nwc.gov.au/www/html/1285-water-management-act-2000.asp. *See* Janice Gray, *Implementing the Human Right to Water in Australia*, 17 HUM. RTS. DEFENDER 1, 4 (2008).

423 Lehman, *supra* note 175, at 164.

424 Peter Bond & Jackie Dugard, *Water, Human Rights and Social Conflict: South African Experiences*, 2008 L. SOC. JUST. & GLOBAL DEV. J. 3, 3 (Feb. 11, 2008), *available at* http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2008_1/bond_dugard.

425 Nicholas Haysom, *Constitutionalism, Majoritarian Democracy and Socio-Economic Rights*, 8 S. AFR. J. HUM. RTS. 451, 459-60 (1992).

426 S. AFR. CONST., Act 108 of 1996, § 27(1)(b) and (2) ("(1) Everyone has the right to have access to. . . (b) sufficient food and water. . . (c)(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.").

protection,[427] causing many to consider the Constitution has having failed to realize its potential.[428]

Since the 1990s, courts have attempted to distinguish constitutional responsibility from the obligations within international covenants like the ICESCR (which South Africa has signed but not ratified).[429] This trend has led to a rejection of certain aspects of the international definition for socio-economic rights like water, including the concept of a "minimum core." These standards have been abandoned in favor of weaker, constitutional tests of "reasonableness." Most recently, South African water rights jurisprudence has even challenged the principle of non-discrimination and the understanding of the proper role of the Court at the heart of international human rights.

Cases concerning water rights stem from the inequitable distribution of resources established during Apartheid.[430] As in Argentina, privatization policies aimed at cost recovery failed to address inequity, causing shortages, disconnections and a general retrogression in access levels.[431] Legislative attempts to address water shortage began with the African Congress Party's "Growth, Employment and Redistribution" (GEAR) policy in 1996. The policy targeted access levels by setting a Free Basic Water (FBW) entitlement of six kiloliters per month, while prepaid meters were installed in some areas to more efficiently regulate provision.[432] The policy was not based on a determination of vital needs however, and was not therefore "rights protection."[433] Water rights were to be safeguarded by the simultaneous passage of the Water Services Act, ensuring

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427 Hopes were high following the 1996 finding of the Constitutional Court in its Certification Judgment that socio-economic rights "are, at least to some extent, justiciable." *See Certification of the Constitution of the Republic of South Africa* 1996 (77) SA 744 (CC) (S. Afr.), *partially reported in* N. Gabru, *Some Comments on Water Rights in South Africa,* 8 POTCHEFSTROOM ELEC. L.J. 5, 6 (2005), *available at* http://ajol.info/index.php/pelj/article/viewFile/43456/26991; *see also* Bond & Dugard, *supra* note 424, at 4.

428 *See, e.g.*, Lehman, *supra* note 175, at 164.

429 South Africa signed the ICESCR in 1994 and has yet to ratify it. Section 39(1)(b) of the South African Constitution of 1996 requires the consideration of international law when interpreting the Bill of Rights. S. AFR. CONST., 1996 § 39(1)(b). The Constitutional Court ruled in *Makwanyane* that non-binding rules of law are also relevant in treaty interpretation. *S. v. Makwanyane* 1995 (3) SA 391 (CC) at 24 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/1995/3.html. In some cases this standard has been tacitly respected; however, true support for the character of the international norm has proven illusory. *See infra* note 458.

430 Winkler, *supra* note 36, at 4.

431 *Id.* at 4 (citing Rose Francis, *Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power,* 18 GEO. INT'L. ENVTL. L. REV. 140, 152-53, 174 (2005)).

432 Winkler, *supra* note 36, at 5-6; Bond & Dugard, *supra* note 424, at 9 (explaining that 25 l/p/d in a household of eight is higher than the national average but still substantially lower than the international human rights norm). Between 1996 and 2002, the FBW reached approximately 27 million South Africans. Bluemel, *supra* note 5, at 979, *citing* MILLENNIUM PROJECT TASK FORCE 7 ON WATER AND SANITATION, ACHIEVING THE MILLENNIUM DEVELOPMENT GOALS FOR WATER AND SANITATION: WHAT WILL IT TAKE? 116 (2004), *available at* http://www.unmillenniumproject.org/documents/tf7interim.pdf.

433 The 6 kiloliter limit was actually based on economic efficiency. *See* Bond & Dugard, *supra* note 424, at 8, (explaining the precedent of the policy, a pilot project in Durban instituting an "informal settlement because it was cheaper to give away the water than to administer bills for it").

everyone "a right of access to basic water supply"[434] and requiring that state policy "not result in a person being deprived access to basic water services for non-payment."[435] The two policies were to work in concert, but disconnections persisted, and cases were soon brought to court. Appeals from the High Court to the Constitutional Court have been commonplace in socioeconomic rights litigation.

At the High Court level, protection for water rights has been mixed. In *Manqele v. Durban Transitional Metropolitan Council,*[436] a High Court in Durban ruled against the applicant in a disconnection case, arguing that her loss of access was legally justified by her refusal to stop extracting water beyond her six-kiloliter allowance despite her inability to pay – a holding similar to the Colombian Court in *Otorola.*[437] The applicant asserted her rights in the Water Services Act, but the Court found the Act's protection incomplete and lacking legislative guidance for enforcement.[438] The Judge considered water provision a "policy matter" linked to the availability of resources and failed to extend Constitutional protection, as the applicant did not consider those rights in her argument.[439]

Several months later a High Court in Witwatersrand exhibited a more open attitude. In *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council,*[440] the Court granted a request for interim relief to a poor community disconnected from the water supply. The judgment noted that disconnection is a prima facie breach of the constitutional obligation to respect water rights and that the burden of proof for constitutional compliance rests on the respondent.[441] The legal standard in that case was similar to those developed by courts in India and Argentina, and the judgment even referenced the ICESCR as informing the constitutional right.[442] A High Court again defined and protected water rights in an early judgment of the *Mazibuko* case below. Unfortunately, however, the opinion was overturned by the Constitutional Court, which has developed a reputation for ignoring international standards in favor of less-stringent, constitutionally-derived standards for socio-economic rights.

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434 Water Services Act 108 of 1997 § 3(1) (S. Afr.).

435 *Id.* § 4(3)(c) (when an inability to pay can be demonstrated).

436 *Manqele v. Durban Transitional Metro. Council,* 2002 (2) SA 39 (D) (S. Afr.).

437 *Id.* at 46. This was before the imposition of pre-paid meters. *See Carolina Murcia Otárola, supra* note 383.

438 *Manqele, supra* note 436, at 43-44.

439 *Id.*

440 *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council 2002 (6) BCLR 625 (W) (S. Afr.).*

441 *Id. at* 630-32.

442 The judge required the interpretation of the Constitution in line with South Africa's commitment to the ICESCR which it had signed (but not ratified) in accordance with § 39(1)(b) of the Constitution. S. AFR. CONST., 1996 § 39(1)(b); *see Residents, supra* note 440, at 629.

The Constitutional Court's *Grootboom*[443] judgment focused on housing rights for a community of poor South Africans subjected to "apartheid-style" evictions from their shanty town, Wallacedene.[444] Although the case's original emphasis was not on water, the Court held that socio-economic rights must be considered together, placing a special emphasis on water rights in its construction of the "reasonableness" test for which the judgment is often cited.[445] Justice Yacoob J.'s opinion argued that the Constitution[446] requires the state to progressively implement socio-economic rights with a coherent program of action in a way that is *reasonable* in both its conception and implementation, including elements of balance, flexibility and attention to short, medium and long-term needs.[447] The reasonableness standard was not meant to determine the "best" possible policy, but only whether or not the solution in question was acceptable.[448] State policies in the present case were found to be unreasonable, because they failed to "provide relief to those in desperate need."[449] While the judgment protected the water rights of the applicants to some degree, it rejected an international basis for those rights.

Many suggested that the Court's interpretation of the constitutional right to water was "similar" (though not identical) to the CESCR's interpretation in General Comment 15.[450] The major difference, however, was that in setting a new standard of "reasonableness," the Court effectively usurped the minimum core

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[443] *South Africa v. Grootboom* 2000 BCLR 1169 (CC) (S. Afr.), *available at* http://www.constitutionalcourt.org.za/Archimages/2798.pdf.

[444] *Id.* para. 10 ("reminiscent of apartheid-style evictions"). The residents of the shanty community of Wallacedene erected shelters of found materials without access to sanitation, electricity or other public services.

[445] The judgment in *Grootboom* also noted that water concerns were part of the "lamentable" living conditions of the applicants as "[t]hey had no water, sewage or refuse removal services." *Id.* para. 7. The reasonableness standard modifies the standard of "rationality" established by an earlier case. *Soobramoney v. Minister of Health, Kwazulu Natal* 1997 (1) SA 765 para. 25, 43 (CC) (S. Afr.).

[446] S. AFR. CONST., 1996 § 26.

[447] *Grootboom, supra* note 443, para. 41-43. The adaption and further application of the legal standard first developed in *Soobramoney* was considered problematic as its reasoning, though leading to a correct judgment in that case, is considered too rigid for a Court faced with ever-more complex socio-economic rights cases. *See generally* Scott & Alston, *supra* note 155.

[448] The Court held that the obligations permitted a "wide range of possible measures" and that it, therefore, would "not enquire whether other more desirable or favourable measures could have been adopted." *Grootboom, supra* note 443, para. 41.

[449] *Id.* para. 66. This judgment, which found a violation of § 26 (the right to housing) but not of § 28 of the South African Constitution (rights of the child not subject to progressive implementation), is somewhat confusingly the *opposite* of the High Court's finding in an earlier instance of the same case. S. AFR. CONST., 1996 § 28; *see Grootboom v. Oostenberg* 2000 BCLR 277 (C) (S. Afr.). The High Court modified the standard set in *Soobramoney* with the test of "reasonableness" later used by the Constitutional Court, but kept the same spirit of judicial deference for the decisions of public officials made in "good faith" expressed by the Court in the earlier case.

[450] *See, e.g.*, Bluemel, *supra* note 5, at 977-78. The Court actually argued that the definition of "progressive realisation" in General Comment 3 was "in harmony" with the Constitutional definition. *Grootboom CC, supra* note 443, para. 45. The Court failed, however, to include any reference to the minimum core. *Id.*

approach.[451] The reasonableness standard quietly borrowed several elements of the minimum core, but weakened the overall concept by insisting that state policies aimed at rights realization may be "reasonable" even if they don't always respond to the needs of the most desperate.[452] By contrast, the minimum core would have likely required the immediate provision of water to meet the basic needs of all Wallacedene residents. If such a policy could not have been implemented, the State would have been responsible for justifying its failure with reference to available resources.[453] The Court referred to the minimum core only as a "detailed, helpful and *creative* approach to the difficult and sensitive issues involved in the case."[454] At the time, the Court insisted that it was "not necessary" to decide the ultimate appropriateness of the approach, leaving open the possibility of its future use.[455]

The decision in *Grootboom* increased anticipation for the Court's subsequent judgment in the 2009 *Lindiwe Mazibuko* case.[456] The case involved a suit by five residents of Phiri in Soweto, a destitute urban development built during Apartheid on the outskirts of Johannesburg. The litigation challenged the imposition of the FBW Policy and the installation of prepaid meters in that district. The residents of Phiri were previously accustomed to being charged a flat rate for what was, in reality, an unmetered and unlimited supply of water.[457] The suit alleged that the FBW policy violated the constitutional right to water, and that the installation of prepaid meters was (inter alia) administratively unfair, discrimina-

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451 The Court had already rejected the approach in a previous case on the right to health, as it was believed to create a problematic right of individual petition for immediate core benefits that "should not be construed" from the Constitution's socio-economic protection, especially considering that such an entitlement would be "impossible" to administer. *Minister of Health v. Treatment Action Campaign (TAC)* 2002 SA 721 (CC) paras. 26, 32, 34-35 (S. Afr.).

452 Authors like Chapman, Russell, and Bilchitz believe that Yacoob's conclusion betrays an implicit minimum core calculus. *See* Bilchitz, *supra* note 176, at 498; Chapman & Russell, *supra* note 152, at 19. The weakness of the standard is betrayed in the Court's judgment itself, stating that if those measures aimed at realizing the right, "though statistically successful, fail to respond to the needs of those most desperate, they [only] *might* not fail the test." *Grootboom CC, supra* note 443, para. 65 (emphasis added). Bilchitz refers to a "claim that it may have been acceptable not to cater for basic needs 'if the nationwide housing programme would result in affordable houses for most people within a reasonably short time.'" Bilchitz, *supra* note 175, at 499.

453 *See* discussion *infra* Part.III.

454 *Grootboom CC, supra* note 443, para. 17 (referring to the submissions of *amici curiae* that explicitly referenced the approach).

455 *Id.* para. 33.

456 Even before it was decided, *Mazibuko* was expected to "test the limits of the enforcement of socio-economic rights through legal and judicial means . . . ." Bond & Dugard, *supra* note 424, at 13. *L Mazibuko v. City of Johannesburg,* 2010 BCLR 239 (CC) (S. Afr.) [hereinafter *Mazibuko CC*], *available at* http://www.saflii.org/za/cases/ZACC/2009/28.html.

457 This background is borrowed from Peter Danchin, *A Human Right to Water? The South African Constitutional Court's Decision in the Mazibuko Case,* EJIL TALK! (Jan. 13, 2010), http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court's-decision-in-the-mazibuko-case/. Danchin mistakenly insists that the Court rejected the minimum core approach despite the insistence of the legal team litigating the case. This is not strictly true, as such an approach was never advocated by written submission.

tory in application, and a violation of the Water Services Act.[458] The *Mazibuko* case is a clear example of the Constitutional Court's restrictive rights protection in contrast to the more open judicial attitude of the High Court.

In the High Court opinion, Justice Toska recognized the opportunity to apply a minimum core calculus left open by the Constitutional Court in *Grootboom*.[459] Toska suggested that a lack of information restricted the application of this standard in previous cases, and that when sufficient information is available, the Court should apply a minimum core calculus.[460] The judgment also noted that water rights lend themselves more easily to a minimum core approach than housing rights, and that a basic level of minimum provision (in this case 50 l/p/d)—though requiring a case-by-case adjustment—is generally determinable.[461] In its judgment, the Court made extensive reference to international and comparative law on service disconnections, strongly supporting the global consensus on water rights.[462] In the end, the Court found: (a) prepaid meters cut off water without reasonable notice, prohibiting explanation for financial constraint; (b) installation of the meters was administratively unfair; and (c) installation was carried out in black communities while more leeway was given to white settlements.[463] The High Court's logic comprehensively supported international water rights norms—including the minimum core—despite their strict constitutional construction. This standard largely held on initial appeal.[464] The Constitutional Court's subsequent repeal of that decision was so restrictive, however, that it has thrown into question the entire international consensus developed thus far.

The Constitutional Court concluded that the FBW Policy (and the installation of prepaid meters) did not challenge the Water Services Act or the Constitution and was in fact "reasonable" in its conceptualization and execution. Essentially, the Court argued that residents were still receiving water and that the supply was only "temporarily suspended" behind an automatic meter.[465] The Court then confirmed its preference for the "reasonableness" test, ruling definitively that the socio-economic rights in the Constitution do not have a minimum core, and that

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458 *Mazibuko CC, supra* note 456. Anti-discrimination is upheld by §9 of the South African Constitution. S. AFR. CONST., 1996 § 9.

459 It should be noted that a "minimum core" analysis was never urged by the applicants in the case, nor was it by any of the *amici curiae*. *Mazibuko v. Johannesburg* Case No. 06/13865 (2008) (HC, Wit.) (S. Afr.) [hereinafter *Mazibuko HC*], *available at* http://www.iatp.org/tradeobservatory/library.cfm?refID=102539.

460 *Id.* para. 131.

461 *Id.* paras. 131-34.

462 *Id.* paras. 34-40 (citing the ICESCR, GC15, and CRC).

463 *Id.* paras. 92-94, 151, 153.

464 *See City of Johannesburg v. L Mazibuko* 2009 BCLR 791 (SCA) (S. Afr.) [hereinafter *Mazibuko SCA*], *available at* http://www.saflii.org/cgi-bin/disp.pl?file=ZA/cases/ZASCA/2009/20.html&query=%20mazibuko. The Supreme Court of Appeals largely upheld the jurisprudential standard, varying the order by changing the required amount of free water from 50 l/p/d to 42 l/p/d, with a two-year suspension pending the reformulation of the government's policy. *Id.* paras. 24, 62. Pre-paid meters were upheld as unlawful. *Id.* paras. 58, 62.

465 *Mazibuko CC, supra* note 456, para. 120 (finding that prepayment meters do not disconnect water supply, but they are "better understood as a temporary suspension in supply, not a discontinuation.").

to determine an appropriate level of basic provision would be judicially inappropriate. Ironically "principles of international law" were cited in support of the Court's dubious conclusion.[466] Citing the *Grootboom* and *TAC* cases, the Court held that "the right to access to sufficient water . . . does not require the state upon demand to provide everyone with sufficient water. . .rather it requires the state to take reasonable legislative and other measures to realize the achievement of the right to access to sufficient water, within available resources."[467] The Court found that the state's policy in Phiri met the criteria for "reasonableness," an assessment worth quoting at length as it distinguishes that standard from the minimum core.

> [T]o raise the free basic water allowance for all so that it would be sufficient to cover those stands [dwellings] with many residents would be expensive and inequitable, for it would disproportionately benefit stands with fewer residents.
>
> Establishing a fixed amount per stand will inevitably result in unevenness because those stands with more inhabitants will have less water per person than those stands with fewer residents. This is an unavoidable result of establishing a universal allocation. Yet it seems clear on the City's evidence that to establish a universal per person allowance would be administratively burdensome and costly, if possible at all. The free basic water allowance is generous in relation to the average household size in Johannesburg. Indeed, in relation to 80% of households (with four occupants or fewer), the allowance is adequate on the applicant's case. In the light of this evidence, coupled with the fact that the amount provided by the City was based on the prescribed national standard for basic water supply, it cannot be said that the amount established by the City was unreasonable.[468]

The opinion relies on a flexible calculation of "utility" in governmental protection for water rights that greatly weakens the universal standard enshrined in General Comment 15. Administrative burden and a disproportionate benefit to some vis-à-vis others justify the state's rejection of "universal allocation" as "costly, if possible at all." Similar reasoning in *Grootboom* was argued by scholars like Bilchitz to be unethical, as "reasonableness" permits the absolute disenfranchisement of some as long as efforts are focused on non-essential improvements for others.[469] The standard in *Mazibuko* is even more questionable as it permits the State to decide against measures that would realize the minimum of the right for all if those efforts would disproportionally *benefit* those already enjoying their rights. In effect, the judgment argues that it is better not to

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[466] *Id.* para. 40 n.31 (citing ICESCR art. 2(1) and CESCR GC3 as outlining principles of international law "consistent" with the Court's own limited understanding of progressive realization, requiring only continuous review in light of legality and "reasonableness." This is despite the purpose of GC3 to end such superficial and un-nuanced understandings of the term).

[467] *Id.* para. 50.

[468] *Id.* paras. 88-89.

[469] Bilchitz, *supra* note 175, at 494-99.

realize the minimum of the right for some if realizing the minimum for all would lead to inequitable enjoyment, especially when such efforts would burden the state.

The judgment is notable for its conceptual retrogression in two other areas. First, the Court established a disturbing standard for non-discrimination. When confronted with the applicant's submission that the meters were only installed in poor, black areas, the Court held that the policy was not discriminatory because the meters had not been installed in *all* poor black areas.[470] Jackie Dugard characterized this finding as "insane" and "the most utterly outrageous and unacceptable of all the components of the judgment."[471] The standard seems to commit a conceptual fallacy. Since non-discrimination is an absolute, a finding of discrimination is instance-based and does not rely on proof of universality. If the way a policy is carried out leads to one instance of discrimination, the policy must be challenged as discriminatory until the discrimination is stopped. To argue that the prepaid meter policy in the *Mazibuko* case is non-discriminatory because it does not discriminate everywhere, is like arguing that a state policy adequately protects the right to life, even if, in a limited number of cases, it directly causes death. Non-discrimination is a central element of all human rights, explicitly enshrined by General Comment 15 as part of both the definition and minimum core of the right to water.

The second (and for our purposes even more disturbing) retrogression in the *Mazibuko* case involves the limitation of the Court's role in socio-economic rights enforcement. The work of this essay relies on an understanding of the role of national courts as supporting the international consensus on socio-economic rights through content-giving.[472] The Constitutional Court in *Mazibuko,* however, effectively *rejects* such a role for itself, content to let legislative measures alone define the nature of positive obligations. The court held that it is only required to review the reasonableness of the chosen method of implementation, or in cases where no steps have been taken, to require only that the state act without defining specific parameters for that action.[473] The court insists that "[c]ourts are ill-placed to make these assessments for both institutional and democratic reasons."[474] Such a finding again builds upon a conceptual misunderstanding in *Grootboom.* The court fails to distinguish between the right itself—the definition of which requires that every state policy contain certain essential

[470] *Mazibuko CC, supra* note 456, ¶ 155-57. The opinion held that even if discriminatory, the purpose for the implementation of the prepaid meter scheme was not administratively unfair, unconstitutional or even harmful for Phiri residents.

[471] Email from Jackie Dugard, Executive Director, Socio-Economic Rights Institute of South Africa, to the author (June 8, 2010 04:18am CST) (on file with the author). Ms. Dugard also argued that the stance overturns the laudable anti-discrimination jurisprudence of South African courts in previous socio-economic rights cases.

[472] *See* discussion *supra* Part IV.A, IV.B.

[473] *Mazibuko CC, supra* note 456, ¶ 62-63, 67-68.

[474] *Id.* ¶ 62.

elements[475]—and the "wide range of possible measures [that] could be adopted by the state to meet its obligations."[476]

When faced with concrete instances of rights infringement, the Constitutional Court defied the work of every other national court struggling to enforce socio-economic rights in the face of insufficient governmental protection. This is despite the opportunity afforded by its unique constitution, judicial stability and international notoriety. South Africa, in (a) refusing to base its definition of water rights on the international consensus, in (b) rejecting a minimum core calculus in favor of a "reasonableness" test, in (c) weakening protection against discrimination and in (d) diminishing its own role in rights construction, provides a powerful challenge to the progress achieved thus far in the definition and defense of the human right to water.[477]

Mitigating Factors to Consider

Before abandoning hope for the future of international water rights protection, there are three important factors to consider regarding the South African cases above. First, differences between the Constitution and international standards may somewhat justify the Constitutional Court's finding and limit the application of that standard in courtrooms abroad. Kende suggests that the drafters of the progressive South African Bill of Rights "never intended to have the socio-economic rights provisions create . . . an individual right to demand," largely due to the perceived unfeasibility of such an approach.[478] The Court itself recognized this historical fact in the landmark *TAC* judgment.[479] To ensure that constitutional socio-economic rights would not too closely mirror their broader international counterparts, the constitutional language was restricted. The Constitution, for example, only enshrines the right "*to have access* to . . . sufficient food and water"—a standard different from that of General Comment 15.[480] Furthermore, because South Africa has not yet ratified the ICESCR, the Court has no firm

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[475] *E.g.*, non-discrimination, basic provision to all, consideration of accessibility, quality, etc. . . . as derived from GC15 and those other sources listed *supra* Part II.

[476] *Grootboom CC*, *supra* note 443, para. 41. This argument is at the heart of Bilchitz's essay. *See* Bilchitz, *supra* note 175, at 487.

[477] The intellectual retrogression of the case was considered by some like Danchin to confirm the worries of scholars like Young over the conceptual indeterminacy of the minimum core. Danchin, *supra* note 457, ¶ 16 ("The sequence of judgments in the Mazibuko case lends credence to Katherine Young's argument in her recent article"); *see also* Young, *supra* note 158.

[478] Kende, *supra* note 175, at 623, 625-29; *but see* Lehman, *supra* note 175, at 178 (arguing that the criticism that the Court has never found such a right is unfair).

[479] *Minister of Health v. Treatment Action Campaign (TAC)* 2002 SA 721, ¶ 26, 32, 34-35 (CC) (minimum core requirements were rejected in the *TAC* case, as they were held to create a problematic right of individual petition for immediate core benefits that "should not be construed" from the Constitution's socio-economic rights as such an entitlement would be "impossible" to administer).

[480] Constitution of the Republic of South Africa § 27(1)(b). There are two other textual differences between the two standards. The Constitution itself introduces the novel language of reasonableness. Bilchitz notes that this term modifies the word measures and not the right itself. *See* Bilchitz *supra* note 175, at 496. Secondly, where the Constitution requires only action "within available resources," the international standard requires action "to the maximum of available resources." The difference, however, is generally considered to be unproblematic as courts are unlikely to negatively infer that the state's

obligation to interpret the constitutional right with reference to international standards, and has previously asserted in both the *Grootboom* and *TAC* cases that such an approach would be inappropriate.[481] By strictly basing its judgment on South African law, the Court may have limited the possibility for judicial transmission abroad.

Secondly, the judgment in *Mazibuko* may have aimed at effectively realizing some rights protection while safeguarding the constitutional separation of powers. The *Mazibuko* opinion directly cites concern for separation of powers as the basis for the Court's reticence to enforce constitutional rights more strictly.[482] The Court's careful circumspection of a sensitive issue has been praised by some South African legal scholars, referring to similar positions as "pragmatic" or even "jurisprudentially sounder."[483] In the end, the *Mazibuko* judgment may be less about rights enforcement and more about finding the appropriate role of the judiciary within the South African constitutional system.[484]

Finally, judicial rejection of the "minimum core" could be a red herring, as the concept may still find imperfect support in South African jurisprudence, albeit under a different name. Some authors have even suggested that the Court's approach is essentially supportive of the concept's application, and only calculatedly restrictive for political reasons. Chowdhury notes that:

> [A] smokescreen and mirrors approach is [perhaps] useful given the many legitimate reasons the courts have to not adopt an explicit minimum core approach such as, for instance, lack of information[485] and yet given the importance of the minimum core approach. So the rejection of the minimum core by the South African Courts could be characterized as a red herring in that it distracts from the actual machinations of the cases.[486]

There are many ways in which essential elements of the minimum core are protected by existing law, including the Water Services Act and FBW policy,[487] and the Court's own opinions seem to make extensive calculations on the "reasonableness" of a policy based in the amount of water necessary to sustain

obligation is lessoned, noting principles of international law governing treaty application like the Vienna Convention. *See* Scott & Alston, *supra* note 155, at 262-63.

481 *S. v. Makwanyane* 1995 SA 391 (CC) ¶ 35 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/1995/3.html (the Constitutional Court held that non-binding rules of law are also relevant in treaty interpretation).

482 *Mazibuko CC*, *supra* note 456, ¶ 61; Danchin *supra* note 457, ¶ 16.

483 *See* Lehman, *supra* note 175, at 165 (proposing that the court's deliberate disuse of the minimum core calculus stems from a discomfort it has yet to fully articulate.); *see generally* Kende, *supra* note 175.

484 *See* Interview with Geoff Bundlender, *in* LITIGATING, *supra* note 235, at 96 ("[t]hat's where the real argument takes place: about there the role of the judiciary starts and stops.").

485 *See* Chowdhury, *supra* note 280, at 13 (referring to the determination by the High Court in *Grootboom* that there was not enough information available to define the appropriate amount of water protected by the right).

486 *Id.* (referencing the original decision in the High Court case).

487 Both specify a 'floor' for basic provisions.

human life.[488] Still, the Constitutional Court's decision in *Mazibuko* so definitively rejects the standard, that even if a red herring, it will most likely limit explicit use of the minimum core by South African courts in the future.

In the end, the reasonableness test—whatever its "flexibility" or "appropriateness" to the South African context—weakens the international standard of protection for the human right to water. Reasonableness treats progressive realization as an open-ended concept within which results can be indefinitely deferred.[489] In fact, the reasonableness test may only "trade arbitrariness for indeterminacy" as it encounters the same difficulties of interpretation and contextualization that the minimum core would encounter in application.[490]

We find in South Africa an almost nationalistic definition of the right to water, which suffers in its judicial isolation from international legal norms. Even when citing international law, the Constitutional Court does so in a transparently inauthentic way—with no reference to expert opinion, legal consensus or true teleology.[491] Again the South African example proves how difficult it can be to find effective protection for one's universal human right to water without true recourse to the ICESCR. This realization is especially bitter for South Africans, however, as the right to water seemed to have been constitutionally embraced. Fortunately, the effect of the ruling above is limited by the mitigating factors noted here. Although the South African case presents a significant challenge, the wealth of progress made in other national courtrooms is far from lost.

V. Concluding Remarks

A. Brief Analysis

Through the work of this essay, we have seen the symbiotic relationship between the definition of the right at the international level and the use of that right for stakeholder protection at home. After reviewing the case law above, it is possible to draw several helpful conclusions about the nature of this process for the human right to water. These conclusions should provide guidance for further, more context-specific inquiry.

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488 The judgments in both *Grootboom* and *Mazibuko CC*, though effectively rejecting a minimum core, still formulate opinions on the amount of water required for human subsistence based on expert standards. Bilchitz insists that the reasonableness calculus used by Yacoob J. engages in a process of balancing for minimum satisfaction and progressive realization that first requires a minimum core-like admission that the achievement of a guaranteed minimum is at all the responsibility of the state. *See* Bilchitz, *supra* note 175, at 498-99.

489 *See* Scott & Alston, *supra* note 155, at 263.

490 *See* Danchin, *supra* note 457, ¶ 22; *see also* Sandra Liebenberg, *South Africa's Evolving Jurisprudence on Socio-Economic Rights: an Effective Tool in Challenging Poverty?*, 6 L. DEMOCRACY & DEV. J. 159, 175 (2002).

491 *See, e.g.*, discussion *supra* note 466 (providing the Court's misinterpretation of GC3) *and supra* note 480 (noting the Court's failure to give legal effect to the full concept of water rights as outlined in GC 3 and GC 15 despite the previous ruling in *Makwanyane*). When citing a standard of non-binding international law these interpretative sources become all the more important in directing the work of a national court.

First, judicial activism can be expected to have continued importance in water rights litigation. Of the seventeen states with constitutional rights to water, only one (South Africa) is included here as a notable example of judicial enforcement. Every other court referenced in this essay developed a standard of protection for water rights by "construing" protection through another, justiciable legal entitlement. This judicial activism seems to indicate a pressing need for an explicitly codified universal human right to water worldwide. More significantly, it signals the continuing role the judiciary can be expected to play in extending water rights protection to stakeholders, making any undue restriction on judicial competence in water rights enforcement (as in *Mazibuko*) especially worrisome.

Secondly, the case law reveals the central role of the ICESCR in ensuring effective water rights protection. It is not *absolutely necessary* that states ratify the ICESCR or enshrine it into national legislation to protect water rights. This is because at the national level courts rely principally on a "local" basis for the right, even when ICESCR provisions are directly enforceable. Instead of asserting the right to water as a universal legal entitlement, the national courts above grounded their arguments in the rights to life (India, Pakistan, Bangladesh, Indonesia, Colombia), well-being (Indonesia), health (Colombia, Argentina), healthy environment (India) and dignity (Belgium, Colombia).

When courts *do* reference international standards in their jurisprudence, however, the level of protection for the stakeholder is strengthened. The Belgian Court of Arbitration, in citing the text of Agenda 21, found an independent right to drinking water even before the legal basis for such a right has been delineated by the CESCR. In the *Pollution Control Board* case, the Indian Supreme Court similarly used the Mar del Plata Action Plan to posit an independent right to water more clearly than in any case before or since.

The ICESCR and its General Comments are the strongest international legal sources for the human right to water to which a state may have recourse. Cases explicitly referencing these texts have therefore developed the most comprehensive standards of protection to date. No Asian case law, for example, is more comprehensive in its interpretation of the human right to water than the *Irrigation Review* judgment from Indonesia. That case directly cited ICESCR Art. 12 and General Comments 3 and 15. Among the countries sampled, Argentina and Colombia have developed the most nuanced understanding of water rights and come closest to explicitly protecting the minimum core. Both have direct constitutional access to the ICESCR.

In the reverse, an unwillingness to interpret constitutional rights with reference to the ICESCR can cause the severe limitation of water rights. Citizens of the United States and Australia—both countries with strong legal systems—have no judicial guarantee of a right to water, which seems obviously related to their national refusal to embrace the ICESCR. Though limited judicial activism in the Philippines has attempted to expand rights protection, a manifest unwillingness to enforce the ICESCR has limited the extent of this work. Bangladesh and Pakistan remain incapable of India's judicial initiative for the same reason. The problems of non-enshrinement are most clearly seen in the South African *Mazibuko* case. The court there chose to interpret constitutional water rights with

reference to domestic legal standards alone, shunning the international norm. The inappropriateness of "reasonable state action" as a benchmark for socio-economic rights enforcement has already been demonstrated.

It may seem obvious to assert that the ICESCR is the linchpin for effective protection of water rights, especially since the legal definition of the right depends so much on Covenant provisions. In the end, however, it is worth noting that ratification of the ICESCR is not only an important step in establishing responsibility for water rights in international law, but also a key element of national protection, as it provides courts with an invaluable legal basis for interpretation. If one lesson can be drawn from the preceding cases, it is this: the more clearly accessible the ICESCR for judicial use, the greater and more nuanced the protection for water rights.

B. In Conclusion

This essay has demonstrated the legal basis for an independent human right to water, developing from international consensus into a reality of positive law. The socio-economic right to water, most appropriately derived from the ICESCR, has clear normative content and places equally clear obligations on the state. Such an understanding of water rights, born as it is from the interpretative work of the CESCR, cannot be explained separately from the concept of its "minimum core." This conceptual tool is meant to distinguish immediately binding obligations from the full scope of the right in a way that supports the *raison d'etre* of the Covenant itself. The minimum core, it is hoped, will more adequately protect stakeholders by closing the loophole of "progressive realization." The complication amidst this clarity comes in the utilization of the right to water by national courts, as this right (no matter its existence in international law) lacks explicit enshrinement in treaty. If the right to water is to become a *universal* right in practice, the integrity of the legal norm must be reinforced and not weakened in its national application.

With one notable exception, the human right to water has yet to meet a serious challenge in its national application. If anything, national case law exhibits a certain immaturity in its conceptual defense of the right to water. Most judgments reference the right in vague, general terms, failing to outline its content and obligations conclusively. Without a doubt, this puerility is born from the novelty of the concept itself and its tendency to clash with entrenched legal norms (ex. property law) and justiciability requirements. Judicial hesitancy, however, may be weakening somewhat. National courts have proven increasingly willing, especially in the past five years, to reference international standards in their jurisprudence. There is plenty of room for the future development of this "green" jurisprudence into more mature efforts of legal-construction, especially if courts are granted greater access to the ICESCR through legislation or judicial initiative. The process outlined above is only beginning, but so far, it seems to be going well.

It remains too early to know how national courts will finally handle the minimum core. An analysis of the above cases reveals a great deal of implicit support

for such a calculus, as courts have (a) made reference to "essential minimum levels" for socio-economic rights (State of New York, India), (b) distinguished immediate from progressive responsibilities (India, Argentina), (c) established specific amounts of water to be provided free of charge (Belgium, Argentina), and (d) embraced the full definition of the right in General Comment 15 (Indonesia, Colombia). Colombia has even applied a minimum core to other socio-economic rights like housing and health. In none of the above cases, however, has a national court explicitly embraced this approach for the right to water.

Whether lagging acceptance of the core concept stems from its political unpopularity, conceptual problems, or only the lack of development in water rights jurisprudence generally, one thing remains clear: the replacement of a minimum core with a weaker standard of enforcement can cause significant conceptual problems in rights interpretation. The *Mazibuko* case is the only notable challenge to water rights since General Comment 15 was published in 2002. By replacing the minimum core with a standard of "reasonableness," the court interpreted the constitutional right to water in a way that both undermined the principle of non-discrimination and degraded the vital role of the judiciary. In deliberately limiting the domestic enforceability of the right to water, the Court's reasoning weakened the normative foundation of that right itself. As important as this judgment may seem in "giving content" to the human right to water, however, there seem to be significant domestic factors at work that would limit its transmission abroad.

Our work here proves the judicial enforceability of water rights—a fact that was once considered dubious for all socio-economic rights. More than this, it suggests that national courts are themselves moving toward a more open embrace of this justiciability. If conceptually rooted in international norms, this legal shift may one day ensure the human right to water true "universality" in practice.