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CROSSING THE CROSSROADS: MAKING COMPETITION LAW EFFECTIVE IN PAKISTAN

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Introduction

This article is written as a follow up to my earlier piece titled "*At the Crossroads: Making Competition Law Effective in Pakistan*"[1] published in the Northwestern Journal of International Law and Business in the Spring of 2006. That article discussed the competition regime in Pakistan as established by the Monopolies and Restrictive Trade Practices Ordinance of 1970[2] (MRTPO); the organizational structure of the Monopoly Control Authority (MCA), the enforcing body of the MRTPO; factors impeding effective enforcement of MRTPO, and

† Member, Competition Commission of Pakistan; and also serves on the International Advisory Board of The Loyola University Chicago School of Law's Institute for Consumer Antitrust Studies, USA. The views expressed here are the author's alone and are not necessarily the views of the Competition Commission of Pakistan or any of its members. The author wishes to thank Mr. Abdul Ghaffar for his comments and for sharing his insights being associated with the reform process, which preceded the introduction of the new competition regime in Pakistan.

[1] Joseph Wilson, *At the Crossroads: Making Competition Law in Pakistan*, 26 Nw. J. INT'L L. & BUS 565 (2006).

[2] Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (Pak.) (Published in THE GAZETTE OF PAKISTAN EXTRAORDINARY, Feb. 26, 1970) [hereinafter MRTPO].

determinants of an effective competition agency.[3] Since the publication of my last piece, the competition regime in Pakistan has gone through monumental changes. In 2007, an entirely new competition law was enacted, and a new enforcement organization, the Competition Commission of Pakistan (the Commission) was established. The Commission has rigorously enforced the law, broken up a number of cartels, punished dominant players for abusing their market positions, cleared over 200 mergers, and worked to create awareness of the new competition regime.

The process for reforming the competition regime in Pakistan initially moved at a snail's pace. It started in the late 1990s, but gained momentum in 2005, when the Government of Pakistan asked the World Bank for technical assistance in designing a new competition law and policy framework for Pakistan.[4] I was approached by the Bank to assist in drafting parts of the competition law. The new competition law was initially promulgated in the form of the Competition Ordinance of 2007,[5] and eventually appeared in its permanent form as the Competition Act of 2010[6] ("the Act")—an act of the Parliament as opposed to temporary legislation by the President.

Part I documents the legislative history of the Competition Act. Part II provides commentary on the substantive provisions, and the tools provided by the Act to enforce its substantive provisions. Part III is a commentary on the institutional architecture, member appointment mechanisms, and adjudicative process of the Commission. Part IV places the enforcement record of the Commission in proper perspective, and Part V sets out the conclusion that periodic examination of the institutional arrangements of the Commission is necessary for effective enforcement of the law.

I. The Run-up to the Competition Act of 2010

A. The Competition Ordinance of 2007

The new competition regime in Pakistan was introduced through the Competition Ordinance of 2007 (CO 2007), promulgated by the President of Pakistan on October 2, 2007.[7] A federal ordinance is a temporary piece of legislation, valid for only 120 days, which the President of Pakistan has authority to issue under Article 89 of the Constitution of Pakistan, provided that (1) the Senate or National Assembly is not in session; and (2) the President is satisfied that circumstances exist which render it necessary for him to take immediate action.

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[3] The determinants identified to make a competition agency effective were: i) Qualified Leadership; ii) Independence; iii) Transparency; iv) Maintenance of Databases; v) Annual Review of Functioning of Agency; vi) Human Resource Audit; vii) Comparative Study; and viii) Competition Advocacy. Wilson, *At the Crossroads*, *supra* note 1, 591-594.

[4] THE WORLD BANK, COMPETITION POLICY AND LAW: PAKISTAN 1 (2007).

[5] The Competition Ordinance, 2007 (Published in THE GAZETTE OF PAKISTAN EXTRAORDINARY, Oct. 2, 2007) [hereinafter "CO 2007"].

[6] The Competition Act, 2010, Act No. XIX of 2010 (Published in THE GAZETTE OF PAKISTAN EXTRAORDINARY, Oct. 13, 2010) [hereinafter "The Act"].

[7] CO 2007, *supra* note 5.

The CO 2007 repealed the Monopolies and Restrictive Trade Practices Ordinance of 1970 ("MRTPO"), dissolved the Monopoly Control Authority ("MCA"), and provided for the establishment of the Competition Commission of Pakistan.[8] The Commission was established on November 12, 2007 through a notification of the Federal Government appointing five members, including the Chairman of the Commission.[9] The newly formed Commission assumed some of the existing staff, liabilities, and assets of the MCA.

In November 2007, then-President Musharraf declared emergency rule and issued the Provisional Constitutional Order of 2007 ("PCO"), which under Clauses 5(1) & (2), gave exemption to all the ordinances in force at the time of Proclamation of Emergency, which included the Competition Ordinance, from being "subject to any limitations as to duration prescribed in the Constitution."[10] The Competition Ordinance of 2007 was one such law exempt from previous constitutional restraints.

On February 15, 2008, in *Tikka Iqbal Muhammad Khan and others v. General Pervez Musharaf*,[11] a seven member bench of the Supreme Court of Pakistan upheld the PCO. The Court stated:

> Ordinances promulgated and legislative measures taken by the President, or as the case may be, by the Governor, which were in force at the time of, or during the period for which the Proclamation of Emergency, dated 3-11-2007 held the field, would continue to be in force by virtue of the Provisional Constitution Order, 2007 read with Art. 270AAA(3) of the Constitution, until altered, repealed or amended by the appropriate Legislature and there would be no question of expiry of these Ordinances in terms of Art.89(2), or as the case may be, under Art.128(2) of the Constitution.[12]

However, on July 31, 2009, a fourteen member bench of the Supreme Court in *Sindh High Court Bar Association v Federation of Pakistan*,[13] declared the PCO unconstitutional and, *inter alia*, directed that all ordinances protected by the PCO be placed before the Parliament and the respective provincial assemblies for their proper validation in accordance with Articles 89 and 128 of the Constitution. A

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[8] *Id.* § 12.

[9] S.R.O (1)/2007; No. F. 3(8)INV.III/2007; *see also* COMPETITION COMMISSION OF PAKISTAN: ANNUAL REPORT 2008, *available at* http://www.cc.gov.pk/images/Downloads/annual_report_2008.pdf. The Members appointed were:

1. Mr. Khalid Aziz Mirza (Chairman)
2. Mr. Abdul Ghaffar
3. Ms. Rahat Kaunain Hassan
4. Dr. Joseph Wilson
5. Ms. Maleeha Mimi Bangash

[10] Provisional Constitution Order No. 1 of 2007, *issued on* November 3, 2007, *amended on* November 15, 2007 (Pak.), *available at* http://www.pakistani.org/pakistan/constitution/post_03nov07/pco_1_2007.html.

[11] P.L.D. 2008 SC 178.

[12] *Id.*

[13] PLD 2009 SC 879.

period of four months was granted from July 31, 2009 for federal ordinances to be validated, while a three month window was created for provincial ordinances. Thus a federal ordinance could be ratified by the Parliament as late as November 28, 2009; otherwise, it would stand repealed. The Competition Ordinance of 2007 was tabled in the National Assembly as the Competition Bill in October 2009. However, the National Assembly was prorogued on November 16, 2009, before it had the opportunity to deliberate on the Bill.

B. The Competition Ordinance of 2009

To avoid the gap that would be created through the lapse of CO 2007, the President of Pakistan promulgated the Competition Ordinance of 2009 ("CO 2009")[14] on November 26, 2009. CO 2009 was made effective from October 2, 2007 thereby giving validity to all actions taken, and decisions made by the Commission under the Competition Ordinance of 2007.[15] On January 27, 2010, the National Assembly passed the Competition Bill, 2009, which was then tabled in the Senate on February 24, 2010, from where it was referred to the Senate's Standing Committee on Finance and Revenue for review. The Parliament failed to pass the Bill within 120 days of promulgation of Competition Ordinance of 2009, and as a consequence, the Competition Ordinance of 2009 lapsed on March 26, 2010, leaving the Commission without any legal status until April 18, 2010 (22 days), when the President promulgated the Competition Ordinance of 2010[16] ("CO 2010").

C. Competition Ordinance of 2010

The modern competition regime of Pakistan was reincarnated a third time as CO 2010.[17] Yet again, the Commission and the businesses were presented with an ephemeral competition regime—casting doubts on the authority and future of the Commission.

On May 5, 2010, the Senate's Standing Committee on Finance unanimously approved the draft of the Competition Bill of 2010 with two major amendments. First, the Committee recommended that the penalties, which are imposed and recovered by the Commission to become part of the Commission Fund,[18] should be de-linked from the Commission Fund and deposited in the national exchequer (consolidated fund account no. 1 of the Federal Government). Second, the Committee recommended that the government to set up a special appellate tribunal—the Competition Appellate Tribunal—for taking up appeals against the decisions

[14] Ordinance No. XLVI of 2009 (Pak.).

[15] This act of the president to re-promulgate the Competition ordinance has been challenged in a number of petitions before the High Courts and it is sub judice yet.

[16] Ordinance No. XVI of 2010 (Pak.); *see also* Kamal Afridi, *Looking into CCP Claims*, DAWN (Dec. 5, 2009), http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/front-page/competition-law-repromulgated-on-18th-official-340.

[17] *Id.*

[18] The Act, *supra* note 6, § 20(2)(b) (the "CCP Fund" shall include "Charges, fees and penalties levied by the Commission").

of the Competition Commission of Pakistan, instead of provincial high courts.[19] The Committee suggested that the Competition Tribunal should be formed within 30 days after the enactment of the Competition Act, 2010 and be located in Islamabad. Appeals against the decisions of the proposed three-member Competition Tribunal will be heard by the Supreme Court of Pakistan.[20]

The Competition Bill, however, was again not passed within the 120 day life of CO 2010, which ended on August 17, 2010, leaving the fate of the Commission in limbo yet again.

D. Competition Act 2010

After another hiatus of 57 days, the Parliament finally passed the Competition Act of 2010[21] on October 6, 2010, which received the assent of the President on October 13, 2010.

II. Competition Act of 2010: Objective & Tools

The Competition Act of 2010 is the fourth incarnation of the modern competition regime in Pakistan.[22] The major provisions remain the same in all four forms, with the exception of new provisions relating to appeals and fines appearing in the Competition Act. While the law was originally introduced through the CO 2007, discussion below refers to the Competition Act of 2010 for the sake of convenience, and also because it is the permanent and present legal instrument documenting competition law of Pakistan.

A. Objective: A Paradigm Shift

The Competition Act was enacted with the following objectives in mind: (i) to ensure free competition in all spheres of commercial and economic activity; (ii) to enhance economic efficiency; and (iii) to protect consumers from anticompetitive behavior.[23] The foregoing triad captures the various facets of the notion "consumer welfare," which is globally recognized as the raison d'être for having a competition regime. The object reflects a marked shift from the objective of the MRTPO, which was enacted with a view to prevent undue concentration of economic power in the hands of a few.[24]

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[19] Sohail Sarfraz, *Senate Body Passes Competition Ordinance With Amendments*, BUS. RECORDER, May 6, 2010.

[20] Sajid Chaudhry, *Further improvement: Senate body approves Competition Bill 2010*, DAILY TIMES (May 6, 2010), http://www.dailytimes.com.pk/default.asp?page=2010/05/06/story_6-5-2010_pg5_12.

[21] The Act, *supra* note 6.

[22] The other three being CO 2007, CO 2009, and CO 2010.

[23] The Act, *supra* note 6, pmbl.

[24] *See* Wilson, *At the Crossroads*, *supra* note 1, at 568 (while it was enacted some three years prior to the present day Constitution of Pakistan, constitutional ground for such legislation was laid in Article 38(a)). Under Article 38(a), the State shall:

> [S]ecure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distri-

B. Substantive Provisions: Competition and Consumer Protection

The Act applies to all undertakings[25] (firms), whether governmental or private, and to all actions or matters which may have the effect of distorting competition within Pakistan. The definition of the term "undertaking" also includes a governmental regulatory body. The substantive provisions of the Act include prohibitions against (i) abuse of a dominant position;[26] (ii) entering into agreements which have the object or effect of preventing or reducing competition within the relevant market;[27] and (iii) deceptive marketing practices.[28] It also introduced a

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bution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants;

PAK. CONST. (1973), art. 38(a).

[25] "Undertaking" means any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association of undertakings. The Act, *supra* note 6, § 2(q).

[26] Id. § 3. Abuse of dominant position:

(1) No person shall abuse dominant position.

(2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market.

(3) The expression "practices" referred in sub-section (2) shall include, but not limited to-

(a) limiting production, sales and unreasonable increases in price or other unfair trading conditions;

(b) Price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justifications that may justify different prices;

(c) Tie-ins, where the sale of goods or services is made conditional on the purchase of other goods or services;

(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of the contracts;

(e) Applying dissimilar conditions to equivalent transactions on other parties placing them at a competitive disadvantage;

(f) Predatory pricing driving competitors out of a market, prevent new entry and monopolize the market;

(g) Boycotting or excluding any other undertaking from the production, distribution or sale of any goods or the provisions of any service; or

(h) refusing to deal.

[27] *Id.* § 4.

4. Prohibited agreements:

(1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5 of this Ordinance.

(2) Such agreements include, but are not limited to-

(a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution or any goods or the provision of any service;

(b) dividing or sharing of markets for goods or services, whether by territories, by volume of sales or purchases, by type of goods or services sold or by any other means;

(c) fixing or setting the quantity of production, distribution or sale with regard to any goods or the manner or means of providing any services; limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any service; or

(d) collusive tendering or bidding for sale, purchase or procurement of any goods or service;

(e) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage; and

(f) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

sophisticated pre-merger clearance regime.[29] The substantive test for merger clearance is the substantial lessening of competition by creating or strengthening a dominant position in the relevant market.[30]

The substantive provisions are modeled after the competition law of the European Union. While there "is a particular competition between the United States and the European Union to expand geographic scope of their law,"[31] one reason Pakistan has its competition law modeled after that of the E.U. was that the World Bank, which was providing technical assistance, engaged the law firm of Jones Day in Brussels. It was simply more convenient for the firm to draft the proposed law using the framework with which it was most familiar.

The substantive provisions have integrated competition policy and consumer protection policy. Section 10 prohibits deceptive marketing. Choice and availability of perfect information are, among others, integral determinants of a competitive market.[32] Choices made on flawed information distort competition. Prevention of deception (fraud) not only helps consumers "by deterring dishonest sellers,"[33] but also "by making it easier for honest sellers to make credible product claims."[34]

> Both consumer and competition policy serve to improve consumer welfare, and they naturally complement each other. Competition theory that excludes consumer policy is not only shortsighted but, given the growing importance of consumer issues, can ultimately be self-defeating. Consumer policy that ignores its impact on competition can result in cures worse than the disease. An agency's contribution to the economy can be

(3) Any agreement entered into in contravention of the provision sub-section (1) shall be void.

[28] *Id.* § 10.

10. Deceptive marketing practices:

(1) No undertaking shall enter into deceptive marketing practices.

(2) The deceptive marketing practices shall be deemed to have been resorted to or continued to or continued if an Undertaking resorts to-

(a) the distribution of false or misleading information that is capable of harming the business interests of another undertaking;

(b) the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;

(c) false or misleading comparison of goods in the process of advertising or packing;

(d) fraudulent use of another's trademark, firm name, or product labeling or packing.

[29] *Id.* § 11. The MCA started requiring premerger clearance in June 2007 under section 24 of the MRTPO. *See* The Monopoly Control Authority (Acquisition of Shares and Merger Notice) Rules, 2007, S.R. & O. 642 (I)/2007.

[30] The Act, *supra* note 6, §11(1).

[31] Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1799 (2000).

[32] The determinants of a competitive market are: (i) absence of a dominant player; (ii) availability of choices; (iii) perfect information as to market conditions; (iv) easy entry; and (v) easy exit. *See* EINER ELHAUGE AND DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 1 (Hart 2007); RICHARD WHISH, COMPETITION LAW 7 (Oxford Univ. Press 6th ed., 2008).

[33] Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 174 (2005).

[34] *Id.*

> measured by its progress in increasing consumer welfare overall. Thus, well-conceived competition and consumer policies should take complementary paths to the same goal.[35]

To enforce the substantive provisions, the Act has given the Commission essential tools of forcible entry[36] and leniency.[37] Forcible entry becomes necessary when an undertaking refuses to let properly authorized officers of the Commission to enter and search premises with a view to gather material that may be relevant for proving and enforcing the provision of the Act. In order to protect that the provision of forcible entry is not abused, the Act provides that an order authorizing an officer(s) to forcibly enter and search premises has to be signed by two members of the Commission, and the officer so authorized shall not use his power with "vexatious, excessive or with *mala fide* intent."[38]

Section 39 provides for leniency for an undertaking, which is a party to a prohibited agreement, and is the first to make the full and true disclosure of the agreement. Leniency promotes compliance with the competition law by offering incentives to disclose prohibited arrangements, entered into with the intent to reduce, restrict or prevent competition. Leniency creates a prisoner's dilemma for cartelists, a situation that instills mistrust, which helps in breaking the cartels.

C. Remedial and Sanctioning Powers

The Commission derives its remedial[39] and sanctioning powers from sections 31 and 38 of the Act, respectively. The Commission can impose penalties either on a fixed amount basis not exceeding PRK 75 million (USD 0.88 million) or on turnover basis not exceeding ten percent of turnover of the undertaking found guilty of a violation.[40]

In the case of a contravention of section 3, i.e., abuse of dominance, section 31(a) states that the Commission may pass an "order as may be necessary to restore competition." This broad framework "allows the Commission to devise behavioural and structural remedies and to order retribution/damages to the victims of abuse—both exploitative and exclusionary."[41] For section 4 violations, *i.e.*, prohibited agreements, section 31(b) lays a narrow framework to make primarily cease and desist orders. The Commission can either annul the complete agreement or strike down provisions which are repugnant to section 4 of the Act.

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[35] *Id.*

[36] The Act, *supra* note 6, § 35.

[37] *Id.* § 39.

[38] *Id.* § 35(3).

[39] *Id.* § 31.

> (a) an abuse of dominant position, require the undertaking concerned to take such actions specified in the order as may be necessary to restore competition and not to repeat the prohibition . . .
>
> (b) prohibited agreements, annul the agreement or require the undertaking concerned to amend the agreement or related practice and not to repeat the prohibitions . . . .

[40] *Id.* § 38.

[41] Joseph Wilson, *Antitrust Remedies in Pakistan: Composition and Challenges*, 6 COMPETITION L. INT'L 62, 64 (2010).

In section 4 violations, the Commission, however, does not have power to order retribution or damages as "the amount to be retributed and damages to be paid by individual members of a cartel is difficult to assess."[42] In cases involving deceptive marketing, Section 31(c) empowers the Commission to issue cease and desist orders, as well as give directions "as may be necessary to restore the previous market conditions." The Commission can confiscate, or "destroy goods used as or in deceptive marketing practice."[43] The Commission does not have powers to impose criminal sanctions.

D. Merger Provisions

Section 11 of the Act lays down an elaborate scheme for pre-merger clearance. The substantive test for merger review is enumerated in section 11(1), which reads: "[n]o undertaking shall enter into a merger which substantially lessens competition by creating or strengthening a dominant position in the relevant market."[44] The substantive test is a combination of the tests deployed in the United States[45] and in Europe.[46] The term dominant position is defined in Section 2(e) of the Act to mean:

> "dominant position" of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent.

The Commission in its recent decision in the matter of *Acquisition of Wind Telecom S.P.A by Vimpelcom Ltd.*[47] made it clear that the term dominant position includes joint or collective dominance, *i.e.*, "a situation where two or more undertakings jointly or collectively hold a dominant position."[48] The Act assumes dominant position if an entity holds more than forty percent of market share. However, the presumption is a rebuttable one and the entity may rebut the presumption of dominance by proving that a mere share of more than forty percent does not lend it "the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers."[49]

Section 11(2) makes the merger clearance regime mandatory. It reads:

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[42] *Id.* at 66-67.

[43] *Id.* at 69.

[44] The Act, *supra* note 6, §11(1).

[45] Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 USC §§ 12-44) (substantially to lessen competition, or to tend to create a monopoly.).

[46] Merger Regulation Act Art. 2(2) (creation or strengthening of a dominant position).

[47] File No. 373/Merger/CCP/2011, *available at* http://www.cc.gov.pk/images/Downloads/vimpel_wind_telecom_merger.pdf.

[48] *Id.* ¶ 9.

[49] The Act, *supra* note 6, § 2(e).

> Notwithstanding the provisions contained in the Act where an undertaking, intends to acquire the shares or assets of another undertaking, or two or more undertakings intend to merge the whole or part of their businesses, and meet the pre-merger notification thresholds stipulated in regulations prescribed by the Commission, such undertaking or undertakings shall apply for clearance from the Commission of the intended merger.

The section requires that any acquisitions of assets and stocks, which meets the pre-merger notification thresholds as stipulated in the Competition (Merger Control) Regulations, 2007[50] (the "CMCR") must seek clearance from the Commission. Regulation 4 of the CMCR sets out the notification thresholds, which are based primarily on (i) the size of the parties; (ii) the size of the transaction; and iii) percentage of voting rights tests. Regulation 4A exempts certain transactions, such as those between a holding company and its subsidiaries, or acquisition of shares through inheritance, or acquisition of voting shares pursuant to a rights issue.

It is interesting to note that section 11(2) starts with a non-obstante clause, notwithstanding the provisions contained in the Act, which appears to be a result of a typographical error as there is nothing repugnant to section 11in the Act. The original wording reads: "Notwithstanding the provisions contained in the Companies Ordinance, 1984. . . ."[51] The rationale for such non-obstante clause was that there are provisions[52] in the Companies Ordinance that require a scheme of amalgamation to be approved by the provincial High Court with a view to secure the interest of minority shareholders. However, when the law was promulgated as CO 2007, the term Companies Ordinance, 1984 was put in the definitions section at 2(j) under the definition of the word "Ordinance." When the Competition Act was drafted, the "find and replace" command was used to replace the word Ordinance with the word Act.[53] The Act still has entry of Companies Ordinance in the definitions clause at section 2(j), but there is no reference to the Companies Ordinance in the Act at all.[54]

Section 11 provides a two-phased merger review scheme. The first phase review has to be completed within thirty days. There is no compulsory wait period.

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[50] Competition (Merger Control) Regulations, 2007, *available at* http://www.cc.gov.pk/images/Downloads/merger_control_regulations.pdf [hereinafter "CMCR"].

[51] The Companies Ordinance, 1984 (XLVII of 1984) (Pak.).

[52] *Id.* § 284-288.

[53] Other instances highlighting the inconsistency created by the "find and replace" command are section 52 and 61. These state:

52. Permitted disclosure: Nothing in section 49 shall preclude a person from:

(a) producing a document to a court in the course of criminal proceedings or in the course of any proceedings under this Act, the Act or any other law for the time being in force;

61. Repeals and savings. —On the commencement of this Act—

(a) the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (V of 1970), hereinafter referred to as the repealed Act shall stand repealed;

(b) the Monopoly Control Authority established under the repealed Act shall stand dissolved . . . . The Act, *supra* note 6, § 52, 61.

[54] Section 2(i) defines the term "Minister," which again is not used in the Act at all. Section 2(i) is also a redundant entry.

The time for Phase-I review starts ticking from the date when a "complete application" is submitted.[55] If after the initial review, the Commission concludes that there is a likelihood of creation or strengthening of a dominant position, it may initiate a second phase review.[56]

During the second phase review, parties can raise efficiencies and/or failing firm defenses.[57] These defenses are expressly recognized in section 11(10) reproduced below:

> (a) [the proposed merger] contributes substantially to the efficiency of the production or distribution of goods or to the provision of services; (b) such efficiency co-uld not reasonably have been achieved by a less restrictive means of competition; (c) the benefits of such efficiency clearly outweigh the adverse effect of the absence or lessening of competition; or (d) it is the least anti-competitive option for the failing undertaking's assets, when one of the undertakings is faced with actual or imminent financial failure.

Sub-section 11 of section 11, and section 31(d) provide broad guidelines for devising remedies for mergers. The Commission can block or approve a proposed merger with or without any conditions. Where a merger is consummated without seeking prior clearance from the Commission, the Commission can require the merged parties to undo the merger.[58]

E. Competition Advocacy: Combating Public Restraint

> Protecting competition by focusing solely on private restraints is like trying to stop the water flow at a fork in a stream by blocking only one channel. A system that sends private price fixers to jail, but makes government regulation to fix prices legal, has not completely addressed the competitive problem. It has simply dictated the form that the problem will take.[59]

The Act did envisage that combating private restraint in the market is not sufficient, and it is equally important to review the effects of government regulation and actions. Therefore, in Section 29[60], the Act mandates the Commission

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[55] CMCR, *supra* note 50, Reg. 9(5).

[56] The Act, *supra* note 6, § 11(6).

[57] For a commentary on efficiency considerations, see Robert Pitofsky, *Efficiency Consideration and Merger Enforcement: Comparison of U.S. and EU Approaches*, 30 FORDHAM INT'L L.J. 1413, 1415 (2007) (efficiency issues are not expressly recognized in statutes covering merger review in either the United State or the European Union).

[58] *See* Wilson, *Antitrust Remedies in Pakistan*, *supra* note 41, at 69.

[59] Muris, *supra* note 33, at 170.

[60] Section 29 states:
29. Competition advocacy. — The Commission shall promote competition through advocacy which, among others, shall include:-
(a) creating awareness and imparting training about competition issues and taking such other actions as may be necessary for the promotion or a competition culture;

to review "policy frameworks for fostering competition and *making suitable recommendations for amendments to this Act* and *any other laws that affect competition* in Pakistan."[61] It is interesting to note that the Act not only recommends reviewing "other laws that affect competition," but also the Act itself if its design or interpretation results in having a negative effect on competition. The Commission has issued a number of policy notes recommending ways the government can improve laws affecting competition.[62]

III. The Commission

Section 12 of the Act provides for the establishment of the Commission, which "shall be a body corporate with perpetual succession and a common seal."[63] Section 12(3) provides that "the Commission shall be administratively and functionally independent, and the Federal Government shall use its best efforts to promote, enhance and maintain the independence of the Commission."[64] The Commission is composed of between five to seven members; however, the Federal Government has the authority to increase or decrease the number of members as it deems appropriate.[65] To ensure that the Commission is largely composed of technocrats, and not bureaucrats, section 14(4) provides that not more than two members shall be employees of the Federal Government. This condition was incorporated based on the experience of MCA, which was composed of bureaucrats alone.

The Commission is body corporate, a juridical device to lend "a separate legal entity having its own rights, privileges, and liabilities distinct from those of its members."[66] The members forming the Commission are to act as a "college." All members are *pari passu* (on equal footing) and the Chairman is *primus inter pares* (first among peers). This principle is reflected in section 14(2), which reads, "[t]he Members shall be appointed by the Federal Government and from amongst the Members of the Commission, the Federal Government *shall appoint* the Chairman." The Chairman is first appointed as a member, and then appointed as the Chairman. If a chairman were to have any higher authority, section 14(2) would have used the word "elevate" rather than "appoint" in the latter half. To stress this point further, section 15, which defines the role of the Chairman, reads: "[t]he Chairman shall be the chief executive of the Commission and shall, *together with the other Members*, be responsible for the administration of the affairs of the Commission." The responsibility for the administration of the af-

(b) reviewing policy frameworks for fostering competition and making suitable recommendations for amendments to this Ordinance and any other laws that affect competition in Pakistan to the Federal Government and Provincial Governments; . . .
The Act, *supra* note 6, § 29.

61 *Id.* (emphasis added).

62 *See* COMPETITION COMMISSION OF PAKISTAN, POLICY NOTES AND OPINIONS, http://cc.gov.pk/index.php?option=com_content&view=article&id=21&Itemid=42 (last visited April 16, 2011).

63 The Act, *supra* note 6, § 12(2).

64 *Id.* §12(3).

65 *Id.* § 14(1).

66 AMERICAN HERITAGE DICTIONARY 311 (3d ed., 1996) (defining "corporation").

fairs of the Commission is, therefore not solely on the chairman, but on all members.

The Act established a board as opposed to a single individual to head the agency. There are a number of countries which have chosen the latter model for its competition agency, such as, Canada, Norway, Sweden, and the United States.[67] The choice of having a board as an institution is grounded in the "belief that the effective oversight of an organization exceeds the capabilities of any individual and that collective knowledge and deliberation are better suited to this task."[68] "The underlying theory is that the consultation and exchange of views is an integral part of the functioning of the board."[69] To enhance the value of consultation and exchange of views, the Act lays down broad categories of disciplines, wherein expertise will make an individual eligible for appointment as Member of the Commission. However, the utility of "collective knowledge" diminishes as the size of the board increases. Members are more likely to engage in "social loafing,"[70] a phenomenon where members of a group do not work at their optimal productivity level as "identification and/or measurement of individual productivity are difficult."[71] A board with a large number of members is also attendant with the problem that the authority which appoints members starts "endorsing candidates with weak qualifications."[72] The appointing authority may argue "that at least some commissioners are qualified and can be relied upon to guide the agency on matters of substance."[73]

The Act stipulates that the Commission shall be composed of no less than five and not more than seven members; and the number the Federal Government may increase or decrease as it deems appropriate. The provision allows the government to create opening and dispense member positions "purely as rewards for faithful political service"[74] or to oblige some political affiliates. The fluid and increasing number of commission members affects its functioning through uncer-

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[67] There are two antitrust agencies in the United States: (i) the Department of Justice, Antitrust Division, which is headed by an individual, (assistant Attorney General for Antitrust); and (ii) the Federal Trade Commission, which is headed by a board consisting of five members.

[68] Stephen M. Bainbridge, *Why A Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 12 (2002) (citing Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489, 500-01 (1999)).

[69] *Id.* (citing MODEL BUS. CORP. ACT ANN. § 8.01(b) (1998)).

[70] *Id.* In a famous 1913 study which measured how hard subjects pulled a rope, members of two-person teams pulled to only ninety-three percent of their individual capacity, members of trios pulled to only eighty-five percent, and members of groups of eight pulled to only forty-nine percent. This phenomenon is partially attributable to the difficulty of coordinating group effort as size increases. In other words, too many cooks spoil the soup. *Id.* at 11; *see also* William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915, 948 (1997) (eliminating the five-member format would also increase accountability and discourage members from shirking responsibility for their policy choices).

[71] Bainbridge, *supra* note 68, at 11.

[72] Kovacic, *The Quality of Appointments*, *supra* note 70, at 949.

[73] *Id.*

[74] *Id.* at 950.

tainty and perhaps induction of weak candidates.[75] It is therefore suggested that the number of commission members be fixed at five and the ability of the Federal Government to increase or decrease the number at will be constrained.

A. Appointments

Section 14(2) of the Act provides that the "*Members shall be appointed by the Federal Government* and from amongst the Members of the Commission, the Federal Government shall appoint the Chairman." Section 14(5) stipulates that "[*n*]*o person shall be recommended for appointment* as a Member unless that person is known for his integrity, expertise, eminence and experience for not less than ten years in any relevant field including industry, commerce, economics, finance, law, accountancy or public administration."[76] The chairman and members are appointed for a term of three years and are eligible for re-appointments until they attain the age of sixty-five years.[77] The members and chairman serve on a full-time basis.[78]

The Act envisages appointment of technocrats, as opposed to political appointees.[79] Section 14(5) talks about "recommended for appointment" but stops short of giving guidance as to who has the responsibility to recommend. However, the proviso to Section 14(5) states "that the Federal Government may prescribe qualifications and experience and mode of appointment of such Members in such manner as it may prescribe." In the United States, Commissioners of the Federal Trade Commission are appointed "with the advice and consent of the Senate."[80] In India, section 9 of the original Competition Act 2002 provided that "members shall be selected in the manner as may be prescribed." In 2007, section 9 was amended to read: "[t]he Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee." The Selection Committee is composed of (i) the Chief Justice of India or his nominee; (ii) Secretary, Ministry of Corporate Affairs; (iii) Secretary, Ministry of Law and Justice; and two experts of repute of international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, or competition law and policy.

In Pakistan, no such mode or manner has been prescribed by the Federal Government so far, despite the fact that the Government has appointed two sets of members to the Commission, one in November 2007, which completed its three-

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[75] In India, Section 8 of the Competition Act of 2002 originally stipulated that "the Commission shall consist of a Chairperson and not less than two and not more than ten other members." The Competition (Amendment) Act, 2002, No. 12, Act of the Competition Commission of India, New Delhi, 2003 (India). This Competition Act was amended by the Competition Act of 2007, which reduced the upper limit of ten other members to six other members.

[76] The Act, *supra* note 6, § 14(5).

[77] *Id.* § 17.

[78] *Id.* § 15(3).

[79] *See, e.g.*, 15 U.S.C. § 41 (not more than three of the Commissioners shall be members of the same political party).

[80] *Id.*

year term by November 2010, and another set of members in January 2011.[81] The first set of members were appointed on the recommendations of the last chairman of the MCA, Mr. Khalid Mirza, who was also the chairman-designate of the yet to be established Competition Commission. Mr. Mirza sent a list of eight names to the Ministry of Finance, which picked the first four in the order of preference of Mr. Mirza, and then put forward a summary for approval to the then Prime Minister. In December 2009, one Member resigned, and the vacancy was again filled on the recommendation of the then-Chairman of the Commission. The new appointment was made for a full three year term. In July 2010, Chairman Mirza retired upon reaching the age of sixty five, but before his departure made a recommendation for his successor, which was accepted. The new chairperson then sent recommendations for appointment of members, which included the reappointment of the existing members, whose term ended in November 2010.

In essence there have been three offices responsible for the appointment of members of the Competition Commission: the Chairman of the Commission, the Minister for Finance, and the Prime Minister. Vacancies on the Commission are not advertised, unlike with other regulatory bodies.[82] In order to attract a larger pool of candidates, it is recommended that the Federal Government prescribe a mode and manner for the appointment of Members, wherein vacancies are advertised, and the entire selection process is transparent, competitive and rigorous.

B. The Model

Section 28 stipulates the functions and powers of the Commission. Of primary importance are the powers to initiate proceedings and to make orders in cases of contravention of the Act. The Commission thus fits into what has been called an "integrated agency model," wherein "a single specialized agency undertakes investigative, enforcement, and adjudicative functions."[83] The other two models they have identified are (i) bifurcated judicial model; and (ii) bifurcated agency model.

> Under the bifurcated judicial model, specialized investigative and enforcement agencies must bring formal complaints before and seek remedial relief from the courts, subject to normal rights of appeal to appellate courts. Under the bifurcated agency model, specialized investigative and

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[81] S.R. & O (1)/2011; No. F. 3(8) INV.III/2007-Vol-II. The Members appointed were:

1. Ms. Rahat Kaunain Hassan (Chairperson)
2. Mr. Abdul Ghaffar
3. Dr. Joseph Wilson
4. Mr. Mueen Batlay

[82] *See, e.g.*, CAREER MIDWAY, MEMBER (OIL) – ISLAMABAD, PAKISTAN, http://www.careermidway.com/jobs/Islamabad/Member-Oil/15307 (last visited April 16, 2011) ("Cabinet Division invites applications for the post of Member (Oil), Oil and Gas Regulatory Authority (OGRA).").

[83] Michael J. Trebilcock & Edward M. Iacobucci , *Designing Competition Law Institutions: Values, Structure, and Mandate*, 41 LOY. U. CHI. L.J. 455, 459 (2010).

> enforcement agencies must bring formal complaints before separate, specialized adjudicative agencies.[84]

While the law was being drafted, the structure of the U.S. Federal Trade Commission (FTC), which represents the integrated agency model, was followed. At the FTC:

> The Bureau [of Competition] undertakes investigations of alleged violations of antitrust laws, and where appropriate recommends that the Commission take formal enforcement action against the alleged violator. If the Commission agrees to take an action, the Bureau will prepare the case for litigation before an administrative law judge (ALJ). The ALJ is an official to whom the Commission "delegates the initial performance of statutory fact-finding functions and initial rulings on conclusions of law." The administrative law judge follows a procedure similar to the one observed by US district courts and issues a so-called initial decision. Decisions by the ALJ may be appealed to the full Commission on both findings of fact and conclusions of law by either the FTC staff or the [defendant or] merging parties.[85]

Of the three models, Trebilcock and Iacobucci recommended the integrated agency model for the new agencies for the following reasons:

> the dangers associated with a lack of expertise are acute for new antitrust regimes. For this reason, we tend to favor the integrated model, where investigators and adjudicators are drawn from the same talent pool. We recognize the concerns about independence that follow from this model, but view it as the preferable alternative. In the early years of an antitrust regime, human capital in the sector will be thin. Adopting an integrated model allows enforcers and adjudicators to move more quickly up the learning curve than the other models, in which adjudicators will have only sporadic contact with antitrust policy. It is better to have potentially biased experts than to have independent, but uninformed, adjudicators.[86]

Since the Act does not envisage private actions where parties challenging competition law violations before general civil courts—a feature peculiar to the U.S. antitrust laws where private actions accounts "for more than ninety percent of all enforcement actions"[87]—the judiciary gets limited opportunity to decide on competition issues, an integrated agency model is well suited. Given that there is a lack of expertise of competition law experts, it is recommended that the Bar

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[84] *Id.*

[85] JOSEPH WILSON, GLOBALIZATION AND THE LIMITS OF NATIONAL MERGER CONTROL LAW 78 (Kluwer Law Int'l 2003) (footnotes omitted).

[86] Trebilcock & Iacobucci, *supra* note 83, at 470.

[87] *Id.* at 460; *see also* Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application Of U.S. Antitrust Law*, 28 HASTINGS INT'L & COMP. L. REV. 205, 205 (2005) ("Outside the United States, private antitrust enforcement is either virtually non-existent or still in the fledging stages.").

Councils in Pakistan should make competition law as a compulsory offering in the bachelor of laws (LL.B.) programs.

C. Independence

Section 12 (3) stipulates that "the Commission shall be administratively and functionally independent, and the Federal Government shall use its best efforts to promote, enhance and maintain the independence of the Commission." To ensure the financial autonomy of the Commission, section 20 of the Act provides that there shall be a fund, which consists of allocations or grants by the government, charges and fees levied by the Commission, as well as "a percentage of the fee and charges levied by other regulatory agencies in Pakistan."[88] A portion (3%) of the fee and charges levied by other regulatory agencies was supposed to be the main source of funding for the Commission; however, the other regulators have challenged this provision, and have not paid a single penny of their share, even after three years of Commission's existence. The Government is however trying to resolve this issue.

To ensure the independence of the Commission, the Act has provided for a secure term of three years for the Chairman and the members,[89] unless they are declared disqualified under sub-section 6 of section 14.[90] The shorter duration of the term of the members and the Chairman, as compared to that of the five-year terms of the parliament of Pakistan, when seen in light of the possibility of getting reappointed for as many terms until one attains the age of sixty-five years compromises this independence. This means that the Prime Minister, who is the appointing authority, gets to appoint two full commissions during his tenure. Any Chairman or member of the Commission, who aspires to get reappointed for a second term, which falls within the tenure of the Prime Minister who originally appointed him, is more prone to yield to any political pressure. The independence of the Commission is linked to that of the independence of its members. Any factor that stifles the functioning of a member be it external or internal, would compromise the independence of the Commission as a college. Compare this to the President of the United States' ability to appoint only half of the FTC members during his tenure (the Presidential term is for four years, while the commissioners at the FTC are appointed for a term of seven years.) In India, members'

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[88] The Act, *supra* note 6, § 20(2)(f).

[89] *Id.* § 17.

[90] *Id.* § 19. Subsection 6 of section 14 states:

(6) No person shall be appointed or continued as a Member if he—

(a) has been convicted of an offence involving moral turpitude;

(b) has been or is adjudged insolvent;

(c) is incapable of discharging his duties by reason of physical, psychological or mental unfitness and has been so declared by a registered medical practitioner appointed by the Federal Government;

(d) absents himself from three consecutive meetings of the Commission, without obtaining leave of the Commission;

(e) fails to disclose any conflict of interest at or within the time provided for such disclosure under this Act or contravenes any of the provisions of this Act pertaining to unauthorized disclosure of information; or

(f) deemed incapable of carrying out his responsibilities for any other reason.

terms for both the Competition Commission and Parliament are five years, so the central government can appoint one commission during its tenure. In order to improve the independence of the Commission, it is suggested that the term of the member and the Chairman be increased to that of five years, and that the members and the Chairman may not serve for more than two terms.

D. Adjudicative process

The Commission has the powers to investigate and adjudicate. Section 30 of the Act lays down the procedure that the Commission should follow in cases of a contravention. The Commission initiates investigation on either receiving a complaint from a private party, a reference from the Federal Government, or on its own motion. An inquiry officer (or inquiry committee) prepares an inquiry report, and depending on the recommendations therein, the Commission issues show cause notices to concerned undertakings, who are given an opportunity of being heard at which charges alleged in the show cause are addressed. The hearing (or a set of hearings) culminates by issuance of a speaking order which lays down the rationale for the decision taken by the officiating officer or member(s) of the Commission.

Most of matters under the Act[91] are decided in the first instance by a single member of the Commission. Appeal against the order of a single member, or authorized officer, may be preferred before an appellate bench comprising of no less than two members of the Commission, not including the one who originally heard the case. The Appellate Bench, constituted by the Commission,[92] has the power to "confirm, remand, set aside or cancel the impugned order or enhance or reduce the penalty or make such other order as it may deem just and equitable in the circumstances of a case."[93] The order of the appellate bench can be appealed against before a yet to be created Appellate Tribunal, and finally before the Supreme Court of Pakistan.[94]

Originally, in the Competition Ordinance of 2007, the appeal from the decision of the appellate bench was maintainable before the Supreme Court of Pakistan, affording the parties a two-tier appellate process, one before the appellate bench of the Commission and a second before the Supreme Court. In the Competition Ordinance of 2010,[95] another tier of appeals was added by stipulating that the appeal from the Commission's decision will lie first to the provincial high court before being maintainable at the Supreme Court of Pakistan. Pursuing cases before different provincial high courts pose practical and financial challenges for the Commission, as the Commission does not have financial or human capital to litigate cases in four different cities. Finally, the Competition Act replaced provincial high courts with a specialized Competition Appellate Tribunal

91 The term "Act" includes all Competition Ordinances that preceded it.

92 The Act, *supra* note 6, § 41(2).

93 The Competition Commission (Appeal) Rule 22 (2007), S.R. & O. 399(I)/2008 (Pak.).

94 The Act, *supra* note 6, § 41.

95 The Competition Ordinance of 2010, No. 6 of 2010, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Oct. 13, 2010.

(CAT), composed of a chairperson who "has been a judge of Supreme Court or retired Chief Justice of High Court and two technical members."[96] CAT was to be constituted within thirty days of the Competition Act's entry into force, but remains uncreated after six months.

The original and prevalent scheme of having an intra-Commission appeal is flawed and defies the very notion of constituting a board as the head of an agency. The underlying theory for choosing a board as opposed to an individual as a head of the agency "is that the consultation and exchange of views is an integral part of the functioning of the board." The participation of board members is essential in the decision-making process, of which a judicial determination whether an undertaking has contravened the provisions of the Act or not, is the most important of all decisions. The model of intra-commission appeal in a sequential fashion rather than sitting as a panel is a novel and unprecedented scheme. At the FTC, an appeal lies from the decision of an Administrative Law Judge to the full Commission. The college does not break its ranks. The Indian Competition Act of 2002 had the concept of Benches of the Commission[97], which it abolished through the Competition (Amendment) Act of 2007. Even there, there was no concept of intra-Commission appeal, from one bench to the appellate bench of the Commission. The supporters of the intra-commission appellate process (among commission members) draw a somewhat misconceived analogy to the functioning of the provincial high courts, where there are intra-court appeals, *i.e.*, an appeal from a decision of a single bench to that of the division bench—composed of two judges. The analogy is flawed in the following respects: (i) a high court is not a collegiate body, where all judges need to be a part of the decision-making process; (ii) all judges in the high court are trained in law, and have experience of adjudication and order writing; (iii) all members of the Commission are not supposed to have training in law, nor experience of adjudication and order writing.

Now that the Act has added another tier of appeal to the CAT, and given that the Commission has heard a number of cases at first instance by a bench composed of two or more members[98], it is recommended that the may Commission dispense with hearing cases in single benches, and should make a final decision in one-go by hearing the matters at first instance by a bench comprising of all

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96 The Act, *supra* note 6, § 41.

97 The Competition (Amendment) Act, 2003, No. 12, Act of the Competition Commission of India, New Delhi, 2003 (India) *as amended by* The Competition (Amendment) Act, 2007.

98 *See, e.g., In re* Fauji Fertilizer Company Limited & Fauji Fertilizer Bin Qasim Limited (April 29, 2008); *In re* Polyester Staple Fibre Companies (June 10, 2008); *In re* Pakistan Steel Mills (May 15, 2009); *In re* Karachi Stock Exchange (May 29, 2009); *In re* All Pakistan Cement Manufacturer Association, *et al.* (Aug. 27, 2009); *JJVL* v. *LPGAP* (Dec. 14 2009); *In re* Trading Corporation of Pakistan (Feb12, 2010); *In re* Engro Chemicals Pakistan Ltd., *et al.* (July 23, 2010); *In re* China Harbour Engineering Company Ltd., *et al.* (July 23, 2010); In re *Tetra Pak* (Aug. 13, 2010); *In re* Pakistan Poultry Association (Aug. 16, 2010); *In re* Wateen Telecom & Defence Housing Authority (March 22, 2011); *In re* Cinepax (March 28, 2011). See COMPETITION COMMISSION OF PAKISTAN: DECISIONS AND ORDERS, http://cc.gov.pk/index.php?option=com_content&view=article&id=168&Itemid=41 for the Commission's Decisions and Orders.

members.[99] This will be in spirit with the notion of the board, and will reduce the time in reaching at the final decision of the Commission.[100]

IV. Enforcement Record

The Commission has an impressive enforcement record. It has in its over three years existence has issued more than 35 orders, inclusive of single bench, and appellate orders, dealing with section 3, 4, & 10 violations.[101] Most of the decisions have been appealed against, and are pending before different high courts and the Supreme Court. Not a single case has been decided by the courts on merit, so far. Moreover, the Commission has cleared over 170 mergers. Of these 170 cases, two cases were cleared with conditions. Of the two, one is challenged before the court and the matter is still pending.

In a 2003 report of the International Competition Network, which synthesized the survey of competition agencies of developing and transition economies, the judiciary has been referred to as "a major stumbling block in the path of effective competition enforcement."

> Judges do not understand competition law and are content to avoid the necessity to learn through diverting competition issues into a maze of esoteric administrative and procedural side-streets out of which the substantive matters at issue rarely emerge.[102]

In Pakistan, it is hoped, at least in theory, that once the Competition Appellate Tribunal is established, with two experts as its members, the tendency to sidestep adjudication on substantive matters will be minimal. And when the case goes to the Supreme Court, the Court will have the benefit of the opinions and decision of the Commission and the CAT in making its final decisions. Whether the government will constitute CAT, and whether it will find experts to appoint as members, remains to be seen.

V. Concluding Remarks

If one is to gauge the performance of the Commission from the number of cases it has decided, the Commission has been sprinting along like the hare in

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[99] The Commission has heard cases at first instance by a bench composed of two or more members on a number of occasions.

[100] *See, e.g., In re* Takaful, *available at* http://cc.gov.pk/images/Downloads/taap_tpl_order_app_bench.pdf. In this instance, the appellate bench overruled the single member's decision. Had all the members sat together in the first instance, the parties would have gotten the final decision from the Commission much earlier.

[101] *See generally* COMPETITION COMMISSION OF PAKISTAN: DECISIONS AND ORDERS, http://cc.gov.pk/index.php?option=com_content&view=article&id=168&Itemid=41.

[102] INT'L COMPETITION NETWORK, CAPACITY BUILDING AND TECHNICAL ASSISTANCE: BUILDING CREDIBLE COMPETITION AUTHORITIES IN DEVELOPING AND TRANSITION ECONOMIES 35 (2003), *available at* www.internationalcompetitionnetwork.org.

Aesop's fable.[103] But the Commission does not deserve the fate of the hare. The Competition Act has provided sound substantive law, and the necessary architecture for strong institutional implementation. Having moved away from the crossroads, what is needed now is a focus on improving the institution that implements the substantive law. Financial autonomy and supportive judicial machinery are of the utmost importance for the sustainable functioning of the Commission. Then comes periodic self-assessment in improving its functioning. In this respect, Professor William Kovacic's observation is instructive for the Commission:

> To have elegant physics without excellent engineering is a formula for policy failure. [A term of three year for the institution head leaves] too few incentives to invest in the engineering of institution building and implementation, which are the agencies' equivalent of durable infrastructure. There is strong incentive to engage in consumption and too little motivation to invest. In regulatory policymaking, consumption consists of engaging in activities that generate *readily observable events for which one can claim credit.* This can imbue policymaking with a highly short-term perspective. By contrast, investments in creating a strong institutional infrastructure generate returns that tend to extend mainly beyond the period of leadership of an individual. . . Given the choice between consumption and investment, the interior voice that urges incumbent leaders to consume easily can drown out the voice that calls for investment. Where there are long term policy needs and short term appointees, *it is a major challenge to create incentives that press the agency to examine its institutional arrangements regularly and pursue measures to improve them.*[104]

This paper has made a number of recommendations to improve the functioning of the institution: (i) that the number of Commission members be fixed at five, and the ability of the Federal Government to increase or decrease at will be constrained; (ii) the term of the members be increased to five years, and members be eligible to be appointed for two terms only; (iii) judicial decisions be made by the full Commission, and should dispense with hearing cases through a single member bench; (iv) members should be appointed in a transparent, competitive and rigorous manner; and (v) competition law should be compulsorily offered in the LL.B. curriculum. The Act facilitates the Commission by imposing a positive obligation to review the Act and make suitable recommendations to amend it.[105] The Commission should undertake periodic examining of the institutional arrangements to develop excellent engineering for the elegant physics it has.

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[103] Rosalind Donald, *The Tortoise and the Hare*, GLOBAL COMPETITION REV., Nov. 18, 2010, at 9 (like the tortoise and the hare of Aesop's fable, Pakistan's Competition Commission has a reputation for action, while India's authority has yet to issue any decisions at all).

[104] William E. Kovacic, *The Digital Broadband Migration And the Federal Trade Commission: Building the Competition And Consumer Protection Agency of the Future*, 8 J. TELECOMM. & HIGH TECH. L. 1, 5-6 (2010) (emphasis added).

[105] The Act, *supra* note 6, § 29(b).

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

George S. McGraw†

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.

A Comparative Analysis of the Chinese and Czech Legal Systems: Which System is More Favorable to and Provides More Stability for Foreign Direct Investment?

Katherine L. Brown†

I. Introduction

Foreign direct investment ("FDI") has become a hot topic in board meetings all over the world as modern businesses are seizing new opportunities within the globalized economy. Profit making activities that were not possible with the technology of the past are now commonplace. The modern economy functions on a larger scale than ever before, and companies are beginning to realize that failing to partake in foreign direct investment could lead to their demise.[1] From a purely profit making perspective, and disregarding the plethora of moral questions that arise in a foreign direct investment context, which this paper does not propose to address, foreign direct investment emerges as one way to weather the storm and succeed in the modern economy.[2]

In the past decade, foreign direct investment has been expanding rapidly, especially to China.[3] However, China is unique, because unlike some countries that attract FDI, like the Czech Republic, China has not accepted the market economy in its entirety[4], and the Chinese Communist Party is not willing to relinquish much of its control.[5] The resistance to reform by the Chinese Communist Party maintains a culture of control that is not sustainable in the modern world and is on the brink of political instability.[6] This increases the risk associated with investing in China.[7] The Czech Republic, on the other hand, underwent rapid tran-

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1 *See* Laura Alfaro & Maggie Chen, U.S. Int'l Trade Comm., Surviving the Global Financial Crisis: Foreign Direct Investment and Establishment Performance 2-5 (2010), http://www.usitc.gov/research_and_analysis/economics_seminars/2010/Alfaro_and_Chen_GlobalFinancialCrisis.pdf (asserting that FDI plays a critical and complex role in surviving the current global financial crisis).

2 *Id.* at 22.

3 *See* Henry H. Liu, *Regulatory Approvals and Compliance in China Relating to Foreign Investment*, Practicing Law Institute Corporate Law and Practice Handbook Series, July 23, 2010, at 192 (China is a choice destination for FDI with over US $100 billion invested).

4 *Id.* at 193. Many of China's largest companies are still state owned enterprises, and although they now engage in the global corporate market, rather than state planned market activities, they do not operate completely on market economy principals because the Chinese state still maintains some amount of control.

5 *See* Michele A. Wong, *China's Direct Marketing Ban: A Case Study of China's Response to Capital Based Social Networks*, 11 Pac. Rim L. & Pol'y J. 257, 271 (2002) (the Chinese Communist Party's response to increased social and economic freedom has been to tighten control).

6 *Id.* (relinquishment of some control is critical as China's economy grows).

7 *Id.*

sition to a market economy in the 1990's.[8] As a result, the Czech Republic does not face the political turmoil associated with resistance to form because the country has effectively worked out the transition kinks.[9]

This paper examines the legal systems in place in China and the Czech Republic and analyzes the impact of both on foreign direct investment. Part II provides background information on the Chinese and Czech legal systems as well as each country's transition to a market economy. Part III discusses the current investment vehicles that allow a foreign company to invest in either China or the Czech Republic. Part IV of this paper considers the advantages and disadvantages of each for FDI and Part V analyzes and proposes which country is a better option for foreign direct investment, considering both long-term and short-term investment horizons.

II. Background

A. The Chinese Legal System and Its Transition into a Market Economy

As the world's largest developing economy,[10] China has attracted foreign direct investment at an impressive rate.[11] However, the legal system in China is unique, and is strikingly at odds with the legal systems of most, if not all, other market economies.[12] This section considers the foundation of the Chinese legal system, and the transition into a socialist market economy.

1. Structure of the Chinese Legal System and Its Political Underpinnings

Although the structure of the Chinese legal system is important, the political system that underlies the structure is perhaps more critical to the analysis of this paper. To that effect, one cannot understand the Chinese legal system without first understanding the role of the Chinese Communist Party ("CCP").[13] The CCP fundamentally drives national policy, and is virtually indistinguishable from other official bodies of government.[14] The CCP has long used the Chinese legal system as a vehicle by which to implement its own policy directives, rather than

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[8] Michele Balfour & Cameron Crise, *A Privatization Test: The Czech Republic, Slovakia and Poland*, 17 FORDHAM INT'L L.J. 84, 86 (1993).

[9] *See* James Walton, *Country Spotlight: Czech Republic*, 11 INT'L HR J. no. 4, art 7, 2002, ¶ 9 (the Czech Republic's economy has stabilized after the mild political turmoil that accompanied rapid privatization).

[10] DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 115 (West Group 2003).

[11] *See* BIN LIANG, THE CHANGING CHINESE LEGAL SYSTEM, 1978-PRESENT 122 (Routledge 2005) (chart shows the rapid increase in FDI in China).

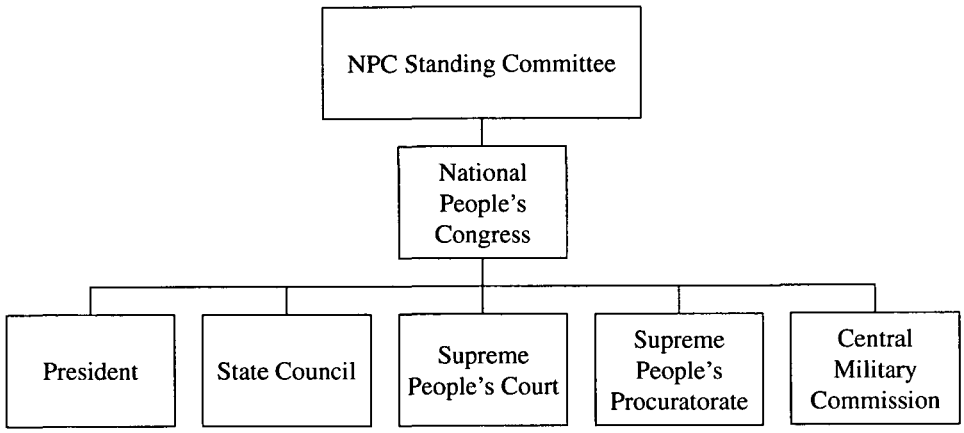
[12] *See* Wong, *supra* note 5, at 263 (China has not fully accepted and adopted the market economy system).

[13] *See* CHOW, *supra* note 10, at 32-33. By 2003, China was the world's largest developing economy but also the seventh largest economy overall.

[14] *See* Wong, *supra* note 5, at 263.

a forum for articulating the law or defining citizen's rights.[15] The fact that the CCP's control is often inconspicuous creates ambiguity in the law-making process, whereby it may appear that the National People's Congress is promulgating laws when in fact the CCP is covertly driving the law-making process.[16] Moreover, membership in the CCP is often the most effective way for one to gain political power and a governmental position.[17] This permeation of political control into the legislative process directly undermines any system of checks and balances and creates uncertainty for foreign investors who realize that the only factor that guarantees success in China is a good relationship with the CCP.[18]

On its face, the People's Republic of China ("PRC") Constitution of 1982 creates seven organs of state government, as depicted by the following graph.[19]



The National People's Congress ("NPC"), and the NPC Standing Committee are at the pinnacle of state power, and comprise the legislative branch of the Chinese legal system, which is established by Article II of the PRC Constitution.[20] The other five organs are subordinate to the NPC and its standing Committee, including: the President of the PRC, the State Council, the Central Military Commission, and the two judicial organs: the Supreme People's Court

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[15] *Id.* As an example, the direct marketing ban discussed in this article is a "short term regulation" promulgated by the State Council in response to the perceived risk associated with rapid market reform.

[16] *Id.*; *see also* CHOW, *supra* note 10, at 133 (stating the political system actually operates in reverse of appearances).

[17] CHOW, *supra* note 10, at 116 (the CCP places people throughout the government apparatus allowing the CCP to exercise control over the government).

[18] Wong, *supra* note 5, at 265 (stating the ambiguity of the law-making process does not allow for adequate appraisal of costs and risks sometimes creating in "insurmountable barrier" to investing in China); *see also* CHOW, *supra* note 10, at 131 (stating that "while the CPC has absolute authority in China, the Party is careful to give the appearance of operating within a legal framework and careful not to give the appearance . . . of acting above the law").

[19] *See generally* CHOW, *supra* note 10, at 79-80 (discussing the background and structure of the Chinese government).

[20] Wong, *supra* 5, at 262; *see also* CHOW, *supra* note 10, at 87.

and the Supreme People's Procuratorate.[21] The President's position is largely ceremonial, and although the office appears graphically equally to the others, in reality, it is not.[22] The state Council is the administrative and executive branch of government, the Central Military Commission controls the military, and the two judicial branches also fall under the authority of the NPC.[23] While there are differences in the function of each of the above mentioned offices, China has no comparable separation of powers doctrine like the United States, and there are many areas of overlapping powers.[24] For example, although the NPC and its Standing Committee have legislative powers, in reality the State Council and its ministries create most of the new legislation.[25]

The structure of the NPC includes the township, county, provincial, and national levels.[26] The PRC Constitution establishes that the NPC as the "highest organ of state power."[27] However, the PRC Constitution is vague and ambiguous with respect to the delegation of legislative power and authority to promulgate laws.[28] The positions are elected, however, the CPC puts forth the list of candidates, and about 85% of the seats are occupied by CPC members.[29] The NPC meets annually and has broad powers that include amending the PRC Constitution, and appointing and removing top governmental officials including the President of the PRC and the heads of the State Council, and Supreme People's court.[30] The NPC additionally has the power to enact and amend basic laws, approve the state budget, and plan social and economic development.[31] Considering the CCP occupies 85% of the NPC, the political stronghold on the effectuation of laws is readily apparent.

Next, the State Council, though technically subordinate to the NPC, promulgates the administrative rulings relating to FDI.[32] For example, the State Council oversees the National Development and Reform Committee ("NDRC"), and the Ministry of Commerce, which is responsible for maintaining foreign investment guidelines.[33] These agencies created categories of foreign direct investment to determine if the investment is encouraged, restricted, permitted or prohibited.[34]

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21 CHOW, *supra* note 10, at 80.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.* at 88.

27 *Id.* (citing Article 57 of the Chinese Constitution).

28 Wong, *supra* note 5, at 262.

29 CHOW, *supra* note 10, at 90.

30 *Id.*

31 *Id.* at 88.

32 Liu, *supra* note 3, at 194.

33 *Id.*

34 *Id.* The rules requiring entry approvals section of this article outlines the agencies and processes for investment approval.

These agencies also oversee the tedious approval process discussed in the discussion section of this paper.[35]

2. *Transition into a Market Economy*

Transition in China took place gradually.[36] Transition began shortly after the death of Mao Zedong and the end of the Cultural Revolution, and continues to the present.[37] Early reforms sought to establish some free markets while maintaining the overall framework of socialism by creating a mixed economic system in which the private sector was viewed as a complement to the state sector.[38] Under the socialist market system, the state maintained all ownership of property and continued to largely control the economy.[39] The first reforms in 1978 targeted the agricultural sector.[40] These reforms shifted responsibility for production from the commune to individual families, and saw immediate success.[41] However, state sector reforms, on the other hand, were largely unsuccessful and continue to pose great challenges in modern China.[42] In large part, these challenges stem from resistance to change, especially since the population is accustomed to inefficient working conditions and state provided social services, including cost free housing.[43]

Since the 1978 reforms, China's economy grew at an unprecedented pace, in no small part due to large quantities of foreign direct investment.[44] Although some of the money has remained in China, and has increased domestic purchasing power, much of it has returned abroad.[45] However, the increased purchasing power and economic freedom lead to a gradual breakdown of social control.[46] The state has simply not been able to accept this breakdown, and has attempted to regain control by, for example "reforms" such as, banning social networks.[47] Currently, the Chinese legal system is at a crossroads – trying to maintain control while seizing the wealth that foreign investment brings.

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35 *Id.*

36 *Id.*

37 CHOW, *supra* note 10, at 26, 33. With Mao's death ending the Cultural Revolution in 1976, the CPC then shifted focus on China's neglected economy. Many were shocked and embarrassed about China's "backwardness and poverty" in comparison to its Asian neighbors like Japan and Hong Kong. Chapter One in this book provides a thorough and complete discussion of China's political and economic history leading up to the reforms of 1978 and beyond.

38 *Id.* at 27.

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.* at 28-29.

43 *Id.* at 20.

44 *Id.* at 32.

45 Liu, *supra* note 3, at 202-03.

46 Wong, *supra* note 5, at 271.

47 *Id.*

B. The Czech Legal System and Its Transition to a Market Economy

The Czech Republic offers a road less traveled for foreign direct investment. Certainly, the Czech Republic has seen less FDI than China, which is at least in part — likely due to its much smaller size, but the Czech Republic — it has a longer standing market economy, membership in the European Union, and a less ambiguous legal system to offer foreign investors.[48]

1. Structure of the Czech Legal System and the Political Foundation

The Czech Republic has a continental legal system, which traces back to its German roots.[49] The continental legal system has the following characteristics: only written law is recognized as a source of law, the main areas of the law are codified, and the structure of legal sources is hierarchical.[50] The Czech Republic adopted its modern Constitution in December of 1992, which proclaims that the Czech Republic is a democratic state founded on respect for the rights and freedoms of its citizens.[51] The Czech Republic has been a member of the European Union since 2004.[52]

The political system is a parliamentary democracy with the head of state being the President, who is elected by both chambers of the Parliament.[53] Similar to China, the role of the president is largely symbolic, but, in the Czech Republic, the prime minister has genuine and unencumbered power.[54] The structure of the state power is divided into three branches: the legislature, which consists of both chambers of Parliament (the Chamber of Deputies and the Senate); the executive, which consists of the President and the Government (consisting of the Prime Minister, deputy Prime Minister, and other Ministers); and the judiciary, which consists of the courts of general jurisdiction, administrative courts, and the Constitutional Court.[55] The three branches have separate and distinct functions and operate under a functional system of checks and balances.[56]

The main codified areas of Czech law are the criminal code, the civil code, and the commercial code.[57] The criminal code defines the criminal offenses and proscribes punishment, while the civil code provides a basic foundation for both the private law and the general legal system.[58] The commercial code, which is

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[48] Michael Bobek, *An Introduction to the Czech Legal System and Legal Resources Online*, GLOBALEX (August 2006), http://www.nyulawglobal.org/globalex/Czech_Republic.htm.

[49] *Id.*

[50] *Id.*

[51] *Id.* (citing Article 1 of the Constitution of the Czech Republic).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

most relevant for FDI, regulates the relationships between commercial activity and transactions.[59]

2. *Transition to a Market Economy*

The Czech Republic, unlike China, chose to undergo rapid transition.[60] Although not without incident, the rapid privatization route chosen in the Czech Republic – namely the voucher system of privatization – was successful.[61] Voucher system privatization is characterized by states selling coupon books to citizens with vouchers, which can be used to purchase shares in public companies.[62] The Czech Republic also effectuated privatization by selling directly to foreign investors.[63] As a result, approximately 2,100 enterprises with an aggregate value upwards of U.S. $17 billion became privatized at a very rapid rate.[64] Most significantly, this created private ownership in property, which in turn created incentives to use the property efficiently.[65] In the Czech Republic, transition was rapid, and the state now exercises relatively little control over enterprises within its borders.[66] In contrast to China, the Czech Republic was controlled externally by the Soviet Union, and once it severed external ties, it did not have to fight internally with a political party that refuses to relinquish control.[67]

III. Discussion

A. Current Vehicles For and Legal Rules Affecting Foreign Direct Investment

When considering whether to invest in any foreign country, a logical starting point is the entities available for business investment and the ease of investing. The entities available for investment are similar between the Czech Republic and China, though some entities may be preferable to others from the standpoint of the foreign investor who likely wants to maintain control over the business.[68]

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[59] *Id.*

[60] Balfour & Crise, *supra* note 8, at 86.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 96.

[64] *Id.*

[65] *Id.* at 87.

[66] For example, in contrast to China, there are no restrictions on the amount of FDI allowed in the Czech Republic, not on the business entity forms which are permissible in the Czech Republic. Regulatory approvals are also straightforward and transparent relative to China, as the Czech Republic uses investment incentives to attract FDI to the country. *See* Walton, *supra* note 9, ¶ 10.

[67] *See* KAREL DYBA, THE CZECH REPUBLIC: 1990 TO 1995, 21 (Schuster Foundation Press 1996) (the Czech people were eager to own business privately and understood that ownership required strong, interested and effective owners).

[68] *See* discussion *infra* Part III.A (discussing the relative forms for FDI and those which offer more control to foreign owners).

Institutional culture and ease of the approval process is also a consideration, and here, the two countries differ.[69]

1. Investing in China

In China, FDI has brought with it much wealth and prosperity playing a critical role in China's development.[70] However, the legal culture and regulatory process requires patience and persistence.[71]

Beginning in 1978 with Deng Xiaoping as the new head of the Chinese state, China implemented an open door policy to attract investment.[72] The first trial of the policy was the creation of special economic zones ("SEZs") as "windows" for foreign investment and international trade.[73] The establishment of the SEZs was met with great success, as both foreign trade and foreign investment have increased dramatically.[74] The success lasted until 1989 when the Tiananmen Square incident scared away many investors.[75] However, the investor retreat did not last, as FDI increased tremendously from 1997 to 2000, and has continued to increase to the present.[76] In 1989, FDI in China was U.S. $3.4 billion; "from 1997 to 2000, China's FDI stabilized between U.S. $40 billion and U.S. $50 billion."[77] In 2009, U.S. $2.9 billion found its way into China in the form of 1.772 FDI projects.[78] China has become a hot spot for foreign investors.[79] The Open Door Policy utilized in modern China under Deng Xiaoping was an important impetus for China's economic development.[80]

There are four primary ways to invest in China: establishment of a representative office (licensing only), a branch office, the equity joint venture, the contractual (or cooperative) joint venture, and the wholly foreign owned enterprise ("WFOE").[81] Both forms of joint ventures as well as the WFOE are collectively referred to as foreign investment enterprises ("FIE"), all of which can usually be

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69 Walton, *supra* note 9, ¶¶ 9-11; *see also* Liu, *supra* note 3, at 194.

70 *See* LIANG, *supra* note 11, at 122; *see also* CHOW *supra* note 10, at 33.

71 *See, e.g.*, Liu, *supra* note 3, at 194 (explaining the lengthy process of entry approvals).

72 LIANG, *supra* note 11, at 121.

73 *Id.*

74 *Id.*

75 *Id.* at 123. On June 4, 1989, the Community Party ordered units of the People's Liberation Army to kill thousands of mostly unarmed civilians in Tiananmen Square in response to pro-democracy demonstration. Two days later, the CPC launched a nationwide search for hidden enemies, arrested over 20,000 people, and executed dozens during the remainder of June 1989. *See generally* CHOW, *supra* note 13, at 20.

76 LIANG, *supra* note 11, at 125.

77 *Id.*

78 US–CHINA BUSINESS COUNCIL, FOREIGN DIRECT INVESTMENT IN CHINA, http://www.uschina.org/statistics/fdi_cumulative.html (last visited Nov. 29, 2010).

79 LIANG, *supra* note 11, at 121-23.

80 *Id.*

81 VAI IO LO AND XIAOWEN TIAN, LAW FOR FOREIGN BUSINESS AND INVESTMENT IN CHINA 73 (Routledge 2009); *see also* CHOW *supra* note 10, at 368. *See generally* MARK SCHAUB, FOREIGN INVESTMENT IN CHINA 15-93 (CCH 2009).

established as a Chinese legal person.[82] The importance of establishing an entity that is a Chinese legal person cannot be understated because it is the only way to gain limited liability protection.[83] The FIEs are the most popular, and are thus the focus of this paper. The Ministry of Foreign Trade and Economic Co-operation ("MOFTEC") is charged with approving applications for establishment of all FIEs.[84]

The EJV Law governs Chinese Foreign Equity Joint Venture business entity ("EJV").[85] The law provides detailed rules for establishing EJVs in China, including "contribution of capital, the requirement of technology transfer, and the functions of the board of directors."[86] To establish an EJV, the foreign party must contribute at least twenty-five percent of the registered capital, which may not be reduced during the EJV's tenure in China.[87] The EJV is a relatively inflexible form of FDI that is governed extensively by the EJV law; for example, the duration of an EJV is generally limited to thirty years.[88] However, many foreign investors choose to utilize a Chinese Foreign Contractual Joint Venture ("CJV") because it is more flexible.[89]

A Chinese Foreign Contractual Joint Venture ("CJV") is the chosen entity for many foreign investors due to its more flexible form.[90] The CJV law was implemented in 1988 to govern this business entity.[91] A CJV is more flexible because it can be a "separate and distinct legal entity or it can be a loosely-linked contractual arrangement between foreign and Chinese parties for cooperation in a business."[92] Moreover, a minimum capital contribution is not required for formation of a CJV, and a CJV is not required to establish a board of directors and may choose to utilize a less formal "combined management body."[93] As such, this entity form is particularly popular with investors who want to do business in China only in the short-term or on a trial basis.[94]

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82 *See* LO & TIAN, *supra* note 81, at 73; *see also* CHOW, *supra* note 10, at 368-69.

83 *See, e.g.*, Yabo Lin, *New Forms and Organizational Structures of Foreign Investment in China Under the Company Law of the PRC*, 7 TRANSNAT'L LAW 327, 337 (1994).

84 *Id.* at 334-35. The State Council promulgated rules pertaining to the EJV, which requires technology transfer and contribution of substantial capital by the foreign party. The regulatory approval process for the EJV is loosely outlined in the EJV Law, which does not provide any regulation on the appeal procedure if an application is denied.

85 *Id.* at 334.

86 *Id.*

87 *Id.*

88 *Id.* at 336-37. Although the EJV law was amended in 1986 to allow the period of an EJV to be extended for more than 50 years, it is discretionary depending on several factors including: the amount on investment, the profit rate, and the level of advanced technology provided by a foreign investor.

89 *Id.* at 337-38.

90 *Id.*

91 *Id.* at 337.

92 *Id.* Thus, investors with short term investment horizons, or those who want to do business on a trial basis will likely prefer the CJV format over the EJV format.

93 *Id.*

94 *Id.* at 337-38.

Finally, the Wholly Foreign Owned Enterprise permits foreign investors to hold a 100% ownership in the private entity.[95] The WFOE Law was enacted in 1986, and although it allows for 100% foreign ownership it requires technology transfer and export production.[96] Although there is no requirement for minimum capital contribution, the WFOE law requires the registered capital to be sufficient in light of the size of the operation of the business, something the MOFTEC considers in the approval process; and like the EJV, the registered capital cannot be reduced during the WFOE's tenure.[97] Additionally, the WFOE is required to export the majority of its product and may only sell in domestic markets according to the sale proportion permitted by the Chinese government.[98] Moreover, any product sold in China is subject to governmental price controls.[99] The increased purchasing power in domestic markets has increased foreign investor interest in selling goods and services domestically.[100]

A final and novel vehicle for FDI is a merger or acquisition of a domestic company.[101] In a merger situation, foreign investors seek to acquire existing Chinese companies in their field that have already established manufacturing facilities and employ a local workforce.[102] This type of FDI is largely a response to the increasingly open domestic markets and seeks to take advantage of increased purchasing power and demand for products within China.[103] Moreover, this form of FDI was not possible until the existence of private companies in China with which foreign companies could engage in a merger or acquisition transaction; as such, it is a relatively novel form of FDI.[104]

In all of the above-mentioned FDI vehicles, one critical factor is common among foreign investment in any country, but with China in particular: the need for local counsel or a local partner with connections to the CCP.[105] Although the obvious drawback to a local partner is that the foreign investor will have to share

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95 *Id.* at 338.

96 *Id.* at 338. This provides a more flexible approach to minimum capital contribution as compared to the EJV law, which requires a minimum of 25% of capital contribution to emanate from the foreign investor.

97 *Id.* at 339. Moreover, there is no mandatory limitation on the period of operation of a WFOE.

98 *Id.*

99 *Id.*

100 *Id.* at 340; *see also* Liu, *supra* note 3, at 202.

101 Liu, *supra* note 3, at 202. China attracted $105.7 billion in FDI in 2011, which is a 17.4% increase from 2009. Analysts predict that 2011 will be a very strong year for M&A activity between Chinese and foreign firms, especially in high tech, mineral resources, agriculture, and financial and consumer goods sectors. *See* Jane Lee & Rachel Armstrong, *Analysis: New China M&A Committee Lifts Hopes of More*, REUTERS (Feb. 16, 2011), http://www.reuters.com/article/2011/02/16/us-china-deals-idUSTRE71F0VF20110216.

102 Liu, *supra* note 3, at 202. Additionally, foreign companies are now seeking to take advantage of already existing infrastructure as well as an established presence in the domestic markets in order to decrease start-up costs.

103 *Id.*

104 *Id.*

105 *See* John D. Crothers, *Project Finance in Central and Eastern Europe from a Lender's Perspective: Lessons Learned in Poland and Romania*, 41 MCGILL L.J. 285, 288 (1995).

profits and relinquish some control, a foreign partner can provide access to additional financing, overcome language barriers, and facilitate the regulatory process.[106] In China, local connections and CCP relationships are critical to both the approval of an FIE as well as its success in the Chinese market.[107]

2. *Investing in the Czech Republic*

The Czech Republic offers many opportunities for foreign direct investment, which largely consists of WFOEs, Joint Ventures, and Branch Offices.[108] The Czech Republic recognizes all kinds of business associations including limited liability companies, general partnerships, and limited partnerships and places no restriction on the amount of FDI in the country.[109] All investors must submit applications through the Investment Promotion Agency.[110] In addition, the Investment and Business Development Agency, established by the Ministry of Industry and Trade offers free services to investors, including information assistances, handling of investment incentives, location of Czech suppliers, business property identification, infrastructure development, and access to structural funds.[111]

The Czech Republic provides incentives for investment in the manufacturing and services industries.[112] These incentives are laid out in the Act on Investment Incentives of 2007.[113] Manufacturing sector incentives are available provided the foreign investor meets the minimum required investment threshold of approximately US $11.5 million. The act provides income tax relief for ten years – full corporate income tax relief for five years, and five additional years of partial income tax relief provided the company is expanding.[114] Job creation grants are also offered in the amount of 50,000CZK (Czech Koruna) for each employee in regions worst affected by unemployment as well as training and re-training

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106 *Id.*

107 *Guanxi* (personal relationships) is a powerful component of the Chinese culture and can play an influential role in business relationships. Failure to take local context into account can cause resentment and erode support for the company. Influential networks arise in China from a strong cultural tendency to rely on personal relationships characterized by exchanges of favors. They can provide security in a sometimes hostile and highly politicized environment. *See, e.g.*, Guanming Fang, *U.S./China Differences and Their Impacts on Business Behaviors*, 6 GOOD BUS. (2008) http://robinson.gsu.edu/ethics_pub/2008/behaviors.html (last visited April 20, 2011).

108 Walton, *supra* note 9, ¶ 9.

109 *Id.* ¶ 10.

110 *Id*; *see also* CZECH INVESTMENT AND BUSINESS DEVELOPMENT AGENCY, http://www.czechinvest.org/en (last visited November 22, 2010).

111 CZECH INVESTMENT AND BUSINESS DEVELOPMENT AGENCY, *supra* note 110 (from the home page click on "Why Invest in the Czech Republic").

112 *See* Walton, *supra* note 9, ¶¶ 12-13; *see also* CZECH INVESTMENT AND BUSINESS DEVELOPMENT AGENCY, *supra* note 110.

113 Walton, *supra* note 9, ¶ 12.

114 *See* CZECH INVESTMENT AND BUSINESS DEVELOPMENT AGENCY, *supra* note 110 (from the home page click on "Why Invest in the Czech Republic," then "Investment Incentives"); *see also* Walton, *supra* note 9, ¶ 12.

grants.[115] Finally, foreign investors may solicit transfers of technically equipped properties for privileged prices.[116]

The Czech Republic has also created incentives available to the services sector that are designed to attract services that add significant value to the Czech economy, create new job opportunities, and enable utilization of information technologies.[117] Provided that a foreign investor meets the minimum investment requirement of U.S. $1.7 million, the following incentives are offered: access to customer contact centers, access to software development centers, access to expert solution centers and high tech repair centers.[118] Both the relatively straightforward approval process and the availability of investment incentives make the Czech Republic an investor friendly country.

IV. Analysis

A. Foreign Direct Investment in China

Foreign Direct Investment in China is booming, and the fact that FDI in China is a road well-traveled is one of its strengths. China, however, is not without some serious institutional weaknesses that should be thoroughly considered before investing in China.

1. Advantage's for Foreign Direct Investment

China's main advantages for FDI include: its enormous population of inexpensive laborers, expansive domestic markets, cultural characteristics and desire for material wealth in the younger generations, and, perhaps most importantly, the amount of foreign investment that has already taken place in China.[119] Although utilizing the expansive work force at extremely low wages raises many human rights issues, from a purely profit maximizing perspective, it is one of China's greatest advantages for attracting FDI.[120] Especially since Chinese laborers are both relatively inexpensive and skilled in relation to many of their Asian counterparts.[121] In addition, both domestic and foreign companies in China are increas-

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[115] *See* Walton, *supra* note 9, ¶ 12; *see also* CZECH INVESTMENT AND BUSINESS DEVELOPMENT AGENCY, *supra* note 110 (from the home page click on "Why Invest in the Czech Republic, then Investment Incentives").

[116] Walton, *supra* note 9, ¶ 12.

[117] *Id.*

[118] *Id.*

[119] *See* Organization for Economic Co-Operation and Development, Directorate for Financial, Fiscal, & Enterprise Affairs, *Main Determinants and Impacts of Foreign Direct Investment on China's Economy* (Working Papers on International Investment, Paper No. 2000/4, 2000), *available at* http://www.oecd.org/dataoecd/57/23/1922648.pdf (noting that the new Chinese are purchasing and putting an emphasis on material wealth); *see also* Daniel Gross, *Shanghai Surprise—Made in China and sold there too*, NEWSWEEK (Nov. 19, 2002), http://www.newsweek.com/2009/11/18/shanghai-surprise.html (noting that the new Chinese are purchasing and emphasizing material wealth).

[120] Keith Bradsher, *China Releases Human Rights Plan*, N.Y. TIMES (April 14, 2009), http://www.nytimes.com/2009/04/15/world/asia/15china.html?_r=1&ref=freedom_and_human_rights.

[121] Edward Wong, *China's export of labor faces scorn*, N.Y. TIMES (Dec. 20, 2009), http://www.nytimes.com/2009/12/21/world/asia/21china.html?pagewanted=1&ref=uneasy_engagement (foreign in-

ingly taking advantage of the domestic markets in China as the culture of consumerism catches on, especially in the younger generations.[122] The younger Chinese generations have the requisite greed and hunger for materialism for capitalism to be successful in China, however, the government is resistant to any loss of social and economic control.[123]

Since the Open Door Policy of 1978, FDI has played an integral role in the rapid economic development of China.[124] The Chinese government has undertaken many policy initiatives to attract FDI and bring economic development to China, but on its own terms.[125] The government is not willing to relinquish total control, but has loosened its ironclad grip.[126] Nonetheless, the Chinese government has encouraged foreign investors to choose China, and investment in China has proved fruitful for many countries.[127] For future investors, the fact that many other companies have already invested in China, and that the system has been tested and has been very successful decreases the risk of investing in China relative to countries where FDI is less common.[128] Overall, China is the paradigm of successful FDI; although not without downside, China has generated tremendous wealth via foreign direct investment.[129]

2. *Disadvantages for Foreign Direct Investment*

China has several serious disadvantages for foreign direct investment, mainly, the lack of substantial intellectual property protections, lack of enforcement of preexisting laws, and ambiguity in the lawmaking process. First, China has poor intellectual property protections, hence the booming counterfeit market.[130] The lack of intellectual property protections is in large part traceable to traditional

vestors often utilize Chinese laborers because they are still inexpensive but are more skilled and easier to manage than surrounding countries).

122 *See* Wong, *supra* note 5, at 275 (increasing economic and social independence but the government has responded by clamping down on independent thought. As China continues to liberalize its economic system, society and politics must evolve to meet new demands); *see also* Daniel Gross, *Shanghai Surprise, supra* note 119.

123 *See id.* (the Chinese government does not want to loosen its control over the Chinese people).

124 LIANG, *supra* note 11, at 121.

125 *Id.*; *see also* SCHAUB, *supra* note 81, at 6-10 (saying the Chinese government still maintains control overlicensing, scope of business, and the tenuous approval process by categorizing FDI into encouraged, restricted, and prohibitive categories).

126 *See* Wong, *supra* note 5, at 273-74 (the CCP has loosened its control economically more than it has socially).

127 *See* Lee & Armstrong, *supra* note 101 (china attracted $105.7 billion in FDI in 2010); *see also* LIANG, *supra* note 11 at 122 (graph shows China has generated an immense amount of FDI and has consistently increased its market share).

128 *See* Crothers, *supra* note 105, at 288 (asserting that it is critical to have foreign counsel that knows the ropes, but the fact that so many companies have engaged in FDI with China means that there a people with professional reputations who can help navigate the immense bureaucracy, and also stating that less developed markets with less foreign investment are perceived by foreign investors as more stable).

129 LIANG, *supra* note 11, at 122.

130 CHOW, *supra* note 10, at 410. *See generally* BRYAN BACHNER, INTELLECTUAL PROPERTY RIGHTS AND CHINA: THE MODERNIZATION OF TRADITIONAL KNOWLEDGE 85-142 (Boom Eleven International 2009) (although patent law exists in China, enforcement is highly problematic).

Chinese culture where copying is not scorned but rather viewed as a method of showing deference to the past.[131] Moreover, intellectual property rights that reward ingenuity, creativity, and individuality are fundamentally inconsistent with a society that stresses "collective endeavor and common ownership."[132] The Chinese government has been faced with the conundrum of guaranteeing superficial intellectual property rights to foreign investors who demand protection before bringing revenue into China while maintaining a culture of collective endeavor and ownership.[133]

In 1979, the United States insisted in the 1979 Trade Agreement, which was part of establishing diplomatic relations between China and the United States, that China agree to provide protection for trademarks, copyrights, and patents to American companies.[134] However, by 1989, both the United States government and American companies had found the Chinese intellectual property guarantees to be inadequate.[135] Since then, China has enacted several major, but largely ineffective, intellectual property laws.[136] Between 1982 and 1991, China enacted three major intellectual property laws: the Trademark Law of 1982, the Patent Law of 1984, and the Copyright Law of 1991.[137] China has also acceded to become a signatory member of a number of significant international intellectual property treaties.[138]

Although it appears that China has caught up to speed with intellectual property legislation, the laws are largely ineffective due to widespread lack of enforcement.[139] In fact, the lack of adequate enforcement has led to serious commercial piracy problems, which many investors say is one of their most serious business problems in China today.[140]

Second, local protectionism is one of the most formidable barriers to enforcement of intellectual property laws.[141] Although the central government may understand the importance of intellectual property protection, enforcement is the

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131 *See id.* (Chinese culture emphasized respecting heritage and ancestry).

132 CHOW, *supra* note 10, at 411.

133 *See* Wong, *supra* note 5, at 282 (the Chinese government has found itself in a predicament between wanting more investment but resisting social and economic freedom of its population, and the CCP cannot maintain absolute control any longer if the Chinese economy is to develop further).

134 CHOW, *supra* note 10, at 413.

135 *Id.* In order to avoid sanction by the U.S., China agreed to a "Memorandum of Understanding" that set out a series of steps China would follow to improve its intellectual property protections.

136 *Id.* at 416.

137 *Id.*

138 *Id.* China has acceded to several international treaties including the World Intellectual Property Organization Convention, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Geneva Phonogram Convention.

139 *Id.* at 433. Although laws that meet international standard are enacted in China, adequate enforcement remains a serious problem. For example, one software industry group estimated that 94% of all software used in China at the end of 2000 was pirated.

140 *Id.* at 433-35. According to industry groups, losses from commercial piracy reached a peak of $2.8 billion in 1997 (considering figures from 2003). Annual losses suffered by U.S. publishers from piracy of academic journals are estimated to be $100 million.

141 *Id.* at 439.

responsibility of the local level of government, and at the local level, economic protectionism prevails.[142] Economic protectionism prevails on the local level because of mismatched incentives. Local level leaders are evaluated based on the economic performance of the local political unit, and since counterfeiting is a massive contributor to the local economy, there is a clear incentive not to enforce intellectual property laws.[143] Upon entering China, it takes very little time for a visitor to find one of the many counterfeiting markets and understand why enforcement is lacking.

Moreover, even where the laws are enforced, the sanctions are inadequate.[144] Where fines are imposed, the fines are extremely small relative to the profit potential, thus providing no incentive for a vendor to discontinue their commercial piracy practices.[145] In 2000, the average fine for engaging in commercial piracy was under $800, and of that amount, the average amount used to compensate owners of the copyrights, trademarks, or patents was merely $19.[146] There are no mandatory guidelines for imposing fines, and therefore the fines are often extremely low and have no effect on reducing the profitability of engaging in counterfeiting business.[147] Even where businesses are shut down, vendors relocate to another market, and are back in business within a few weeks.[148] So long as commercial piracy is profitable, vendors will pay the minute fines and continue business.[149]

Finally, ambiguity in the Chinese lawmaking process is a disadvantage for FDI.[150] The ambiguity in the lawmaking process and general lack of enforcement complicates risk analysis because potential investors are unable to accurately estimate costs and risks.[151] In short, China is a risky choice for investment precisely because of the permeation of communist politics into the lawmaking process.[152] Therefore, the CPC can enact a law to appease foreign investors and foreign governments, but can also control enforcement of the law, thus creating the risk that laws exist but are not enforced entirely for political reasons (as

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142 *Id.* As an example, a well-known commercial piracy center in the Zhenjiang Province attracts at least 200,000 customers every day to the 33,000 stores where industry experts estimate 90% are counterfeit or infringing goods.

143 *Id.* Since local government entities are measured based on economic performance of their constituent, they often have a direct financial interest in the illegal trade itself.

144 *Id.* at 442-43. In 1999, only 1 in 806 cases resulted in any form of criminal prosecution, a level far too law to act as a deterrent.

145 *Id.* at 443. Brand owners who have successfully urged enforcement in some cases complain that the vendors are back in business with a matter of weeks.

146 *Id.*

147 *Id.* at 442. One reason Chinese officials may be hesitant to widely enforce counterfeiting laws is the local turmoil that would like result as many utilize counterfeit operations as their source of employment.

148 *Id.* at 443.

149 *Id.*

150 Wong, *supra* note 5, at 265.

151 *Id.* The lack of any transparent or established protocol for the transformation of CCP policy into legislation results in a system that is unclear even to those working within it.

152 *Id.*

appears to have happened in the intellectual property arena).[153] In China, the lack of "consistency, predictability, and transparency" in the lawmaking and regulatory process creates confusion for investors who are unable to adequately evaluate the risks and costs of doing business in China.[154]

There is, of course, always a risk factor inherent in FDI, especially when the target company is an emerging market, however, in China, the undue interference by the CCP in the lawful generation of revenue magnifies the already inherent risk.[155] In sum, although China is probably the most successful example of risky foreign direct investment paying large returns, the political system in China creates several disadvantages for investment and should be thoroughly considered by prospective investors.

B. Foreign Direct Investment in the Czech Republic

Although the Czech Republic is the road less traveled in terms of foreign direct investment, it has many advantages to offer for the prospective investors without the severe risks associated with investing in China.

1. Advantages for Foreign Direct Investment

The Czech Republic has been a member of the European Union since 2004, and with EU membership comes a tremendous amount of stability.[156] The stability certainly extends in the monetary sense (as we have seen this past year with Greece, and, more currently, Ireland), but also in the political sense.[157] In order to be eligible for European Union membership, the country must fulfill the democratic, political, and economic criteria; therefore, European Union membership decreases the risk of investing in any EU member country.[158] In effect, EU membership is a voucher by many powerful and economically stable countries (many of whom are long-term allies of the United States) that the member country is a safe investment decision.[159]

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[153] *Id.*

[154] *Id.* In some cases, this has created an "insurmountable barrier" to doing business in China.

[155] *See* Crothers, *supra* note 105, at 288.

[156] Walton, *supra* note 9, ¶ 9.

[157] *Id.*; *see also* Lefteris Papadmias & Jan Strupczewski, *EU and IMF agree $147M Bailout for Greece*, REUTERS (May 2, 2010), http://www.reuters.com/article/idUSTRE6400PJ20100502 (the EU will go to great lengths to ensure political and monetary stability because instability in one country has the potential to affect instability in all the others).

[158] By the time a country joins the EU, it must have: (1) stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; (2) a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union; and (3) the ability to take on the obligations of membership, including support for the aims of the Union. They must have a public administration capable of applying and managing EU laws in practice. EUROPEAN COMMISSION, ENLARGEMENT AND NEIGHBOURHOOD POLICY, http://europa.eu/abc/12lessons/lesson_3/index_en.htm (last visited Nov. 22, 2010).

[159] *See* Papadmias & Strupczewski, *supra* note 157 (The EU money markets rely on the monetary stability of the EU as a whole as well as the individual countries).

In addition to its membership in the EU, the Czech Republic also has a central European location, stable political and economic environment, extensive infrastructure, and relatively lost cost of labor to offer prospective investors.[160] The Czech Republic's central location is the best of both worlds, because it allows easy access to the still developing and potential news markets of the Eastern European countries like Hungary, Slovakia, and Croatia as well as the Baltic countries. These countries are likely to be the target of further expansion in foreign investment, but the Czech Republic also offers close proximity to the developed Western European countries and exposure to a booming export market.[161] Moreover, rapid privatization in the Czech Republic forced (and did not, like China, postpone) political turmoil.[162] This turmoil has long passed, and the Czech Republic now has nearly two decades of economic stability under its belt.[163] With the success of voucher privatization, foreign investors can attempt and sometimes successfully buy companies from individual shareholders and avoid the costly process of creating a new entity.[164]

The Czech Republic also has extensive infrastructure covering the country and connecting it to neighboring countries.[165] Many large foreign companies have taken advantage of the existing infrastructure system and invested in the Czech Republic.[166] Another advantage of the Czech Republic is its relatively inexpensive, but also relatively skilled labor force.[167] Although more expensive than the Chinese labor force, the labor force is inexpensive relative to many other EU members, and is also is relatively educated and skilled.[168] Finally, the Czech government has sought to attract foreign investment by creating the numerous and significant tax incentives described in the previous section of this paper.

2. *Disadvantages for Foreign Direct Investment*

The chief disadvantage of the Czech Republic for purposes of FDI is that there is less risk, which generally follows less returns.[169] Relative to China and other Asian markets, the size of the potential labor force is only a fraction, and the cost of labor is higher.[170] Although human rights issues are greatly decreased by

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160 Walton, *supra* note 9, ¶ 9.

161 *Id.*

162 *See* background *supra* Part II.B.2.

163 *Id.*

164 CZECH INVESTMENT AND BUSINESS DEVELOPMENT AGENCY, *supra* note 110 (from the home page click on "Why Invest in the Czech Republic" and then click on "Educated Workforce").

165 Walton, *supra* note 9, ¶ 9.

166 *Id.* ¶ 3.

167 Balfour and Crise, *supra* note 8, at 106.

168 *Id.*

169 *See* Carl Richards, *Bonds: Higher Returns equals Greater Risk*, N.Y. TIMES (Sept. 7, 2010), http://bucks.blogs.nytimes.com/2010/09/07/bonds-higher-returns-equal-greater-risk/ (stating that general investment and economic theory supply that less risk generally equates to less returns).

170 Walton, *supra* note 9, ¶ 9; *see also* background *supra* Part II.A.1 (because China's population is larger, China necessarily has a larger potential labor force; additionally, China is a target for FDI precisely because of the low costs of labor and production, as previously discussed).

investing in the Czech Republic, costs of production are greater, especially in light of the consistent policy of the Chinese government to devalue the Chinese Yuan relative to the dollar and the Euro to bolster exports.[171] In terms of profit making incentives, a skilled labor force is not necessarily an advantage because it generally translates to increased cost of production.[172] Moreover, the domestic market in the Czech Republic is miniscule relative to Asian markets, and large, profit seeking companies can tap into Western European markets by exporting products made inexpensively in the Asian markets.[173]

In conclusion, the Czech Republic is a favorable location for FDI because of its European Union Membership, central European location, and political and economic stability. Although clearly a less risky alternative for FDI than China, the Czech Republic would likely be more costly and have lower, albeit more stable, returns.

V. Proposal

This section analyzes the facts discussed in the previous sections and proposes which country is a better target for Foreign Direct Investment.

A. Which country is more favorable to Foreign Direct Investment?

Here, the legal and the business worlds are at odds. From a legal perspective, the Czech Republic is a better target for foreign direct investment because the integrity of the legislative process is not in question.[174] A functioning system of checks and balances in the Czech Republic ensures that no one person or group has undue influence over the legislative process.[175] In such a system, laws are passed and enforced by separate entities, and the general population has respect for the rule of law.[176] Because the Czech legal system is more transparent, prospective investors are able to calculate the risks and costs; investors know what they need to do in order to gain approval and the process by which approval

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171 Li Yanping, *China Exports may Lose Pace on Europe Crisis, Yuan*, BLOOMBERG BUS. WEEK (July 11, 2010), http://www.businessweek.com/news/2010-07-11/china-exports-may-lose-pace-on-europe-crisis-yuan.html. *See* Dariusz Bialuski, *China's Devaluation of the Yuan: A Global Economic Imbalence*, FORDHAM POL. REV. (Jan. 23. 20011), http://fordhampoliticalreview.org/?p=54. *See* Grant McCool, *CHINA: Wal-Mart turns Blind Eye to Factory Conditions*, CORP WATCH (Feb. 9, 2004), http://www.corpwatch.org/article.php?id=9949.

172 Walton, *supra* note 9, ¶ 9 (although the Czech Repbulic has a skilled labor force, this often leads to higher labor costs). See background *supra* Part II for a detailed discussion of each country, and its strengths and weaknesses for FDI.

173 Walton, *supra* note 9, ¶ 9

174 *See* background *supra* Part II.A.1 (Because the integrity of the legislative process in China is questionable, foreign investors can not adequately assess the risks and costs of investing in the China, therefore, because the Czech Republic does not face these issues, investors can better asses the risks).

175 *See* background *supra* Part II.B.1 (Czech political parties have much less influence than the CPC on the law-making process).

176 *See* background part II.B.1 for a detailed discussion of the Czech legal system including the separation of powers. Unlike China, Czech citizens do not question the integrity of the laws nor are they faced with inconsistent enforcement of the laws, therefore, the rule of law is more respected.

occurs is not unduly influenced by politics.[177] Moreover, investor's intellectual property would be protected on a much more sophisticated level in the Czech Republic.[178] Overall, the Czech Republic is more favorable to foreign direct investment from a risk adverse perspective.[179] However, general economic theory provides that where there is less risk, there are also generally lower returns, which is why the legal and business viewpoints are at odds in regard to this issue.

From a purely profit maximizing perspective, China is almost certainly a more favorable target for FDI.[180] The cost of production is incredibly low in China, and returns to FDI have historically been substantial.[181] At least currently, the Chinese government has decided that it wants to entice foreign investors to China, but the future is uncertain as the communist party could change its position at any time.[182] Because the communist party permeates virtually every facet of life in China, a change in stance would be devastating to foreign investors. Additionally, the legislative and regulatory processes are far from transparent, and there is little that foreign investors could do in the event of institutional roadblocks other than pull out of China.[183] For now, China appears to be interested in continuing to bring wealth and prosperity to China, and as long as that is the case, China is a better target for FDI from a purely profit maximizing vantage point. China is a place where enormous profits can be made, but also where enormous losses could be suffered in the event that the government changes its mind about foreign investment, or if the county becomes politically unstable.

In addition, there are vast untapped domestic Asian markets, and the younger generations in China are fascinated by materialism.[184] The Chinese people, especially the younger generation that has grown up with some disposable income, are hungry for more. The potential for consumerism to take off in China is immense. However, consumerism cannot take off without a relinquishment of con-

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[177] *See* analysis *supra* Part IV.B.1 (there is less risk in the Czech Republic that an FDI proposal will be rejected for political reasons); *see also* background *supra* Part II.B.1.

[178] *See* analysis *supra* Part IV.A.2 (because China has poor intellectual property protections, the Czech Republic does not have a large hurdle to overcome to be better in that arena); *see also Czech Republic, Intellectual Property Protections*, THE EUROPEAN COMMISSION, http://ec.europa.eu/youreurope/business/competing-through-innovation/protecting-intellectual-property/czech-republic/index_en.htm (last visited April 20, 2011).

[179] *See* analysis *supra* Part IV.B.1 (because the political uncertainty is much less in the Czech Republic, foreign investors are able to better predict the future of their enterprises).

[180] *See* analysis *supra* Part IV.A (as is demonstrated by the fact that, currently, China is a significantly more popular destination for FDI).

[181] *See* discussion *supra* Part III.A.1 (the history of high profit margins, due in large part to the much lower costs of production, in Chinese markets has attracted consistently expanding FDI markets).

[182] *See* analysis *supra* Part IV.A.2 (in China, there is very little transparency in the regulatory and law-making processes, which makes it very difficult for foreign investors to predict how regulators and law makers will proceed with respect to authorizing further FDI or extending existing FDI).

[183] *See* discussion *supra* Part III.A.1 (if the CPC decides FDI is no longer desirable for China, foreign investors will face significant barriers to future or further foreign investment).

[184] *See* analysis *supra* Part IV.A.1 (this injects hope into the foreign investor because, until recently, many FDI enterprises have sought Asian markets for the low cost of production and high profit margins, not the vast domestic markets. Those markets could lead to even greater profit potential for foreign investors).

trol by the central government. As such, China is at a crossroads, which is why FDI in China with a long-term view should be approached with caution.

B. Which country is more stable for Foreign Direct Investment?

The Czech Republic is more stable than China, and is definitively a less risky investment.[185] The risk of investing in the Czech Republic is much lower than in China because it is politically and economically stable, is a member of the European Union, and has a functioning system of checks and balances.[186] The Czech Republic now has a fully functioning market economy that operates on similar social and economic driving forces to the United States' economy.[187] The stability and familiarity with the economic forces driving the Czech economy make it both a more stable and therefore, a less risky location for FDI.[188] However, the profit potential of foreign investment for short-term investors in the Czech Republic is less than in China, due largely to the higher cost of labor and smaller population.[189] Nonetheless, a long-term investment in a stable country like the Czech Republic could likewise generate high returns if a foreign investor capitalized on the European domestic markets as well as possibly utilizing the lower cost of labor in the Eastern European countries.[190]

C. Which country is better overall for Foreign Direct Investment?

1. Short-term Investment Horizon

For purely profit-seeking investors who are willing to face risk of political instability, and who are looking for a short-term investment, China is the better option.[191] During the current economic challenges, successful FDI in the Asian markets has aided companies in surviving the recession.[192] At least until the political turmoil that ultimately accompanies economic freedom occurs, China will likely continue to offer low cost of production and expansive export markets

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185 *See* analysis *supra* Part IV.A.1 (political stability is the primary area in which the Czech Republic is more favorable than China for FDI).

186 *See* analysis *supra* Part IV.B.1 (European Union membership is somewhat of a guarantee that the Czech Republic will remain politically stable and that other countries rely on its stability and vitality).

187 *See* background *supra* Part II.B.1 (market forces have taken off in the Czech Republic, which now has thriving financial and consumer markets).

188 *See* analysis *supra* Part IV.B.1 (economically, the Czech Republic is more similar to Western economies like the United States, thus making it more predictable).

189 *See* analysis *supra* Part IV.A.1; *see also* analysis *supra* Part IV.B.2 (one downside to the more developed Central European economies from a profit maximizing perspective is the higher standard of living and higher costs of production).

190 *See* analysis *supra* Part IV.A (in the long term, stability from an established market economy and democratic political system, relatively educated labor force, and favorable Central European location could make the Czech Republic a better long term location for FDI).

191 *See* analysis *supra* Part IV.A.1 (an investor who is willing to take on the risk of political turmoil may be more likely to invest in China and seek to access the vast Asian markets).

192 ALFARO & CHEN, *supra* note 1, at 8 (asserting that FDI plays a critical and complex role in surviving the current global financial crisis).

to entice profit-seeking investors.[193] Moreover, as long as the government continues to want to attract FDI into China, they will act to make investment profitable.[194]

However, if a foreign investor did not require low cost laborers for profit and instead needed skilled laborers, the Czech Republic could pose a better option for short-term investment.[195] This is especially true if an investor bought shares from individuals and took over an already existing company and therefore had lower startup costs.[196] If a foreign investor were looking to capitalize on domestic markets, or the European market, then the Czech Republic would be a wiser choice for investment since the Chinese government still largely controls the Chinese domestic markets.

2. *Long-term Investment Horizon*

China is at a crossroads, and as such, long-term investment in China cannot be predicted with any certainty.[197] With increasing social and economic independence comes knowledge that the government does not want the Chinese population to have, and the tension between social and economic independence and communist party control is palpable in China.[198] Foreign investors know the potential in China is greater than has been tapped, and the Chinese people have tasted small amounts of freedom and will someday demand more. Foreign investors will probably try to pressure the Chinese government to relinquish control and allow them to exploit the vast and largely untapped domestic markets. However, the CCP probably will not give up control easily.[199] In fact, it is likely that the CCP will try to clamp down harder and ultimately either China will end up in revolt and political instability or foreign investors will gradually move to other

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[193] *See* analysis *supra* Part IV.A.1 (China will, at some point in the future, face a decision between loosening the reins on freedoms associated with more knowledge and wealth, or it will stagnate as an FDI destination. Certainly, any political revolution would likely scare investors out of China, as happened after the Tiananmen Square incident).

[194] *See* analysis *supra* Part IV.A.1 (the key for foreign investors is to ensure that the CPC continues to want to attract FDI into China. As soon as the CPC changes its mind, investors will likely face insurmountable barriers to entry due to the lack of transparency).

[195] *See* analysis *supra* Part IV.B (although the Chinese labor force is catching up, higher education is still limited to only the brightest students, while the Czech labor force offers both political stability and a skilled labor force).

[196] *See* discussion *supra* Part III.B (since the Czech Republic chose to undergo rapid transition, there are no longer any SOEs, and thus there is opportunity for a foreign investor to purchase an already existing company through a public or private market).

[197] *See* analysis *supra* Part IV.A.2 (China will ultimately have to choose between FDI and its associated freedoms or shut out many foreign investors and retain tight control over the population).

[198] *See, e.g.*, CNN Wire Staff, *China Sentences Woman to Labor Camp for Twitter Post*, CNN (Nov. 18, 2010), http://articles.cnn.com/2010-11-18/world/china.tweet.punishment_1_labor-camp-twitter-japanese-products?_s=PM:WORLD.

[199] *See* background *supra* Part II.A.1 (with incidents like the censorship of Wikipedia and Facebook as well as the direct marketing ban discussed in Wong, *supra* note 5, the CCP has demonstrated that it will not let go of control quickly, quietly, or easily).

locations where the economic opportunities are not stagnant.[200] There appear to be two options for China. It cannot stay as it is now, where the government has its cake and eats it too—foreign investors are pouring into China, while the CCP has somehow managed to retain control over the general population.[201] The CCP will either relinquish control and FDI in China will propel to levels never before imagined as the vast domestic markets are opened, or China will stagnate or fall backwards as the CCP tries to regain total control, in which case, either political revolt will occur or investors will relocate.

Therefore, the Czech Republic is a much safer long-term investment.[202] Although it may not generate the same level of short-term profits, it will also not likely suffer huge losses, and may balance out over the long-term. Of course, the Czech Republic is just one of many other options for FDI.

VI. Conclusion

In conclusion, both China and the Czech Republic are viable targets for FDI. Although both countries have advantages and disadvantages for FDI, the Czech Republic is, without a doubt, the more stable political, economic, and legal system, and therefore investment in the Czech Republic is less risky. As such, a long-term investor with his or her sights set beyond the current global economic crisis should seriously consider investing in the Czech Republic.

China, however, is a hot bed for FDI and has enormous potential to generate tremendous profits, especially if the domestic markets are opened up without interference from the government. The younger generations in China have been exposed to consumerism and have tasted a small amount of social and economic freedom. If the domestic markets in China were unencumbered by the government, the profit potential is massive, but if China continues to regulate internal markets and export much of what is produced in the country, investors may ultimately relocate.

However, the main issue with China is not that the status quo will remain, because foreign investors are making a lot of money on the status quo by taking advantage of cheap labor and exporting products, but the fact that the status quo is not sustainable in a world where with global scale productions comes social and economic freedom. The real issue is the tension that now exists between the government wanting to maintain control and the people trending towards consumerism. The Chinese government will not tolerate the social and political knowledge that comes with international consumerism, and it is likely that the government will attempt to contain it, stagnating investment returns and potentially inciting revolt. Therefore, long-term investment in China should be ap-

200 *See* analysis *supra* Part IV.A.2 (this is especially true if there are other Asian markets that do not face the tight control of the CPC, which would provide relatively easy opportunities for foreign investors to relocate in Asia).

201 *See* Wong, *supra* note 5, at 265-66.

202 *See* analysis *supra* Part IV.B.1 (If China ultimately faces some form of political or social instability, investors would likely suffer great losses, thus, the Czech Republic would provide a more stable long term investment).

proached with extreme caution, as some form of political instability is likely to be in China's future. Until that time, however, China is a favorable target of foreign direct investment.

GENOCIDE, INC.: CORPORATE IMMUNITY TO VIOLATIONS OF INTERNATIONAL LAW AFTER *KIOBEL V. ROYAL DUTCH PETROLEUM*

Geoffrey Pariza†

I. Introduction

A nameless Multinational Corporation (MNC) enters into an agreement with the government of some nondescript underdeveloped nation to construct an oil pipeline. The MNC is concerned with its profits and completing its pipeline, while the foreign government is concerned with modernizing and bringing foreign investment to its underdeveloped country. The native population is only concerned with scraping out whatever meager existence is possible. But, now the natives are being forced from their land to permit the MNC to build its pipeline. The natives are tied to their land. It is all they have, and it is all they know. Many flee, some protest, and others take action. They raid the MNC's construction site and supply trains and sabotage the pipeline. The MNC is furious. Delays in the project are costing millions.

Although the MNC was given assurances by the local government that security for the project would be provided and that the local populace would not be an issue, the local forces are ill equipped, largely untrained, and corrupt. A decision is made by the MNC that it would be more cost effective to hire its own contractors to handle security and deal with the locals. The contractors it hires are good at what they do. The methods they use are brutal but effective. Systematically, they hunt down and kill the locals responsible and those that aid or abet them. Torture, rape, mutilation, amputation, whatever gets the job done. Within a few weeks the native resistance has been quelled and the project is back on schedule. Those that are still alive have no redress in their own country. The government is largely corrupt and not interested in their plight.

As horrific as this scenario sounds, in the world of Alien Tort Statute (ATS) litigation, it is a tale that is all too common.[1] Until recently, the victims of these atrocities could find redress in American courts through use of the ATS, a statute that allows aliens to bring suit against others for violations of international law.[2] Suits under the ATS present two options: (1) a violation of the law of nations or

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[1] This scenario was created using one of Judge Leval's scenarios from Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 158, 164 (2d Cir. 2010); *see also* Church of Sudan v. Talisman Energy Inc., 582 F.3d 244, 248-50 (2d Cir. 2009) (Sudanese plaintiffs alleged that a Canadian oil company assisted the Sudanese government in a campaign of genocide, crimes against humanity, and war crimes); Bowoto v. Chevron Corporation, 557 F. Supp. 2d 1080, 1083-84 (N.D. Cal. 2008) (Nigerian villagers alleged that Chevron aided the Nigerian government in attacks against the local populace); Galvis Mujica v. Occidental Petroleum Corp., 564 F.3d 1190, 1197 (9th Cir. 2009) (plaintiffs alleged that Occidental instigated and guided a Columbian bombing attack on a village killing 17 civilians).

[2] 28 U.S.C. § 1350 (2011). This statute is also referred to as the Alien Tort Claims Act (ATCA), but since the U.S. Supreme Court referred to 28 U.S.C. § 1350 as the Alien Tort Statute in *Sosa*, ATS has

(2) a violation of a treaty of the United States.[3] Most litigation and debate has understandably centered on the first option. To bring a successful claim under the first option of the ATS, a plaintiff must allege that: (1) he is an alien; (2) a tort has been committed; and (3) that that tort is in violation of the law of nations.[4]

For the past thirty years, plaintiffs like the ones described above have successfully brought a litany of cases under the ATS, suing state actors, non-state actors, and corporations for violations of international law.[5] However, a recent decision by the Second Circuit Court of Appeals could change that. The Second Circuit sounded the death knell for an entire class of putative ATS litigants in *Kiobel* by holding that corporations cannot be held liable for violations of international law, thereby creating corporate immunity for an entire host of crimes from genocide to slavery.[6] This very controversial decision by the Second Circuit did not go unnoticed. Almost immediately after it was handed down, the blogosphere and the legal community at large were in an uproar over the soundness of the court's reasoning along with the implications for its holding.[7] This Note seeks to explore the rationale for the court's holding to include the historical backdrop of the ATS and make a determination as to whether the court arrived at the correct position concerning corporate ATS liability.

Part II of this Note discusses the history of the ATS, to include the impetus for its passage and several seminal ATS cases that have expanded and shaped the ATS. Part III is an in depth analysis of the Second Circuit's holding in *Kiobel* including the concurrence. Part IV explores several of the arguments from *Kiobel* and their soundness. Finally, Part V looks at the negative impact the *Kiobel* decision will have on future ATS plaintiffs litigating against corporate defendants.

II. Background

A. The Beginning

The passage of the ATS was heavily influenced by English law and more specifically by the legal commentaries of William Blackstone.[8] Blackstone

become the most widely used term to reference the statute. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[3] The law of nations in modern parlance is usually referred to as international law. Both are used interchangeably in this note.

[4] 28 U.S.C. § 1350.

[5] *See* discussion *infra* Part II.

[6] Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 148-49 (2d Cir. 2010).

[7] *See generally* Julian Ku, *Goodbye to the Alien Tort Statute? Second Circuit Rejects Corporate Liability for Violations of Customary International Law*, OPINIO JURIS (Sep. 17, 2010), http://opiniojuris.org/2010/09/17/goodbye-to-ats-litigation-second-circuit-rejects-corporate-liability-for-violations-of-customary-international-law/; Trey Childress, *Keitner on Kiobel and the future of the Alien Tort Statute*, CONFLICT OF LAWS (Sept. 22, 2010), http://conflictoflaws.net/2010/keitner-on-kiobel-and-the-future-of-the-alien-tort-statute/.

[8] *See* William R. Castro, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 489-90 (1986).

counseled that the law of nations must be included as part of domestic common law as a way for a nation to protect itself from other sovereigns.[9] This is because during Blackstone's time, the mistreatment of a country's citizens in other nations was the preferred excuse for going to war.[10] In his commentaries, Blackstone set forth the principle offenses against the law of nations that should be guarded against: (1) violations of safe conducts; (2) infringement on the rights of ambassadors; and (3) piracy.[11] The fledgling United States had a real interest in providing redress for torts committed by aliens against aliens as a way to "maintain neutrality in the face of warring European powers."[12] Additionally, the United States wished to assure the other nations of the world that it would abide by and enforce the law of nations.[13] However, under the Articles of Confederation, the Continental Congress was really powerless to provide any redress, as the "Marbois affair" so aptly illustrates.[14]

In Philadelphia, in May of 1784, Chevalier de Longchamps, a Frenchman, assaulted and battered Francis Barbe de Marbois, a member of the French legation, first in front of the French Ambassador in the Ambassador's house and then again a few days later in the streets of Philadelphia.[15] The international community was outraged with the assault of a foreign diplomat within the United States and demanded that Congress take action.[16] Even though the Continental Congress was wholly impotent and could do little more than symbolically sanction de Longchamps, he was subsequently brought to trial in a Pennsylvania state court, where he was found guilty of violations of both the common law and the law of nations.[17] The court held that to determine whether a crime against the law of nations had been perpetrated, one must look at the "practices of different Nations, and the authority of writers."[18] After doing so the court found that all nations were in agreement that ambassadors were protected under the law of nations.[19]

After the ratification of the Constitution, Congress was no longer confined by the inadequacies of the Articles of Confederation and passed the ATS as part of the Judiciary Act of 1789.[20] Originally a one-line tort statute, believed to be penned by Oliver Ellsworth, the ATS stated that:

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9 *Id.*

10 *See* Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 63-64 (1988).

11 Castro, *supra* note 8, at 498-90.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at 491-94; Respublica v. De Longchamps, 1 U.S. 111, 111-12 (1784).

16 Castro, *supra* note 8, at 491-94.

17 *De Longchamps*, 1 U.S. at 116-18; *see* Castro, *supra* note 8, at 491-94.

18 *De Longchamps*, 1 U.S. at 116.

19 *Id.*

20 Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 50 (1923).

> [T]he District Courts. . .shall. . .have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for tort only in violation of the law of nations or a treaty of the United States.[21]

B. Resurgence

After passage of the ATS, the statute remained largely dormant for close to two hundred years.[22] Relatively unchanged from its original incarnation, today the ATS states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[23] The only difference of note between the present ATS and its predecessor is that state courts no longer have jurisdiction over ATS claims.[24]

The Second Circuit Court of Appeals, which has been at the forefront of almost all significant ATS litigation, breathed new life into the ATS in 1980 with its seminal case, *Filartiga v. Pena-Irala*, where it held that deliberate torture under the color of law violated universally accepted international norms and was against the law of nations.[25]

In reaching its decision the court consulted the following sources to determine whether torture was a violation of international law: (1) scholarly writings; (2) international customs, i.e. generally accepted practices; (3) judicial decisions; and (4) international conventions.[26] After conducting its analysis, the court found that the law of nations evolves over time and what may have at one point been only comity among nations could ripen into a rule of international law.[27] Therefore, courts must not interpret the law of nations as it existed in 1789 when the ATS was enacted, but as it is today, which included torture by state officials.[28]

Besides arguing that torture was a violation of the law of nations, the plaintiffs also asserted that the ATS in effect created new rights for aliens by providing an independent cause of action in U.S. courts for aliens.[29] The court rejected this view, holding that the ATS was merely a jurisdictional statute that gave federal

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[21] *Id.*; Judiciary Act of 1789, 1 Stat. 73, 77.

[22] *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Claims Statute*, 18 N.Y.U. J. INT'L L. & POL'Y 1, 4-5 nn.15-16 (1985) (of twenty-one reported cases brought under the ATS prior to *Filartiga*, only two were successful).

[23] 28 U.S.C. § 1350 (2011).

[24] *See* Judiciary Act of 1789, 1 Stat. 73, 77.

[25] Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). In *Filartiga*, Dolly Filartiga and her father, who were both Paraguayan citizens, brought suit in federal district court against another Paraguayan citizen, Americo Norberto Pena-Irala, a high ranking police official, for the torture and murder of their brother/son in violation of the law of nations. The district court subsequently dismissed the action for lack of subject matter jurisdiction.

[26] *Id.* at 880 (citing The Paquete Habana, 175 U.S. 677, 700 (1900)).

[27] *Id.* at 881.

[28] *Id.*

[29] *Id.* at 887.

courts the power to adjudicate the rights of aliens that already existed in international law.[30]

The Second Circuit's decision in *Filartiga* ushered in a new era for ATS litigation. After the decision was handed down, more than 100 similar cases were brought almost immediately.[31] Post *Filartiga*, courts have held that federal courts have ATS jurisdiction over a wide range of crimes, such as genocide, war crimes, summary execution, forced disappearance, slavery, prolonged detention, and cruel, inhuman, and degrading treatment.[32] However, the lasting impact of *Filartiga* is not merely a growth in litigation. The case stands for the proposition that plaintiffs are not constrained by the law of nations as it existed in Blackstone's time, but that the law of nations is fluid and constantly changing. Additionally, the case stands for the proposition that individuals have rights that are recognized by international law and redress is available in U.S. courts when those rights have been violated.[33]

A few years after *Filartiga*, the D.C. Circuit Court of Appeals handed down a *per curiam* opinion in *Tel-Oren v. Libyan Arab Republic* that was somewhat at odds with the Second Circuit's holding.[34] The case in actuality consists of three opinions, all at odds with each other, as all three justicies affirmed the dismissal of the case, but each wrote his own concurrence.

Judge Edwards's opinion largely adopted the Second Circuit's rationale in *Filartiga*. However, he distinguished *Tel-Oren* from *Filartiga* in that in *Tel-Oren* the torture and other violations of the law of nations were not done under the color of law by state actors and therefore, not actionable.[35] Judge Edwards also agreed with the Second Circuit that the law of nations was not static, but he was not prepared to hold that torture by non-state actors had arisen to a level where it was universally recognized as *hostis humani generis*, an enemy of all mankind, such as piracy or slavery.[36] Besides limiting the Second Circuit's holding in *Filartiga* to state actors, Judge Edward's opinion really brought nothing new to

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30 *Id.*

31 MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE 5 (Martinus Nijhoff 2009).

32 Daniel Disken, *The Historical and Modern Foundations for Aiding and Abetting Liability under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 815-16 (2005); *see* Tracy Bishop, *Cause of Action to Recover Civil Damages Pursuant to the Law of Nations and/or Customary International Law*, 21 CAUSES OF ACTION 2d 327 (2010) (Part II.A§7 covers the post Filartiga expansion of private persons culpable under the ATS. Part II.C on parties states that persons perpetrating certain crimes like genocide, slavery, and war crimes and/or persons acting under "the color of law" may be prosecuted under the law of nations).

33 See Jeffery M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v Pena-Irala*, 22 HARV. INT'L L. J. 53 (1981) for a detailed discussion of the post Filartiga state of the ATS.

34 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775-76 (D.C. Cir. 1984) (parenthetical is same as above).

35 *Id.* at 795.

36 *Id.* at 794-95.

the field, and much the same could be said of Judge Robb's concurrence. Judge Robb argued that the case presented a nonjusticiable political question.[37]

Judge Bork's concurrence, on the other hand, has been widely controversial and has garnered much criticism.[38] In his lengthy concurrence, Judge Bork essentially stated that: (1) international law does not create a cause of action for individuals unless the law itself so provides; (2) the law of nations is only concerned with states and not individuals; and (3) because of the first two propositions, Congress only intended the ATS to apply to Blackstone's original three violations.[39] Judge Bork's concurrence stands at the opposite end of the spectrum form the *Filartiga* decision and is the narrowest interpretation of the ATS to date.[40] However, a majority of the circuits still follow *Filartiga*, and as a direct result of the *Tel-Oren* decision and more specifically Judge Bork's concurrence, Congress passed the Torture Victims Protection Act (TVPA) in 1991, which provides redress in the form of civil damages for citizens and aliens who are victims of torture.[41] The legislative history of the TVPA is also supportive of the *Filartiga* decision and the Second Circuit's rationale.[42]

C. The Second Wave

The Second Circuit weighed in on the issue of the liability of non-state actors for violations of the law of nations a few years later in another landmark case, *Kadic v. Karadzic*.[43] The Second Circuit agreed with the DC Circuit that certain acts such as torture and summary execution were only violations of the law of nations when committed under the color of law.[44] But, the court further held that

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[37] *Id.* at 823.

[38] *Id.* at 777-78; *see* Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92, 92-105 (1985); *see also* William S. Dodge, *The Historical Origins of the Alien Tort Statue: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 238-43 (1996).

[39] *Tel-Oren*, 726 F.2d at 813-16; *see* D'Amato, *supra* note 38, at 96-98.

[40] KOEBELE, *supra* note 31, at 26.

[41] Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as 28 U.S.C. § 1350); *see* Diskin, *supra* note 32, at 817; *see* KOEBELE, *supra* note 31, at 5-6.

[42] Torture Victims Protection Act § 2 (the legislative history cites and supports the *Filartiga* decision).

[43] In *Kadic*, Bosnian Muslims and Croats brought suit against Radovan Karadzic for numerous human rights violations, to include: genocide, rape, forced prostitution, forced impregnation, torture, and summary execution. Karadzic was the self-proclaimed leader of Srpska, a putative Bosnian-Serb state which was not recognized by the international community, and had ultimate control over all of the Bosnian-Serb forces that committed the alleged atrocities. After the suit was brought, Karadzic moved for dismissal on several grounds, but the district court dismissed the action because of lack of subject matter jurisdiction, holding that "acts committed by non-state actors do not violate the law of nations." Kadic v. Karadzic, 70 F.3d 232, 236-37, 43 (2d Cir. 1995) (citing *Doe v. Karadzic*, 866 F. Supp. 734, 738 (S.D.N.Y. 1994)). In other words, since Srpska was not a recognized state, Karadzic could not be a state actor and, therefore, could not violate international law. See Alan Frederick Enslen, *Filartiga's Offspring: The Second Circuit Significantly Expands The Scope of the Alien Tort Clam Act with its decision in Kadic v. Karadzic*, 48 ALA. L. REV. 695, 696 (1997) for an in depth analysis of *Kadic*.

[44] *See Kadic*, 70 F.3d at 243-44.

acts, such as genocide, war crimes, and slavery, were violative of the law of nations regardless of who committed them.[45]

The Second Circuit's opinion in *Kadic* significantly widened the scope of the ATS by allowing plaintiffs to file suit against non-state actors.[46] This decision has probably been just as influential as the court's decision in *Filartiga*, if not more so. After the decision was handed down there was again a flurry of activity and a rapid increase in litigation, but this time instead of being directed at state actors, it was directed predominately at corporations.[47] Defendant's included oil companies such as Chevron, Texaco, Occidental, Royal Dutch Shell, and Talisman and mining companies such as Freeport-McMoRan, Newport, Rio Tinto, and the Southern Peru Copper Corporation.[48] There have also been several other well-known defendants such as Coca-Cola, Fresh Del Monte Produce, The Gap, Daimler-Chrysler, Ford, DynCorp, and Pfizer.[49] In fact, almost half of the ATS cases brought today involve corporate defendants.[50]

D. The Supreme Court Weighs in

After the *Kadic* decision was handed down, fairly clear battle lines had been drawn concerning the scope of the ATS and its ability to cover new causes of action and defendants. The Second Circuit, with its seminal cases *Filartiga* and *Kadic*—allowing new causes of action and suits against natural and ostensibly juridical persons—was at one end of the spectrum, and Judge Bork's concurrence in *Tel-Oren*—disallowing any new causes of action or classes of defendants—lay at the other. The field was ripe for the Supreme Court to step in and put several of these disagreements to rest. Unfortunately, the only time that the Supreme Court has weighed in on the ATS, to date, was in *Sosa v. Alvarez-Machain* in 2004, and as far as parties interested in the corporate aspects of the ATS were concerned, it was not an ideal case.[51]

The Defendant sided with Judge Bork, arguing that the ATS only gives federal courts jurisdiction, but does not allow for the creation of new causes of action.[52] Whereas, the Plaintiff took the other extreme by arguing that the ATS granted

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45 The court further held that it was irrelevant whether Srpska was a recognized state or not. It was sufficient that it held itself out to be one. *See id.* at 244-45.

46 *Id.*

47 KOEBELE, *supra* note 31, at 6.

48 *Id.*

49 *Id.*

50 *Id.*

51 In *Sosa*, the Drug Enforcement Agency (DEA) paid Mexican Nationals to kidnap a Mexican physician and bring him to the United States. The physician was wanted by the DEA because he was believed to have prolonged the life of a DEA agent so that members of the Mexican drug cartel could torture and eventually kill him. After the physician stood trial in the United States and had returned to Mexico, he brought suit against the DEA and one of the Mexican Nationals involved in his kidnapping. The claim he brought against the Mexican national alleged that he was subject to an unlawful arrest and detention in violation of the law of nations. Sosa v. Alvarez-Machain, 542 U.S. 692, 698 (2004). *See generally* Beth Stephens, *Corporate Liability Before and After Sosa v. Alvarez-Machain*, 56 RUTGERS L. REV. 995, 996 (2004).

52 *See Sosa*, 542 U.S. at 712.

federal courts the authority to create new causes of action for violations of the law of nations.[53] The Court rejected the Defendant's argument, and therefore Judge Bork's contentions outright, holding that under his construction, the statute would have been stillborn.[54] After an examination of the legislative history and the historical backdrop, the Court concluded that Congress most certainly intended the statute to have practical effect and that common law would provide a cause of action.[55] The Court's construction of the ATS also rejected the Plaintiff's view, as causes of action are created at common law and not by the judiciary.[56] This decision was simply an affirmation of the Second Circuit's holding in *Filartiga.*

The Court further affirmed the *Filartiga* decision by holding that the law of nations was not static and that new causes of action could be recognized.[57] The Court, however, urged extreme caution on the lower courts in recognizing additional causes of action.[58] The Court's reasoning was that: (1) our conception of the common law has changed over the last two hundred years; today instead of discovering what the law is, courts are seen as creating it;[59] (2) because the Court essentially abolished the existence of federal common law in *Erie v. Tompkins*, restraint should be shown;[60] (3) the creation of a private right of action is better left to the legislature;[61] (4) the creation of new causes of action could have far reaching collateral consequences affecting the foreign relations of the United States and the international community at large;[62] and (5) it is not the place of the judiciary to seek out and create new causes of action.[63] The Court summarized its position by holding that "judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping and thus open to a narrow class of international norms today."[64]

In rendering its decision, the Court declined to develop its own standard to determine what constituted a definite international norm to be considered part of the law of nations. Besides holding that any new cause of action recognized should be just as definite and accepted among civilized nations as Blackstone's original causes, the Court approvingly cited several of the circuits' tests and constructions for propositions, such as *hostis humani genereis*, an enemy of all mankind, and violations of norms that are specific, universal, and obligatory.[65] In a

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[53] *Id.* at 713.

[54] *Id.* at 714.

[55] *Id.* at 724.

[56] *Id.*

[57] *Id.* at 724-25.

[58] *Id.* at 725.

[59] *Id.*

[60] *Id.* at 726 (citing Erie v. Tompkins, 304 U.S. 64, 58 (1938)).

[61] *Id.* at 727.

[62] *Id.* at 727-28.

[63] *Id.* at 728.

[64] *Id.* at 729.

[65] *Id.* at 732 (citing *Filartiga*, 630 F.2d at 890; *Tel-Oren*, 726 F.2d at 781).

footnote which has become the source of much controversy, Justice Souter also stated that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[66] After looking at these various standards, the Court ultimately concluded that being illegally detained for one day did not constitute a violation of the law of nations and dismissed the physician's claims.[67]

Although, all the justices concurred in the decision and much of the opinion, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas did not join the portion of the opinion related to the creation of new causes of action through the use of federal common law.[68] In Justice Scalia's view, the *Erie* decision eliminated the federal common law and, therefore, what Congress originally intended was irrelevant.[69] The only thing that mattered was the present authority of the courts, which in his view were only granted jurisdiction under the ATS.[70] Justice Scalia also cited the reasons the Court used to counsel the lower courts on the dangers of hastily creating new causes of action as reasons for not allowing them to do so.[71] To illustrate his point he used the *Kadic* decision as an example of what could happen when the lower courts were able to create new causes of action.[72] While the *Sosa* decision may have lain to rest the *Filartiga*-Bork debate, it failed to answer the question of whether corporations could be held liable for violations of international law.[73]

Amazingly enough, even with the amount of ATS litigation directed at corporations, courts have largely avoided the issue of corporate liability.[74] The Eleventh Circuit aside, courts have generally assumed that it is possible to hold corporations liable for violations of international law, but declined to hold one way or the other and largely dismissed cases on other grounds, much to plaintiffs' chagrin.[75] The Supreme Court is no exception. Most recently, the Court

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[66] *Id.* at 732 n.20; *see* discussion *infra* Part IV.A (discussing how both proponents and opponents of corporate liability see what they want to in this quotation with the former believing that it infers that corporations can be held liable and the later claiming that they cannot).

[67] *Sosa*, 542 U.S. at 738.

[68] *Id.* at 739.

[69] *Id.* at 744. However, this note does not address *Erie* issues concerning the ATS; b*ut see* William S. Dodge, *Bridging Erie: Customary International Law in the U. S. Legal System After Sosa v. Alvarez-Machain*, 12 TULSA J. COMP. & INT'L 87, 100-08 (2004) (discussing a synopsis of the *Erie* issues).

[70] *Id.*

[71] *Id.* at 746-47.

[72] *Id.* at 748.

[73] See Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241 (2004) for a discussion of *Sosa*; *see also* Naomi Norberg, *The US Supreme Court Affirms the Filartiga Paradigm*, 4 J. INT'L CRIM. JUST. 387, 392 (2006).

[74] *See* Rosaleen T. O'Gara, *Procedural Dismissals Under the Alien Tort Statute*, 52 ARIZ. L. REV. 797, 802 (2010).

[75] *See* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1245, 1253 (11th Cir. 2005); *see also* Romero v. Durmmond Co., 552 F.3d 1303, 1315 (11th Cir. 2008); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009) (citing *Romero* and *Aldana*); *see also* O'Gara, *supra* note 74. Some plaintiffs have met with success reaching settlements outside the court room. *See* Doe v. Unocal,

was given the opportunity to answer this question in *Talisman* but declined to do so.[76] In a much criticized decision that will certainly have a chilling effect on corporate ATS cases if allowed to stand, the Second Circuit held that the aiding and abetting liability standard for corporations required a mental state of purpose rather than mere knowledge.[77] Both parties requested certiorari, with the plaintiff's requesting a reversal, while the defendant filled a cross petition raising the issue of corporate liability.[78] The Court subsequently denied both petitions.[79]

III. Discussion

Kiobel, which was recently decided by the Second Circuit, deviated from the judicial patterns of avoidance and confronted corporate liability head on.[80] The Second Circuit again blazed a trail by being the first appellate court to make a detailed analysis of whether corporations can be held liable for violations of international law under the ATS.[81] In *Kiobel*, residents of the Ogoni region of Nigeria alleged that Royal Dutch Petroleum, along with Shell, had aided and abetted the Nigerian government in committing human rights abuses against them.[82] Specifically, the plaintiffs alleged that the Nigerian government had engaged in: (1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhuman, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the right to life, liberty, security, and association; (6) forced exile; and (7) property destruction.[83] The plaintiffs also alleged that Royal Dutch and Shell had aided and abetted the government by: (1) providing transportation for Nigerian forces; (2) allowing their property to be used as a staging area for government attacks on the plaintiffs; and (3) providing food and compensation to the

403 F.3d 708 (2nd Cir. 2005); *see also* Wiwa v. Royal Dutch Petroleum Co., 626 F. Supp. 2d 377 (S.D. N.Y. 2009); *see also* Bloomberg News, *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES (Dec. 14, 2004), *available at* http://www.nytimes.com/2004/12/14/business/14unocal.html; *see also* Mark Fass, *Shell Agrees to $15.5 Million Settlement in Nigeria Case,* N.Y. L.J. (June 9, 2009), *available at* http://www.law.com/jsp/article.jsp?id=1202431321301.

[76] Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) [hereinafter "*Talisman* 2009"]; Presbyterian Church of Sudan v. Talisman Energy, Inc., 131 S.Ct. 79 (2010) [hereinafter "*Talisman* 2010"]; Talisman Energy, Inc. v. Presbyterian Church of Sudan, 131 S.Ct. 122 (2010) [hereinafter "*Presbyterian* 2010].

[77] *Talisman* 2009, *supra* note 76, at 259; *see* Kevin Jon Heller, *Talisman Energy-Amateur Hour at the International Law Improv*, OPINIO JURIS (Oct. 6, 2009), *available at* http://opiniojuris.org/2009/10/06/talisman-energy-amateur-hour-at-the-international-law-improv/; JOHN RUGGIE, REMARKS FOR ICJ ACCESS TO JUSTICE WORKSHOP 8 (2009), *available at* http://198.170.85.29/Ruggie-remarks-ICJ-Access-to-Justice-workshop-Johannesburg-29-30-Oct-2009.pdf.

[78] Petition for Writ of Certiorari, 2010 WL 1602093 (Apr. 15, 2010); Brief of Talisman Energy Inc. in Opposition to Petition for a Writ of Certiorari, 2010 WL 2544898 (Jun. 21, 2010).

[79] *See* cases cited *supra* note 76.

[80] *Kiobel*, 621 F.3d at 115.

[81] *Id.* at 123; *see* cases cited *supra* note 75 (although the Eleventh Circuit has looked at the issue, its decisions are largely devoid of any analysis. Rather the court has taken the path that most courts have and assumed that since natural persons may violate the law of nations, juridical persons may as well.).

[82] *Kiobel*, 621 F.3d at 123.

[83] *Id.*

government forces involved in the attacks.[84] The matter came before the court on an interlocutory appeal to decide several issues, but the only one of any importance was whether jurisdiction under the ATS extended to corporations.[85]

A. The Majority

The majority opinion, authored by Judge Cabranes, held that it did not.[86] The majority began its opinion by asserting that "[f]rom the beginning. . .the principle of individual liability for violations of international law has been limited to natural persons-not 'juridical' persons such as corporations."[87] The court further explained that this was because the moral responsibility for crimes rests solely with individuals and that the provisions of international law can only be enforced by punishing individuals.[88]

1. International Law Governs the Scope of Corporate Liability

After emphasizing that corporations are not traditionally the subjects of international law, the court moved on to make a determination as to whether corporations could nonetheless be held liable for violations of international law.[89] Relying almost entirely on footnote 20 from *Sosa*, the court concluded that customary international law determined whether or not corporations could be liable for violations of the law of nations.[90] The court held that the "Supreme Court instructed the lower federal courts to consider 'whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.'"[91] It further held that this language "requires that we look to *international law* to determine our jurisdiction over ATS claims."[92] The court also cited Justice Breyer's concurrence in *Sosa* approvingly, where he stated that "[t]he norm [of international law] must extend liability to the *type of perpetrator* (*e.g.* a private actor) the plaintiff seeks to sue."[93]

The court went on to cite the Restatement of Foreign Relations Law of the United States, *Oppenheim's International Law*, the Nuremburg Trials, and several of its past decisions for this same proposition.[94] When looking at its past decisions, the court specifically asserted that it had always followed the method prescribed in *Sosa*, "by looking at international law to determine *both* whether

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[84] *Id.*

[85] *Id.* at 124.

[86] *Id.* at 120.

[87] *Id.* at 119.

[88] *Id.*

[89] *Id.* at 125.

[90] *Id.* at 127-31.

[91] *Id.* at 127 (citing *Sosa*, 542 U.S. at 732 n.20).

[92] *Id.*

[93] *Id.* at 127-28 (citing *Sosa*, 542 U.S. at 760).

[94] *Id.* at 126-28.

certain conduct leads to ATS liability *and* whether the scope of liability under the ATS extends to the defendant being sued."[95] The court concluded that in order to ensure that it had jurisdiction to hear a claim under the ATS, it should "first determine whether the alleged tort was in fact committed in violation of the law of nations. . .and whether this law would recognize the defendants' responsibility for that violation."[96]

2. *Corporations cannot be held Liable for Violations of International Law*

After concluding that international law governs whether or not corporations could be held liable under the ATS, the court turned its attention to the sources of international law, specifically international tribunals, international treatises, and the work of publicists.[97] Concerning tribunals, the court found it "particularly significant. . .that no international tribunal. . .has *ever* held a corporation liable for a violation of the law of nations."[98] Focusing on the Nuremburg trials, the court first took notice of the fact that the London Charter, which established the International Military Tribunal (IMT), only granted jurisdiction over "*natural persons.*"[99] The court also pointed out that while the charter did grant the IMT jurisdiction to declare organizations criminal, this only had the effect of allowing the IMT to prosecute individuals for membership in those organizations.[100] The court then used the Farben case to illustrate its point, by holding that "[t]he refusal of the [IMT]. . .to impose liability on I.G. Farben is not a matter of oversight."[101] The court went on to approvingly cite several passages from the Farben case, which stated that Farben itself was not on trial and that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[102]

After concluding that at the time of the Farben trial international law did not recognize corporate liability, it moved on to more recent tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and concluded that they also declined to hold corporations liable for violations of international law.[103] The court also asserted that the history of the Rome Statute, and more specifically, the rejection of the French delegation's proposal to grant the International Criminal

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[95] *Id.* at 128.

[96] *Id.* at 129 (citing Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 270 (2d Cir. 2007)).

[97] *Id.* at 132, 137, 142.

[98] *Id.* at 132.

[99] *Id.* at 133 (citing Article 6 of the London Charter). While the drafters of the London Charter probably intended it to apply to natural persons, it should be noted that Art. 6 only says "persons." *See* LONDON CHARTER art. 6 *in* YALE LAW SCHOOL, THE AVALON PROJECT, *available at* http://avalon.law.yale.edu/imt/imtconst.asp.

[100] *Id.* at 134 (citing Article 10 of the London Charter).

[101] *Id.*

[102] *Id.* at 135 (citing The Nuremburg Trial, 6 F.R.D. 69, 110 (1946)).

[103] *Id.* at 136.

Court (ICC) jurisdiction over corporations, confirmed that there is an "absence of any generally recognized principle. . .concerning corporate liability for violations of customary international law."[104]

Next, the court briefly turned to the subject of international treaties.[105] Suffice it to say that the court found there were some specialized treaties concerning corporate liability but nothing that was far reaching enough to create a norm of customary international law.[106] Lastly, the court examined the work of scholars, to which it also gave little weight. The court citied three noted scholars, two of whom were paid expert witnesses for the defendant in *Talisman* and argued the same day as *Kiobel*, for the proposition that no national court outside the United States nor any international tribunal had thus far recognized corporate liability for violations of customary international law.[107]

The court concluded that "customary international law has steadfastly rejected the notion of corporate liability for international crimes."[108] The court also held that the nations of the world "have determined that moral and legal responsibility for heinous crimes should rest on the individual whose conduct makes him or her *hostis humani generis*, an enemy of all mankind."[109] However, nothing in the opinion prohibited suits under the ATS against officers, directors, and employees of a corporation that aids and abets violations of international law.[110]

B. The Concurrence

Judge Leval's lengthy concurrence is more of a scathing dissent insofar as it completely rejects the majority's rationale. Judge Leval argued that there is no basis in international law for the proposition that individuals can violate international law, but corporations cannot.[111] He first examined the focus of international law on humanitarian and moral concerns, (i.e. prohibiting heinous actions that violate definable, universal, and obligatory norms, such as genocide, slavery, war crimes, and torture).[112] He then pointed out, through a series of examples, how the majority's construction of the law is in direct conflict with these overarching objectives.[113]

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104 *Id.* at 137.

105 *Id.*

106 *Id.* at 140.

107 *Id.* at 143.

108 *Id.* at 120.

109 *Id.* at 149.

110 *Id.*

111 *Id.* at 151.

112 *Id.* at 155.

113 *Id.*

1. The Majority Frustrates the Purpose of International Law

Judge Leval examined several scenarios in which corporations themselves are committing violations of the law of nations.[114] Using the Farben case and sex slavery as examples, he asserted that as long as groups that utilize slave labor incorporate, they would escape liability and be free to retain any profits that their venture made under the majority's construction of the law.[115] He also pointed out that even though the IMT did not prosecute Farben, it did make a finding that Farben had violated international law.[116]

Next, Judge Leval utilized the example of Somali pirates to make two points.[117] First, modern pirates operate much like corporations and/or trusts and could easily incorporate to avoid liability.[118] Second, corporations generally own large vessels and if they were seized by pirates, the corporation would have no redress under the ATS or any other provision, since according to the majority, corporations are not recognized at international law.[119] Lastly, he created a scenario whereby a corporation has tried to get a local government to curb an indigenous population in order for the corporation to exploit natural resources.[120] After the government fails to do so sufficiently, the corporation takes matters into its own hands and facilitates the removal of these peoples.[121] In essence, instead of aiding and abetting, the corporation itself is committing genocide. He also made the same arguments concerning aiding and abetting liability.[122]

Judge Leval concluded that all of these scenarios demonstrate that the majority's holding only frustrates the objectives of the law of nations by allowing corporations to not only act with impunity while conducting these atrocities but also to retain their profits.[123] He further argued that the majority's decision serves no rational purpose and furthers no objective of the international community.[124]

2. The Lack of and Misapplication of Precedent

The next section of Judge Leval's concurrence focused on what he argued is the majority's lack of precedent for its holding.[125] Citing a litany of ATS cases brought against corporations, he makes the argument that no court, to date, has ever dismissed a suit against a corporation "on the grounds that juridical entities

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114 *Id.* at 155-57.

115 *Id.* at 155-56.

116 *Id.* at 155.

117 *Id.* at 156-57.

118 *Id.*

119 *Id.*

120 *Id.* at 157.

121 Id.

122 *Id.* at 157-59.

123 *Id.* at 159.

124 *Id.* at 160.

125 *Id.*

have no legal responsibility or liability under [the law of nations]."[126] Judge Leval asserted that quite the opposite is true; courts have rejected the argument outright when it has been raised.[127] Judge Leval also asserted that no international tribunal has ever been structured in a manner that is consistent with the majority's construction.[128] The thrust of his contention is that the tribunals that the majority points to are only concerned with criminal liability of individuals and that no tribunal has ever had the jurisdiction to consider private civil remedies regardless of whether they pertained to corporations or private individuals.[129]

3. *Deficiencies in Reasoning*

A major portion of the Concurrence also vehemently opposed the majority's use of Footnote 20 from *Sosa*.[130] Judge Leval asserted that Footnote 20 stands for the exact opposite proposition for which the majority is using it.[131] According to Judge Leval, Justice Souter included Footnote 20 specifically to address whether or not the conduct complained of is a violation of international law when committed by a non-state actor.[132] For example, in *Tel-Oren*, torture was not found to be a violation of international law when not committed by a state actor, and in *Kadic*, genocide was.[133] In other words, the statement "if the defendant is a private actor such as a corporation or an individual" is not to be read as foreclosing liability on corporations, but rather stands only for the proposition that courts need to make a determination as to whether the conduct in question constitutes a violation of the law of nations when committed by a non-state actor.[134] In Judge Leval's estimation, the Court was not implying that natural persons and corporations were to be treated differently under the ATS, rather they were to be treated identically.[135]

Judge Leval followed this by a rather lengthy section he termed "[t]he deficiencies of the majority's reasoning."[136] A large portion of this section deals with the failure of the majority to make any delineation between criminal and civil liability.[137] By first examining the refusal to empower international tribunals with the power to impose criminal penalties on corporations, Judge Leval

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126 *Id.* at 161.

127 *Id.*

128 *Id.* at 163.

129 *Id.*

130 *Id.*

131 *Id.* at 164.

132 *Id.* at 165.

133 *Id.*

134 *Id.* (citing *Sosa*, 542 U.S. at 760 (2004)).

135 *Id.*

136 *Id.* at 165-78.

137 *Id.* at 166-70.

declared the majority's argument to be a non sequitur.[138] He argued that the reason that these tribunals have not been granted jurisdiction to impose criminal sanctions against corporations has nothing to do with the fact that they cannot do so at international law, but rather that corporations are at their heart an "it," and it is not possible for an "it" to have criminal intent, which is widely recognized as a precondition to criminal punishment.[139] There are several purposes of criminal punishment: (1) giving society the satisfaction of retribution; (2) taking away the perpetrators ability to commit further crimes; (3) curbing the offenders conduct by imposing punitive sanctions; and (4) dissuading others from engaging in such conduct.[140] These objectives would not be met by punishing an abstract entity such as a corporation and, in fact, may be undermined by misdirecting energy away from the real perpetrators.[141]

While criminal punishment is not a viable instrument when wielded against juridical persons, Judge Leval argued that civil liability is a more appropriate vehicle because its focus is on the compensation of victims and restoring them to their previous form.[142] Holding a corporation civilly liable is the best option, since it is the corporation that has derived a profit from the violations of international law, and the corporation is, therefore, in the best position to compensate its victims.[143] Even if it were possible for the victims to sue the defendants individually as the majority suggests, it is unlikely that they would be able to do so in the first instance or collect an adequate amount in the second.[144] Additionally, Judge Leval argued that while many nations do not impose criminal sanctions against corporations, civil liability is universally recognized.[145]

Judge Leval also attacked that majority's assertion that international law does not distinguish between civil and criminal liability.[146] He pointed to the fact that the tribunals cited by the majority were only given criminal jurisdiction and have never addressed civil damages for anyone, whether individuals or corporations.[147] However, in some instances they have advised victims to seek civil damages in other forums.[148] In support of his argument, he also pointed to monetary reparations awarded by the International Court of Justice (ICJ) and its predecessor the Permanent Court of International Justice (PCIJ) for the proposition that civil liability is recognized as distinct from criminal liability in the international community.[149] Furthermore, international law treats criminal and civil lia-

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138 *Id.* at 166.

139 *Id.* at 166-67.

140 *Id.* at 167.

141 *Id.* at 168.

142 *Id.* at 169.

143 *Id.*

144 *Id.*

145 *Id.* at 169-70 (citing the Chairman of the Rome Statute's Drafting Committee).

146 *See id.* at 170.

147 *Id.* at 171.

148 *Id.*

149 *Id.*

bility differently.[150] In both cases, due to the varying legal systems of the world, international law does not prescribe the manner in which punishment or compensation must be delved out.[151] However, where there is criminal liability, international law requires punishment, whereas civil liability is left to the states, which are free to fashion a remedy and hold violators liable if they see fit.[152]

Another closely related point of Judge Leval's argument is that the majority has a fundamental misunderstanding of how international law operates by insisting that a lack of widespread agreement within the international community concerning the imposition of civil liability against corporations means there can be no such liability.[153] Judge Leval agreed with the majority that the place to look for violations of international law is international law, but he believed that international law takes no position as to whether civil liability should be imposed against corporations.[154] International law is primarily concerned with norms of conduct and prohibiting certain acts such as genocide, torture, slavery, and war crimes.[155] In certain instances, international law demands the imposition of criminal punishment, but it nevertheless allows each state to make its own determination concerning civil liability.[156] It does not exempt corporations.[157] The ATS does not award civil damages for violations of the law of nations because international law requires that it do so.[158] Damages are awarded because the law of nations prohibits certain conduct and allows each state to implement its own procedures concerning its violation.[159] The United States has chosen to do so through the ATS and civil liability.[160] The fact that other nations have not chosen to follow suit is inconsequential.[161]

The majority has also taken *Sosa* out of context concerning "a 'norm' that must command virtually universal acceptance among the civilized nations as a rule of international law."[162] The majority cites this passage for the proposition that liability may not be imposed against a corporation unless there is a "'norm' generally accepted throughout the world for the imposition of tort liability on. . .a corporate violator of the law of nations."[163] What the Court was addressing, however, was whether the norms of conduct violated were violations of interna-

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150 *Id.* at 172.

151 *Id.* 173-74.

152 *Id.* 172-73.

153 *Id.* at 174.

154 *Id.* at 174-75.

155 *Id.* at 175.

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 Id.

161 *Id.* at 176-77.

162 *Id.* at 177 (citing *Sosa*, 542 U.S. at 732).

163 *Id.*

tional law as opposed to merely widely recognized rules of domestic law.[164] According to the majority's construction, corporations would still be in violation of the norms of international law, but liability could not be imposed.[165] This is entirely different from the *Kadic-Tel-Oren* distinction between violations of international law that can be committed by non-state actors and those that can only be committed by states.[166] If a non-state actor cannot commit a certain violation, such as torture, then it is not a violation of the law of nations when committed by a non-state actor.[167] However, this is not what the majority is arguing. The majority is stating that violations committed by corporations would still constitute violations of the law of nations, but corporations would be unable to be held liable for them.[168] Judge Leval looks to the concurrence in *Sosa* for the proposition that this construction could not have been what the Court meant.[169] If courts have to look to international law to determine whether there is a widespread practice of awarding civil damages for violations of the law of nations, then the *Filartiga* line of cases could not stand, as there is no such widespread practice.[170] If this were the case, then the majority could not have disagreed with the concurrence's insistence that further legislation was needed in order to allow damages to be awarded.[171]

Judge Leval also takes issue with the majority's contention that corporations are not subjects of international law.[172] The majority does not cite any authority for this proposition; furthermore, this view has not been widely held since before the Second World War.[173] The IMT during the Nuremburg trials clearly recognized corporate obligations at international law.[174]

The IMT found in the Flick, Farben, and Krupp cases that these various corporations had all violated international law.[175]

Lastly, Judge Leval criticized the majority for the complete lack of scholarly support in its argument.[176] The majority did not cite one published work in its opinion.[177] The only scholarship employed by the majority consisted of the affidavits of two professors hired by the defendants in *Talisman*, which were addressing specific questions asked by the court.[178] After examining these

164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.*
169 *Id.* at 178.
170 *Id.*
171 *Id.* (citing *Sosa*, 542 U.S. at 746-47).
172 *Id.* at 179.
173 *Id.*
174 *Id.*
175 *Id.* at 180.
176 *Id.* at 181.
177 *Id.*
178 *Id.* at 182.

affidavits, Judge Leval concluded that the majority had taken them out of context, and that they only stand for the proposition that no court outside the United States has held corporations liable for violations of international law.[179] Judge Leval then produced several works of scholarship that support his position, that international law leaves the decision of whether to impose civil remedies to corporations to individual nations.[180]

IV. Analysis

The majority's opinion in *Kiobel* marks a drastic departure from the general consensus among U.S. courts that corporations can be held liable for violations of international law.[181] For nearly 20 years, the question has not even been an afterthought when adjudicating ATS claims, with courts assuming that because private persons could be liable for violations of the law of nations, juridical persons, could too.[182] Before *Kiobel*, the Eleventh Circuit was the only circuit to have directly addressed the issue, holding that "[t]he text of the Alien Tort Statute provides no express exception for corporations and the law of this Circuit is that this statute grants jurisdiction from complaints. . .against corporate defendants."[183] The relative ease with which the Eleventh Circuit disposed of the matter is illustrative of the view that most courts have taken. However, as lengthy as the opinion in *Kiobel* is, it disposes of the matter almost as dismissively as the Eleventh Circuit did.

While the arguments of both the majority and the concurrence are at times disingenuous, one can only conclude after examining the majority opinion that its argument is completely without merit and wholly lacking support. Judge Leval's concurrence goes to great lengths to point out the complete lack of support for the majority's bold assertions, and it would be pointless to rehash all his arguments here.[184] However, several assertions of both sides do warrant further examination.

A. *Sosa,* Footnote 20, and the Scope of International Law

The majority opinion can be broken down into two parts. The first is the proposition that *Sosa* commands the lower courts to make a determination as to who can be held liable, i.e. individuals, corporations, or states, for violations of

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179 *Id.* at 182-84.

180 *Id.* at 185.

181 Abdullahi v. Pfizer, Inc., 562 F.3d 163, 187 (2d Cir. 2009); *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 314 (S.D.N.Y. 2003); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1303 (C.D. Cal. 2000); *see* also Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 258 (2d Cir. 2008); Bigio v. Coca-Cola Co., 239 F.3d 440, 447 (2d Cir. 2000); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 103-04 (2d Cir. 2000); *Kadic*, 70 F.3d at 236.

182 *Abdullahi*, 562 F.3d at 187; *Agent Orange*, 373 F. Supp. 2d at 58; *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 314; *Unocal Corp.*, 110 F. Supp. 2d at 1303; *see also Khulumani*, 504 F.3d at 258; *Bigio*, 239 F.3d at 447; *Wiwa*, 226 F.3d at 103-04; *Kadic*, 70 F.3d at 236.

183 *Romero*, 552 F.3d at 1315.

184 *Kiobel*, 621 F.3d at 150.

international law.[185] This is as opposed to whether the conduct in question constitutes a breach of international law when perpetrated by a certain actor. The second is to make a determination as to whether liability for the defendant has become universally recognized, so as to become a specific, universal, and obligatory norm of international law.[186] The court relied almost exclusively on the Supreme Court's holding in *Sosa,* and more specifically on footnote 20 when making the first determination.[187] The language that the court used, maintaining that the Supreme Court essentially commands that footnote 20 be employed in the manner in which the court utilizes it, and generally the weight the majority accords a one-sentence piece of dicta tucked away in a footnote is a little alarming and greatly detracts from their argument.[188] The majority's assertion that the previous holdings of the court also followed this rule is also disingenuous, since the previous decisions involved whether conduct constituted a breach of international law when committed by type of actor and not whether those actors were capable of being liable for violating international law.[189]

At any rate, the interpretations of both the majority and the concurrence concerning the first portion of the opinion are nothing new. Each side sees what it wants to see, with corporate defendant's siding with the majority and plaintiff's siding with the concurrence.[190] The only difference heretofore was that courts had largely discounted the corporate interpretation and equated corporations to natural persons.[191] Judge Leval's interpretation is more than likely the one that Justice Souter intended to make. The most obvious reason is that the end of footnote 20 instructs courts to "[c]ompare *Tel-Oren*. . . (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic*. . . (sufficient consensus in 1995 that genocide by private actors violates international law)."[192] If read in its entirety, nothing in the footnote says anything about whether some entities can be held liable for violations of international law while others may not. It simply implies that a distinction be made between conduct that is only a violation of international law when committed by a state actor as opposed to non-state actors, "such as a corporation or individuals."[193]

Another oft cited reason that would suggest Judge Leval's interpretation is correct revolves around the nature of the ATS. The ATS is a hybrid statue that deals with both international law and private U.S. tort law. In order to maintain

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185 *Id.* at 125.

186 *Id.* at 131.

187 *Id.* at 127.

188 *Id.* ("[t]he Supreme Court instructed . . . [t]hat language requires . . .").

189 *Id.* at 128; *see Filartiga,* 630 F.2d at 889; *see Kadic,* 70 F.3d at 239-41; *see Tel-Oren,* 726 F.2d at 791-95.

190 Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer,* 8 J. INT'L CRIM. JUST. 745, 751 (2010).

191 *Id.*; *see Abdullahi,* 562 F.3d at 187; *Agent Orange,* 373 F. Supp. 2d at 58; *Presbyterian Church of Sudan,* 244 F. Supp. 2d at 314; *Unocal Corp.,* 110 F. Supp. 2d at 1303; *see also Khulumani,* 504 F.3d at 258; *Bigio,* 239 F.3d at 447; *Wiwa,* 226 F.3d at 103-04; *Kadic,* 70 F.3d at 378.

192 *Sosa,* 542 U.S. at 732 n.20.

193 *Id.*

an ATS claim an alien must sue in tort for a violation of international law.[194] So even though the determination of a violation is governed by international law, outside of the alien requirement, the determination of who may file suit is governed by domestic law, which allows suits against corporations.[195] Judge Leval addresses this point, by asserting that international law predominantly leaves questions of prosecution and/or civil liability up to each individual nation.[196]

Lastly, something not addressed by the court, but not unknown to those familiar with the inner workings of the Supreme Court, is the fact that the very nature of the Court would lend credence to the argument that footnote 20 was not meant to infer that corporations are to be treated differently than natural persons.[197] *Sosa* did not raise the question of corporate liability under the ATS and, therefore, it is almost unfathomable to believe that the Court would answer a question of such importance, which was not addressed, on a whim, and in a one-sentence footnote.[198]

Ultimately, the question will only be answered definitively when either enough circuits weigh in on the issue, or the Supreme Court sees fit to clarify what it meant in footnote 20. The majority's interpretation of footnote 20, however, does not foreclose the possibility of finding corporations liable for violations of international law. It merely points courts to international law for the answer. This leads to the second portion of the court's opinion and its determination that corporations cannot be liable for violations of international law.[199]

B. Corporate Liability for Violations of the Law of Nations

The majority essentially argues that because no corporation has ever been held criminally liable for a violation of international law, no corporation can be held liable for such a violation.[200] Judge Leval correctly attacks this proposition as "illogical, misguided, and based on misunderstandings of precedent."[201] As touched upon briefly by Judge Leval, international law is not concerned with parties, or liability, or even a ready forum to prosecute crimes.[202] It is concerned with obligations and prohibitions on certain types of conduct, such as genocide, war crimes, and slavery.[203] The fact that a corporation has never been tried for a

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194 28 U.S.C. § 1350 (2010).

195 KOEBELE, *supra* note 31, at 209.

196 Kiobel, 621 F.3d at 175.

197 *See generally* Hormel v. Helvering, 312 U.S. 552, 556 (1941) (holding that the Court generally does not address issues not before it).

198 *Id.*

199 *Kiobel,* 621 F.3d at 131.

200 *See* discussion *supra* Part II.A.2.

201 *Kiobel,* 621 F.3d at 151.

202 *Id.* at 157.

203 Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility,* 111 YALE L.J. 443, 476 (2001); Volker Nerlich, *Core Crimes and Transnational Business Corporations,* 8 J. INT'L CRIM. JUST. 895, 899 (2010); Andrei Mamolea, *The Future of Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap,* 51 SANTA CLARA L. REV. 79, 94-95 (2010).

criminal violation of international law has nothing to do with whether it is capable of violating international law and/or can be found liable for such violations.[204]

The majority, however, emphasizes that "no international tribunal. . .has *ever* held a corporation liable for a violation of the law of nations."[205] The central focus for this argument, and really the only definitive source that the majority relies on, are the Nuremberg Tribunals.[206] The majority held that "[t]he refusal of the military tribunal at Nuremburg to impose liability on I.G. Farben is not a matter of happenstance or oversight."[207] However, a historical investigation conducted by Jonathon A. Bush, which is conspicuously absent from the majority's analysis, essentially trounces this argument.[208] Bush's investigation sheds light on the backdrop of the Nuremberg Tribunals and makes it clear that criminally prosecuting German businesses, such as I.G. Farben, Krupp, and Flick, for war crimes was seriously considered.[209] The idea of dissolving German corporations for their crimes and implementing reparations was "[h]igh on the list of various options" considered by the Allies.[210] It is also clear that Control Council Law No. 10 did not place any bar on charging corporations for violations of international law as the majority contended.[211]

Ultimately, the rationale for not criminally prosecuting German corporations rested solely on prudential considerations and not any prohibition or rejection of the possibility as the majority argued.[212] Post-war Germany was in shambles. Allied bombing had destroyed most of Germany's industry; famine was rampant; and with the war over, the Soviet threat was looming.[213] There was a very real need to rebuild and mobilize the German economy as quickly as possible. Additionally, companies like I.G. Farben were huge cartels of enormous proportions, with tentacles encircling the globe, and entire economies dependent upon them.[214] This was the first instance where the argument "too big to fail" surfaced. The problems within Germany coupled with what dissolving/severely penalizing these corporations could do to the global economy were sufficient motivation for the Allies to forego corporate prosecution.[215] The after-effects of the war guilt clauses from the Treaty of Versailles were also not lost on the

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[204] Ratner, *supra* note 203, at 476; Nerlich, *supra* note 203, at 899; Mamolea, *supra* note 203, at 94-95.

[205] *Kiobel*, 621 F.3d at 132.

[206] *Id.*

[207] *Id.* at 134.

[208] Jonathon A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1096-1100 (2009).

[209] *Id.* at 1118.

[210] *Id.* at 1119.

[211] *Id.* at 1151.

[212] *Id.* 1117-24.

[213] *Id.*

[214] *Id.* at 1117-18.

[215] *Id.* at 1117-24.

Allies, and while there was a desire to punish the Germans, nobody wanted a repeat of the war the world had just suffered through.[216] Nuremberg may have revolutionized international law by holding private individuals liable for violations of international law for the first time, but what it did not do was foreclose on the idea of corporate liability.

If anything, Nuremberg stands for the opposite proposition when the record is examined in total, especially the *Farben* case. Despite the majority's assertions to the contrary, Farben was definitely present in the court room and very much on trial.[217] All 23 Farben defendants were not only charged individually, but also as "acting through the instrumentality of Farben."[218] Farben even had corporate counsel present in the courtroom throughout the proceedings and was allowed to give a closing statement on the corporation's behalf.[219] Whether Farben was ever directly charged or not is not dispositive of the fact that the corporation was most certainly brought to trial along with its 23 employees.

A related concern that the majority also takes from Nuremberg as a reason to not prosecute corporations, is the fact that the moral responsibility for crimes rests with men and not the vehicles they use to commit them.[220] Judge Leval explains away this fact by stating that the nature of criminal law and its focus on punishment is ill equipped to handle juridical entities.[221] Neither of these arguments is worth making; the court is comparing apples to oranges. Even though corporations may be juristic persons, the fact remains that they are not persons. A corporation is an "it" and cannot have intent. This does not mean, however, that corporations cannot commit crimes against international law or that punishing them for these crimes may not be beneficial. States also cannot have intent, since they are also abstract entities, but no one would argue that they cannot be held liable for violations of international law.[222]

Professor Ratner specifically addresses these issues in his essay *Corporations and Human Rights: A Theory of Legal Responsibility*.[223] A large portion of his work is dedicated to the fact that corporations do not fit neatly into either category of rules, those governing states or those governing individuals.[224] His proposed solution was to blend certain aspects of each category together creating a hybrid set of rules to govern corporations. For instance, to hold an individual criminally liable there is a *mens rea* requirement, which is obviously too strin-

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216 *Id.* at 1119.

217 *Id.* at 1224.

218 *Id.*

219 *Id.*

220 Throughout its opinion, the court in *Kiobel* takes several quotations from the IMT out of context and this is no exception. 621 F.3d at 119. See Mamolea, *supra* note 203 at 100-11 to view these various quotes in context.

221 *See* discussion *supra* notes 140-43 and accompanying text.

222 Ratner, *supra* note 203, at 522 (states are not considered to be "liable," but the actions are attributed to them).

223 *Id.* at 492-96, 518-24.

224 *Id.* at 492-96.

gent and an impractical requirement when dealing with a corporation.[225] On the other hand, when dealing with states there is no intent requirement and the violations are merely attributed to the state.[226] Again, this requirement would be too onerous to place on a corporation. Professor Ratner advocates using a duty of care standard, whereby, if a corporation could show that it used due diligence to prevent violations of international law it could absolve itself of any wrong doing.[227] Thus, intent is not necessary to find a corporation liable for a violation of international law.

While Professor Ratner was speaking theoretically of what could or should be, courts should not be constrained by the fact that it has yet to happen in the international arena. As Judge Leval points out again and again, maintaining such a dogmatic and overly formalistic view of international criminal liability frustrates the objectives of international law and creates unjust results.[228] As has already been shown, international law is not concerned with parties; it is only concerned with obligations. And some obligations, described as core crimes, such as prohibitions on genocide, war crimes, and slavery, are imposed on everyone. The mere fact that corporations have yet to be prosecuted for violations of these core crimes on the international stage is irrelevant.

This closely tracks another argument that has been raised several times, most recently by Judge Leval, but also by other courts and several commentators. It can be termed the "why not" argument.[229] There is no compelling reason not to hold corporations liable for their violations of international law. If individuals are held liable for violations and states are held liable for violations, then why should the law grant corporations a free pass? While corporate officers and directors may indirectly benefit from corporate violations, such as when profit margins increase from the use of slave labor, it is the corporation itself that is deriving benefit from the violation. So, why should a corporation not disgorge its profits and pay them as damages to the people that it has wronged? In a recent article, Professor Ku argues that the main policy reason for not holding corporations liable for violations of international law is because it is too difficult to determine when criminal acts should be attributed to a corporation and when they should not.[230] This argument seems hardly worth making. Just because it would be a lengthy and somewhat difficult process, to do as Professor Ratner advocates, and create a third standard which would apply to corporations, is no reason not to impose liability for corporate crimes against international law. International law is not concerned with "victimless" white collar crimes that may

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225 *Id.* at 522-23.

226 *Id.*

227 *Id.* at 523-24.

228 *See* discussion *supra* Part III.B.

229 *Kiobel*, 621 F.3d at 160; *Agent Orange*, 373 F. Supp. 2d at 54, 59; Ratner, *supra* note 203, at 461; Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 264 (2004); *see also* Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 802 (2002).

230 Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 387 (2010).

not warrant the effort it would take to effectively prosecute, but the most heinous crimes possible. These are crimes that make all who commit them *hostis humani generis*, an enemy of all mankind. Unless a better argument against the imposition of liability against corporations can be made, U.S. courts are hardly justified in failing to impose liability because it would be an arduous task.

V. Impact

If allowed to stand, *Kiobel* will have a tremendous impact on the future of ATS litigation concerning corporate defendants. The Second Circuit has traditionally been at the forefront of ATS litigation with a majority of courts following its precedents and the *Kiobel* decision continues that practice. The decision has already had a negative impact on ATS plaintiffs complaining of human rights violations, child labor, and environmental contamination, within the Second Circuit and at least two other cases within the Seventh Circuit have also adopted the rationale from *Kiobel*.[231]

There is, however, a chance that the holding may be overturned. The Plaintiffs in *Kiobel* filed for an *en banc* review by the Second Circuit, which was subsequently denied.[232] As the case was allowed to stand, it will more than likely make its way to the Supreme Court. There is arguably a circuit split between the Second and Eleventh Circuits concerning corporate liability.[233] Additionally, there is an important legal question that as of yet has been unanswered by the Court: whether corporations can be liable for violations of international law? It is always difficult to predict how the justices on the Court will vote, but it seems like there will be some substantial resistance to overturning the Second Circuit's decision. Justices Scalia and Thomas made no secret of the fact that they would strip courts of their ability to create new causes of action under the ATS in their concurrence in *Sosa*.[234] As has already been discussed, this was because in their combined opinion, *Erie* stripped Federal Courts of their ability to create common law with its proclamation that "[t]here is no federal general common law."[235] The Justices also implied that courts could not be entrusted with the creation of new causes of action because: first, they did not have the wherewithal to predict or deal with the possible far reaching implications; and second,

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231 *See* Mastafa v. Chevron Corp., No. 10 Civ 5646(JSR), 2010 WL 4967827 at *3 (S.D.N.Y. 2010) (dismissing plaintiffs' complaint alleging Chevron had aided Sadam Hussein commit human rights abuses because corporations cannot be liable for violations of international law); *see* Aziz v. Alcolac Inc., 2009 cv 00869, *appeal docketed*, No. 10-1908 (4th Cir. Dec. 8, 2010) (requesting dismissal on the grounds that corporations cannot be liable for violations of international law under the ATS); Flomo v. Firestone Natural Rubber Co., 744 F. Supp. 2d 810, 818 (S.D. Ind. 2010) (dismissing Liberian children's claims of child labor, holding that corporate liability is not a rule of customary international law); Viera v. Eli Lilly & Co., 1:09-cv-0495-RLY-DML, 2010 WL 3893791 at *5 (S.D. Ind. Sept. 30, 2010) (dismissing Brazilian residents' claims of environmental contamination because ATS action may not be maintained against corporate defendant).

232 *See* Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010), *pet. reh'g denied*, 2011 WL 338048 (2d Cir. Feb. 4, 2011).

233 *See* discussion *supra* notes 75, 81, 183.

234 *See Sosa*, 542 U.S. at 739-42.

235 *Id.* at 741 (citing *Erie*, 304 U.S. at 78).

the power to create new causes of action intruded on the purview of the "political branches."[236] It would be well within the realm of possibility for Chief Justice Roberts and Justice Alito to join them in a drive to limit the scope of the ATS. However, Justices Breyer, Ginsburg, and Kennedy were all in favor of ensuring the continued relevance of the ATS in *Sosa* and remain on the Court along with two new Obama appointees, Justices Kagan and Sotomayor.[237]

It should also be noted that all the justices on the Court cautioned restraint when recognizing new causes of action, and while this may not be a new cause of action per se, allowing corporations to be held liable for violations of international law could have far reaching collateral consequences.[238] The continued practice of U.S. courts extraterritorially applying the ATS does not resonate well with most nations. Several nations, along with foreign treaty and trade-based organizations, have continually protested application of the ATS to foreign corporations.[239] In their estimation, the ATS is not a force for good in the world allowing victims of heinous crimes to obtain some limited form of redress, but rather the U.S. violating customary norms of international law by impinging on the sovereignty of other nations with what has been termed its "International Civil Court."[240] The United States has also not gone to any great lengths to ingratiate itself to the world community by refusing to become a member of the International Criminal Court and vociferously arguing against foreign court's jurisdiction over U.S. officials.[241] Outcry in the international community has thus far gone unnoticed, but the diplomatic and political consequences associated with the application of the ATS to corporations may be the catalyst these groups need to be heard.

VI. Conclusion

The majority's holding in *Kiobel* substantially misconstrues general tenants of international law and twists prior precedents to conform to its conclusions. Holding corporations liable for violations of international law may well be outside the scope of the original impetus for the passage of the ATS, but to quote Judge Weinstein, "[l]imiting civil liability to individuals while exonerating. . .corporation[s]. . .makes little sense in today's world."[242]

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[236] *Id.* at 746-48.

[237] *See id.* at 695, 751.

[238] *Id.* at 725-28.

[239] *See* John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Aboard: The Alien Tort Statute and other Approaches,* 42 VAND. J. TRANSNAT'L L. 1, 8-13 (2009); *see* Brief of European Commission as Amicus Curiae in Support of Neither Party at 4-5, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339); *see* Brief of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioner at 6, *Sosa*, 542 U.S. 692 (No. 03-339).

[240] Bellinger, *supra* note 239, at 8-9.

[241] *Id.*

[242] *Agent Orange,* 373 F. Supp. 2d at 58.