

THE EMERGENCE OF THE HUMAN RIGHT TO WATER IN INTERNATIONAL HUMAN RIGHTS LAW: INVENTION OR DISCOVERY?

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Not until the UN Committee on Economic, Social and Cultural Rights ('CESCR') issued General Comment No 15 on the human right to water in 2002 was access to drinking and sanitation water authoritatively defined as a human right. The CESCR carved the right to water out of other related rights, an approach that has been criticised as 'revisionist'. Some argue that the CESCR went beyond state practice, inventing a previously non-existent right in an attempt to remedy a gap that states should have filled through treaty amendment. This article contends that the CESCR has in fact articulated a pre-existing right that had a prior autonomous, if latent, existence in the International Covenant on Economic, Social and Cultural Rights ('ICESCR'). It also suggests that the CESCR approach to the analysis of the human right to water grounded the right on a narrowly defined legal basis, and that the CESCR inadvertently limited the scope of its scrutiny to the mainstream human rights regime. The article further argues that a meaningful analysis of the normative basis of the human right to water should read the ICESCR in conjunction with rules and principles of international environmental law and international water law. The combined use of these three legal regimes reveals that the right is not so much an 'invention' as a 'discovery', since it has been recognised in the relevant rules of international treaties and is supported by growing state practice.

CONTENTS

I	Introduction	2
II	The Human Right to Water in the Texts of Human Rights Treaties	6
III	Evolution through Interpretation: The CESCR <i>General Comment No 15</i> and Beyond	9
	A The Teleological Interpretation Approach	9
	B <i>General Comment No 15</i> and Its Discontents	11
IV	The Derivation Approach	15
V	Recognition through the State Reporting Procedure: The CESCR Concluding Observations and States' Acquiescence	16
VI	The Human Right to Water Outside the Human Rights Regime	18
	A Acceptance and Recognition in International Environmental (Soft) Law	19
	B The Human Right to Water in International Water Law	23
VII	Conclusion	25

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I INTRODUCTION

The birth of the human right to water has been both slow and controversial. Indeed, perhaps no other right in the catalogue of international socioeconomic rights has had its status and normative basis as contested as the human right to water. Not until after the UN Committee on Economic, Social and Cultural Rights ('CESCR') issued *General Comment No 15*¹ on the human right to water² in 2002 has the right to drinking and sanitation water been authoritatively defined as a human right.³ Save for some narrow exceptions,⁴ the major UN human rights instruments do not make explicit mention of a fully-fledged human right to water.⁵ Lacking comprehensive legal recognition in the major UN human rights instruments, the human right to water creates a hierarchy within a hierarchy, as it sits on the lowest rung of the already marginalised category of socioeconomic rights. The absence of a comprehensive guarantee for the human right to water in the universal human rights treaties has variously been dubbed 'odd, at best'⁶ and 'startling'.⁷ Humans can survive more than a month without food, but only about a week without water, as their bodies are between 60 and 80 per cent water by weight, depending upon the individual.⁸ It is disquieting that a right so basic and fundamental for bare human survival has not been given explicit expression in the major UN human rights treaties.

¹ General Comments are authoritative interpretations by expert human rights monitoring bodies of the content of human rights treaty provisions that they are established to monitor. While highly persuasive, they are not legally binding.

² *General Comment No 15 (2002): The Right to Water (Arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 29th sess, Agenda Item 3, UN Doc E/C.12/2002/11 (20 January 2003) ('*General Comment No 15*'). According to para 2 of *General Comment No 15*, the human right to water 'entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.

³ Vrinda Narain, 'Water as a Fundamental Right: A Perspective from India' (2010) 34 *Vermont Law Review* 917, 919; Stephen C McCaffrey, 'The Human Right to Water' in Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (Oxford University Press, 2005) 93, 101.

⁴ There has been a qualified recognition of aspects of the right to water as constituent elements of other rights. Such an approach narrows the scope of the right to water such that it can only be invoked in specifically limited circumstances and to benefit only a defined group of people protected under the relevant human rights treaty regimes: see Part II below.

⁵ See generally Stephen C McCaffrey, 'A Human Right to Water: Domestic and International Implications' (1992) 5 *The Georgetown International Environmental Law Review* 1; Stephen Tully, 'A Human Right to Access Water? A Critique of *General Comment No 15*' (2005) 23 *Netherlands Quarterly of Human Rights* 35; Peter H Gleick, 'The Human Right to Water' (1998) 1 *Water Policy* 487; Amanda Cahill, "'The Human Right to Water — A Right of Unique Status": The Legal Status and Normative Content of the Right to Water' (2005) 9 *International Journal of Human Rights* 389; Anton Kok, 'Privatisation and the Right to Access to Water' in Koen de Feyter and Felipe Gómez Isa (eds), *Privatisation and Human Rights in the Age of Globalisation* (Intersentia, 2005) 259, 259; Narain, above n 3, 919.

⁶ McCaffrey, 'The Human Right to Water', above n 3, 94.

⁷ Matthew Craven, 'Some Thoughts on the Emergent Right to Water' in Eibe Ridet and Peter Rothen (eds), *The Human Right to Water* (Berliner Wissenschafts-Verlag, 2006) 37, 39.

⁸ Stephen C McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (Oxford University Press, 2001) 3–4.

Fresh attempts to establish the human right to water have been plagued by lack of legal articulation.⁹ The CESCR has had to ‘read in’¹⁰ the right from the implicit terms of arts 11 and 12 of the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*),¹¹ which respectively provide for the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of physical and mental health. The CESCR thus broke new ground by unequivocally affirming that the *ICESCR* contains provisions that implicitly contain an autonomous human right to water.¹²

However, for all its innovative approaches to carving the human right to water out of other more explicit rights of the *ICESCR*, the CESCR and its *General Comment No 15* have been criticised as ‘revisionist’,¹³ and the CESCR’s approach to the interpretation of arts 11 and 12 of the *ICESCR* has been criticised as ‘unreflective’.¹⁴ The CESCR has been admonished for inventing a novel right to water,¹⁵ which has been referred to as a ‘new-born thing’,¹⁶ in a way that — to these commentators — is at odds with or ahead of state practice or what states parties envisaged upon their ratification of or accession to the *ICESCR*.¹⁷ The human right to water thus continues to be a favourite subject of academic controversy.

Arguments against the legal recognition of the right to water have taken two related approaches. To some, the right lacks an explicit and comprehensive

⁹ See generally United Nations Office of the High Commissioner for Human Rights, *The Right to Water* (Fact Sheet No 35, August 2010) 3; see also Ling-Yee Huang, ‘Not Just Another Drop in the Human Rights Bucket: The Legal Significance of a Codified Human Right to Water’ (2008) 20 *Florida Journal of International Law* 353, 353–4; Narain, above n 3, 917.

¹⁰ ‘Reading-in’ is an act of interpretation whereby a judicial or quasi-judicial body, following the object and purpose of a legal instrument, includes in its reading of a legislative instrument words or phrases that are not explicitly stated in the document. The effect is to read the instrument ‘as if certain words appeared in the statute. The words are notionally “included” to reflect in express, and therefore more readily observable form, the true construction of the words actually used, by way of a strained construction’: James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 133–4 (emphasis in original).

¹¹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (*ICESCR*).

¹² As Malcolm Langford has observed, ‘General Comment [No 15] may be of some surprise. The word “water” does not appear in the *Covenant* [*ICESCR*]. Recent international declarations ... do not mention the right to water.’ Malcolm Langford, ‘The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?’ (2005) 21 *Water Resources Development* 273, 275 (emphasis removed).

¹³ Tully, ‘A Human Right to Access Water’, above n 5, 37, quoting Michael J Dennis and 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 and Health?’ (2004) 98 *American Journal of International Law* 493, 462.

¹⁴ Stephen Tully, ‘Flighty Purposes and Deeds: A Rejoinder to Malcolm Langford’ (2006) 24 *Netherlands Quarterly of Human Rights* 461, 461.

¹⁵ Tully, ‘A Human Right to Access Water’, above n 5.

¹⁶ McCaffrey, ‘The Human Right to Water’, above n 3, 115.

¹⁷ McCaffrey argues thus: ‘While thus far State Parties to the *Covenant* have not objected to the interpretation contained in the *General Comment* [No 15], State Practice occurs more through accretion than avulsion. Thus it may take some time for countries to react, one way or the other’: *ibid* 94.

expression in international human rights law, and does not exist as such.¹⁸ To others, it can be derived from such rights as the right to health and the right to life, but its scope is limited. For example, it cannot be claimed except when the rights of which it is a component are threatened because of a lack of an adequate quantity or quality of water.¹⁹ This is meant to imply that the right to water is a derivative or ancillary right, available only in the context of the other more explicit rights of the *ICESCR*. In this sense, the right to water is an auxiliary entitlement that is subservient to other explicitly protected rights, and is dependent on the main right in the interest of which access to water is guaranteed.²⁰ The right to water thus lacks an independent or free-standing status in its own right, and its realisation per se cannot be demanded. On this argument, access to drinking and sanitation water should be ‘enveloped’ with other rights and claimed as such.

Consequently, the normative terrain underlying the human right to water remains muddled. Academic literature on the human right to water has added to the prevailing confusion, and has given some credence to the reticence of many states to recognise and implement the right domestically. For instance, the UN General Assembly resolution that recognised water as a human right was passed with a positive vote of 122 states, but saw as many as 41 states abstaining in the belief that they did not owe a legal obligation to ensure the right towards their respective residents.²¹ This is a doubly dangerous trend. For one, it allows states wide wriggle room to evade responsibility for realising the right. Indeed, *General Comment No 15* of the CESCR came about because the Committee was alarmed by the fact that it was ‘confronted continually with the widespread denial of the right to water in developing as well as developed countries’.²² In the absence of formal recognition of the right, the correlative obligations of states to *respect, protect* and *fulfil* the right do not apply.²³ For another, right holders would not be able to have their rights addressed or violations thereof remedied. Unless the right is firmly established, lack of access to basic drinking and sanitation water would give rise to a scenario where ‘there is no breach of obligation, nobody at fault, nobody who can be held to account, nobody to blame

¹⁸ See generally Amanda Cahill, ‘Protecting Rights in the Face of Scarcity: The Right to Water’ in Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010) 194; McCaffrey, ‘The Human Right to Water’, above n 3.

¹⁹ See generally Cahill, ‘A Right of Unique Status’, above n 5.

²⁰ Cahill, ‘Protecting Rights in the Face of Scarcity’, above n 18, 194.

²¹ *The Human Right to Water and Sanitation*, GA Res 64/292, UN GAOR, 64th sess, 108th plen mtg, Agenda Item 48, UN Doc A/RES/64/292 (3 August 2010). According to Paula Gerber and Bruce Chen, the adoption of this declaration ‘suggests that the tide has turned, and the right to water is now a legitimate part of international human rights law’. Paula Gerber and Bruce Chen, ‘Recognition of the Human Right to Water: Has the Tide Turned?’ (2011) 36 *Alternative Law Journal* 21, 26. However, since this resolution is merely a declaration, its nature as a soft law might render it too soft to command compliance as a matter of legal duty. For a detailed analysis of this point, see Part VI(A) below.

²² *General Comment No 15*, UN Doc E/C.12/2002/11, para 1.

²³ The whole international human rights regime is tailored towards establishing a binary right-duty relationship, hence between right-holders and duty bearers: see Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press, 2007) 132; Frédéric Mégret, ‘Nature of Obligations’ in Daniel Moeckli et al (eds), *International Human Rights Law* (Oxford University Press, 2010) 130–2.

and nobody who owes redress'.²⁴ In a situation of worsening scarcity of fresh water resources, and the increasing number of people without basic access to the same,²⁵ the analysis of the uncertainty surrounding the legal basis and status of the human right to water is not merely of academic interest. It is also part of addressing the practical problems of ensuring right holders' access to water for survival needs through its contribution to the clarification of the legal basis of the right and related state obligations. It may help relevant right holders, activists and litigants, policymakers and duty bearers in the interpretation, application or remedying of the right in question.²⁶

This article argues that a free-standing human right to water has been an implied and latent component of other, more explicitly guaranteed, socioeconomic rights of the *ICESCR* and other water-related treaties. It demonstrates that *General Comment No 15* of the CESCR has simply articulated a pre-existing right that had a prior autonomous existence and a firm legal basis in the *ICESCR*, supported by state practice and international environmental law and international water law. It also suggests that the CESCR approach to the analysis of the human right to water has grounded the right on a narrowly defined legal basis, as the scope of CESCR's analysis in *General Comment No 15* was limited to the human rights regime. The article contends that a comprehensive analysis of the normative basis of the human right to water requires reading the *ICESCR* in conjunction with the rules and principles of international water law and environmental law. The combined use of these three legal regimes reveals that the right has been latently, as well as patently, recognised in the relevant rules of international treaties and that it has been supported by an increasing body of state practice.

Part II charts the normative basis of the human right to water in the texts of relevant human rights treaties. Parts III–V analyse three approaches to the 'discovery' of the human right to water, through which the CESCR grounded the human right to water in the latent corpus of international human rights law in general and the *ICESCR* in particular. Part VI analyses parallel developments beyond the human rights regime. It highlights that there has been rising recognition of the human right to water as part of debates on principles of international environmental law and international water law. Part VII draws the threads together and concludes that the human right to water is an independent entitlement, with its legal basis scattered in the *ICESCR*, international water law and environmental law regimes.

²⁴ Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 *International Affairs* 427, 430.

²⁵ Currently, some 884 million people do not have access to improved sources of drinking water, while 2.6 billion lack access to improved sanitation facilities. Worse, these figures do not tell the whole truth as millions of poor people living under similar conditions in informal settlements are simply missing from the statistics: see United Nations Office of the High Commissioner for Human Rights, above n 9, 1; *The Human Right to Water and Sanitation*, UN Doc A/RES/64/292, 2.

²⁶ In this sense, academic commentators are sometimes referred to as an 'open community of constitutional interpreters' as a group of 'free and rational society receptive to a pluralist interplay of forces and ideas' shaping the destiny of a certain legal instrument: Lourens Du Plessis, 'Legal Academics and the Open Community of Constitutional Interpreters' (1996) 12 *South African Journal on Human Rights* 214, 215.

II THE HUMAN RIGHT TO WATER IN THE TEXTS OF HUMAN RIGHTS TREATIES

Notwithstanding the relative marginalisation that has characterised their implementation as compared to their civil and political counterparts,²⁷ international socioeconomic rights have passed the stage in their normative development where questions are asked as to whether they are rights per se, or mere aspirations of moral character, devoid of legal bite.²⁸ Legal protections of socioeconomic rights emerged much later than those afforded to civil and political rights whose standards have gone through long processes of progressive development, norm clarification and judicial scrutiny.²⁹ Indeed, socioeconomic rights came into full prominence only in the late 20th century.³⁰ As a consequence, the ambit, core content and attendant state duties relative to socioeconomic rights are still evolving.³¹ Nevertheless, since these rights have been formally consecrated in international human rights treaties, the identification of a specific legal basis for the majority of socioeconomic rights guarantees has generally become an easier matter of locating a specific provision in the relevant human rights treaties. Even staunch critics of the international legal protection or justiciability of socioeconomic rights agree that this group of rights has now attained universal recognition.³² The principal questions that arise in relation to these rights now pertain instead to how to enhance their justiciability and enforceability as well as the normative content of the entitlements and the corresponding state duties that their international recognition entails. As Martin Scheinin noted, '[t]he problem relating to the legal

²⁷ See Joseph Oloka-Onyango, 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa' (2003) 18 *American University International Law Review* 851; Christof Heyns, 'Civil and Political Rights in the African Charter' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (Cambridge University Press, 2002) 137, 137; Asbjørn Eide and Allan Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff, 2nd ed, 2001) 3, 3; David Beetham, 'What Future for Economic and Social Rights?' (1995) 43(4) *Political Studies* 41, 41.

²⁸ Foremost among the early sceptics is E W Vierdag, who argued that 'only enforceable rights will be considered as "real", legal rights' and that the lack of a complaints procedure under the *ICESCR* would reduce the rights enshrined therein to nothing more than hortatory. According to Vierdag, the word 'rights' should be reserved 'for those rights that are capable of being enforced by their bearers in courts of law, or in a comparable manner': E W Vierdag, 'The Legal Nature of the Rights Granted by the *International Covenant on Economic, Social and Cultural Rights*' (1978) 9 *Netherlands Yearbook of International Law* 69, 73; cf G J H van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in P Alston and K Tomaševski (eds), *The Right to Food* (Martinus Nijhoff, 1984) 97.

²⁹ See Robert E Robertson, 'Measuring State Compliance with the Obligations to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights' (1994) 16 *Human Rights Quarterly* 693, 693–4; Philip Alston, 'Putting Economic, Social and Cultural Rights Back on the Agenda of the United States' (Working Paper No 22, Center for Human Rights and Global Justice, New York University School of Law, 2009) 2.

³⁰ O'Neill, above n 24, 427.

³¹ Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press, 2006) xiii.

³² O'Neill, above n 24, 428; Michael J Dennis and 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, and Health?' (2004) 98 *American Journal of International Law* 462, 463.

nature of social and economic rights does not relate to their validity but rather to their applicability'.³³ But as they are set out in explicit provisions in human rights treaties, questions about the very existence of the rights seldom arise.³⁴

The same cannot be said about the human right to water. As noted at the outset, the human right to water is still vying for a status similar to the other, explicitly recognised, socioeconomic rights. A human rights treaty that mentions the right to water by name is more an exception than the norm. This temporarily stopped the UN Sub-Commission on the Protection and Promotion of Human Rights from appointing a Special Rapporteur on the right to water. The Commission, observing that the human right to water was undefined, had to temporarily postpone the appointment of its first Special Rapporteur on the human right to water.³⁵ It requested a Senegalese jurist, Mr El-Hadji Guissé, to investigate the status of the right to water for drinking and sanitation purposes.³⁶ Mr Guissé submitted his report on the right to water,³⁷ and was subsequently entrusted with the promotion and protection of the right as a Special Rapporteur on the same.³⁸

The right to water has been such a 'great unknown' in the human rights catalogue that some have even asked 'if it is proper to name it [as a human right]'.³⁹ This has meant that questions are raised about the propriety of the use of a definite article before the right, as 'the' right to water as opposed to 'a' right to water.⁴⁰ The argument is that the human right to water cannot be accorded the same legal status and recognition as the other, more explicitly guaranteed, socioeconomic rights within the existing corpus of the international human rights regime. Some have even called for the adoption of a global convention that accords the right to water the status of a right *per se*.⁴¹ Thus, any meaningful analysis of the problems of implementation of the right and associated states' obligations must examine the normative basis of the right as a starting point.

The implementation of a given human right depends upon the extent of its legal recognition in a binding instrument. It is difficult for monitoring and adjudicatory bodies to respond to violations of a right that is imprecise about the

³³ Martin Scheinin, 'Economic, Social and Cultural Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff, 2nd revised ed, 2001) 29, 29.

³⁴ See generally Sage Russell, 'Minimum State Obligations: International Dimensions' in Danie Brand and Sage Russell (eds), *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (Protea Book House, 2002) 11.

³⁵ Tully, 'A Human Right to Access Water', above n 5, 36.

³⁶ *Ibid.*

³⁷ See El Hadji Guissé, *The Right of Access of Everyone to Drinking Water Supply and Sanitation Services (Working Paper)* UN ESCOR, 50th sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/1998/7 (10 June 1998).

³⁸ Tully, 'A Human Right to Access Water', above n 5, 36.

³⁹ Richard P Hiskes, 'Missing the Green: Golf Course Ecology, Environmental Justice, and Local "Fulfillment" of the Human Right to Water' (2010) 32 *Human Rights Quarterly* 326, 327.

⁴⁰ McCaffrey, 'The Human Right to Water', above n 3, 93–4; Stephen C McCaffrey and Kate J Neville, 'Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries' (2009) 21 *Georgetown International Environmental Law Review* 679, 681 (intentionally referring to the right as 'a' right instead of 'the' right).

⁴¹ See, eg, Kerry Tetzlaff, 'Towards a Global Convention on the Right to Water?' (2005) 2 *New Zealand Postgraduate Law e-Journal* 2, 31.

individual freedoms and entitlements or the state obligations it entails.⁴² After all, the existence of a human right is contingent upon its formal approbation in a given legal regime. This applies to the human right to water. Moreover, the obscurity of the normative basis of a right (and hence its content) makes it significantly more difficult for rights holders or activists and litigants acting on their behalf to ‘spot’ breaches with ease and specificity, thereby negatively impacting upon their implementation and enforcement.⁴³ Accordingly, the former Special Rapporteur on the Right to Water, Mr El-Hadji Guissé, found it essential to identify and clarify the legal basis of the human right to water ‘since it would be impossible for individuals to call for this right without a legal text to support them’.⁴⁴

The explicit provisions of the *ICESCR* and the *Universal Declaration of Human Rights*⁴⁵ are silent about the right to water. At the universal level, there are only two human rights instruments that make explicit, if brief, mention of water. In the *Convention on the Elimination of All Forms of Discrimination against Women* (‘*CEDAW*’),⁴⁶ state parties are duty bound to ensure that women have the right to ‘enjoy adequate living conditions, particularly in relation to ... water supply’.⁴⁷ Under the *Convention on the Rights of the Child* (‘*CRC*’),⁴⁸ states parties undertake to combat disease and malnutrition ‘through the provision of adequate nutritious food and clean drinking water’.⁴⁹

While these provisions are the only two global instruments that explicitly provide for the human right to water,⁵⁰ they are far from comprehensive. In the *CEDAW* the right to water is recognised only in the context of ensuring adequate living conditions of women, and arguably does not apply to any other group of people. In the *CRC* it is a means of prevention of disease and malnutrition of children. The scope of the provisions also excludes adults as they apply only to children. Moreover, even in relation to the beneficiaries of the instrument — children — the provision in the *CRC* only relates to a certain aspect, namely, quality of water, and is silent about the quantity of water which

⁴² See Takele Soboka Bulto, ‘The Utility of Cross-Cutting Rights in Enhancing Justiciability of Socio-Economic Rights in the African Charter on Human and Peoples’ Rights’ (2010) 29 *University of Tasmania Law Review* 142, 151–2.

⁴³ Takele Soboka Bulto, ‘The Indirect Approach to Promote Justiciability of Socio-Economic Rights of the African Charter on Human and Peoples’ Rights’ in Rachel H Murray (ed), *Human Rights Litigation and the Domestication of International Human Rights in Sub-Saharan Africa* (International Commission of Jurists — Kenya, 2009) 135.

⁴⁴ Sub-Commission on the Promotion and Protection of Human Rights, ‘Sub-Commission Begins Consideration of Economic, Social and Cultural Rights’ (Press Release, 7 August 2003) <<http://www.unhchr.ch/hurricane/hurricane.nsf/0/9E2A907D8C9AB866C1256D7C0026017B?opendocument>>.

⁴⁵ *Universal Declaration of Human Rights*, GA Res 217(III) A, UN GAOR, 3rd Comm, 3rd sess, 183rd plen mtg, Agenda Item 58, UN Doc A/RES/217(III) A (10 December 1948).

⁴⁶ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (‘*CEDAW*’).

⁴⁷ *CEDAW* art 14(2)(h).

⁴⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (‘*CRC*’).

⁴⁹ *Ibid* art 24(2).

⁵⁰ See Cahill, ‘A Right of Unique Status’, above n 5, 391.

the beneficiaries are entitled to claim.⁵¹ Furthermore, the *CRC* and the *CEDAW* only place a duty on governments to ensure that the human right to water is provided to persons, without providing for corresponding subjective entitlements for human beings in human rights terms.⁵²

III EVOLUTION THROUGH INTERPRETATION: THE CESCR *GENERAL COMMENT NO 15* AND BEYOND

The most comprehensive and authoritative interpretation of the human right to water to date is *General Comment No 15* of the CESCR, adopted in November 2002.⁵³ Its adoption has drawn increased attention from scholars and practitioners to the examination of theoretical and practical dimensions of the emergent human right to water.⁵⁴ Indeed, the contribution of *General Comment No 15* towards the debate surrounding the development and explication of the human right to water cannot be overstated. First, it clearly stated for the first time that there is an autonomous (free-standing) human right to water under existing human rights instruments, notably the *ICESCR*.⁵⁵ Secondly, it elaborated the normative content of the right under the *ICESCR*.⁵⁶ In addition, the CESCR addressed the typologies and extent of discrete obligations of states in the realisation of the human right to water.⁵⁷

A *The Teleological Interpretation Approach*

The lack of an explicit protection of the human right to water in the *ICESCR* meant that the CESCR was forced to find innovative ways to ground the right in the elastic and inclusionary terms of the *ICESCR* through the use of teleological (purposive) interpretation. This approach to interpretation dictates that primary importance should be given to the object and purpose of a legal provision, rather than giving the instrument a narrow and restricted meaning. The overall effect is that a court or quasi-judicial body is to prefer a construction that would promote the purpose of legislation in all stages of the process of interpretation.⁵⁸ An interpretation method that is at the heart of the jurisprudence of the European Court of Human Rights,⁵⁹ the African Commission⁶⁰ and domestic courts,⁶¹ the

⁵¹ Ibid; Melvin Woodhouse, 'Threshold, Reporting, and Accountability for a Right to Water under International Law' (2004) 8 *University of Denver Water Law Review* 171, 173.

⁵² McCaffrey, 'The Human Right to Water', above n 3, 98.

⁵³ McCaffrey and Neville, above n 40, 681–2.

⁵⁴ See Eibe Riedel, 'The Human Right to Water and the *General Comment No 15* of the CESCR' in Eibe Riedel and Peter Rothen (eds), *The Human Right to Water* (Berliner Wissenschafts-Verlag, 2006) 19, 19; Narain, above n 3, 919.

⁵⁵ *General Comment No 15*, UN Doc E/C.12/2002/11, para 2.

⁵⁶ Ibid paras 10–15.

⁵⁷ Ibid paras 17–38.

⁵⁸ Kath Hall and Claire Macken, *Legislation and Statutory Interpretation* (LexisNexis Butterworths, 2nd ed, 2009) 74; Donald Gifford, *Statutory Interpretation* (Law Book, 1990) 49–51.

⁵⁹ Mireille Delmas-Marty (ed), *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (Christine Chodkiewicz trans, Martinus Nijhoff, 1992) 292; Henry G Schermers and Denis F Waelbroeck, *Judicial Protection in the European Union* (Kluwer Law International, 6th ed, 2001) 21–2.

teleological approach to treaty interpretation — also called the purposive interpretation approach⁶² — dictates that ambiguities and lacunae in treaty provisions should be interpreted in such a way that best serves the object and purpose of the treaty.⁶³

Teleological interpretation is used, *inter alia*, to promote the objectives for which the rule of law was designed and to fill legal gaps in a given legal order.⁶⁴ The CESCR's approach in its *General Comment No 15* serves these two purposes. By defining the right holders' entitlements and duty bearers' obligations in the realisation of the human right to water, it expanded and promoted the human rights guaranteed under the *ICESCR*. More importantly, by explicating the latent content of the *ICESCR* in relation to the human right to water, it attempted to fill the gap in the protective regime relating to the human right to water that had been missing from the explicit terms of the *ICESCR*.

The CESCR carved out a free-standing right to water from, *inter alia*, the provisions of art 11 (the right to an adequate standard of living) of the *ICESCR*. Article 11(1) provides that:

The 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.

The CESCR put special emphasis on the usage of the word 'including' in the phrase 'including adequate food, clothing and housing'. Undeterred by the lack of any mention of the right to water in the list, the CESCR viewed the manner in which the word 'including' is put in front of the list (food, clothing and housing) as indicative of the fact that the catalogue of rights guaranteed under art 11(1) of the *ICESCR* is not exhaustive. Since art 11 seeks to guarantee the right to an adequate standard of living to right-holders, the prerequisites of which comprise food, housing and clothing, the inclusion of the right to water in the list is in consonance with the object and purpose of art 11(1). Access to an adequate quantity and quality of water is as crucial — or, arguably, even more so — as the more explicitly guaranteed elements of the right to an adequate standard of living listed under art 11(1).

The approach of the CESCR has therefore taken care not to overstretch the ambit of art 11, as it only added a similarly essential component of the rights guaranteed under the provision. The CESCR stated that '[t]he right to water clearly falls within the category of guarantees essential for securing an adequate

⁶⁰ See Danwood Mzikenge Chirwa, 'African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) 323, 338. This is also in line with the controlling rule of interpretation under art 31(1) of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*'): see below n 87 and accompanying text.

⁶¹ Gifford, above n 58, 49.

⁶² See Schermers and Waelbroeck, above n 59, 21.

⁶³ *Ibid*; Delmas-Marty, above n 59, 292–3.

⁶⁴ Schermers and Waelbroeck, above n 59, 21.

standard of living, particularly since it is one of the most fundamental conditions of survival'.⁶⁵

B General Comment No 15 and Its Discontents

Despite its utility in the explication of the right to water in an authoritative form, *General Comment No 15* has not been without its critics. Foremost among these is Stephen Tully, who severely criticises the manner in which the CESCR used the term 'including' for the purpose of locating the human right to water within art 11.⁶⁶ Pointing to the imprecision of the term 'including', he argues that it leaves one 'to speculate on the number and nature of other characteristics essential to an adequate standard of living but not explicitly guaranteed by the Covenant'.⁶⁷ Tully enumerates a seemingly endless list of possible candidates for inclusion in the 'including' word of art 11, and argues that if one were to follow the approach of the CESCR, the list would include such things as access to the internet and postal delivery services.⁶⁸ Tully essentially calls for a restrictive interpretation of treaty provisions when the language used in the treaty is vague and capable of diverging interpretations. He thus criticises the CESCR for adopting a 'revisionist' approach in *General Comment No 15* in an attempt to remedy a gap that, according to him, states parties should have filled through treaty amendment.⁶⁹

However, Tully's argument falters on numerous counts. The use of the word 'including' is not novel to legal drafting, as any lawmaking body — be it domestic or international — cannot always be completely exhaustive in the list of rights and behaviours it seeks to regulate. In the human rights treaty-making processes, ambiguities such as the instant one are constructive, as they allow the incorporation of emerging fundamental rights that eluded the explicit list of the lawmaking body at a particular time, the best example of which is the right to water itself.⁷⁰ In instances where a treaty is fluid along its margins, the clarification of the normative content is the proper task of treaty interpreting bodies such as the CESCR. Such ambiguities allow room for updating and elaboration of treaty norms in keeping with emergent international problems without the need to resort to rigorous treaty amendment procedures. Additionally, Tully's warning against the pursuit of the CESCR's purposive approach to treaty interpretation represents a misunderstanding of *General Comment No 15*, as well as of the basic rules of legal interpretation.⁷¹ As for the first, Tully's approach equates the human right to water with postal services and access to the internet. A reading of *General Comment No 15* reveals that the CESCR's selection of words is crafted carefully, so as to incorporate only such rights that are fundamental and that can clearly fit within the list of rights

⁶⁵ *General Comment No 15*, UN Doc E/C.12/2002/11, para 3.

⁶⁶ See Tully, 'A Human Right to Access Water', above n 5, 37–8.

⁶⁷ *Ibid.* 37.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ This is also true of the interpretation of domestic statutes. See Kent Greenawalt, *Legislation: Statutory Interpretation — 20 Questions* (Foundation Press, 1999) 128.

⁷¹ For a critical appraisal of Tully's arguments, see generally Malcolm Langford, 'Ambition That Overleaps Itself? A Response to Stephen Tully's Critique of the General Comment on the Right to Water' (2006) 24 *Netherlands Quarterly of Human Rights* 433.

essential for the 'adequate standard of living' guaranteed under art 11. As the CESCR commented in *General Comment No 15*, the right to water was included in the list 'particularly since it is one of the most fundamental conditions of survival'.⁷² This CESCR approach obviates the possibility of including an endless list of relatively less essential categories under the guise of the imprecision built into art 11(1) through the word 'including'. Jenny Grönwall observes that the approach of the CESCR means '[t]here will hardly be any flood of new rights only because the special status of water is recognised'.⁷³

Admittedly, Tully's argument that the word 'including' is imprecise is doubtlessly correct. But it is equally clear that the imprecise word was designed from the outset to include some unnamed rights, and is not an empty signifier. And, if the imprecise word 'including' implies any latent rights, surely the human right to water which seeks to guarantee the bare necessities of life falls into that category. An approach that excludes the human right to water from those entitlements implied by the word 'including' under art 11(1) renders the latent content of the provision practically meaningless and inapplicable. One is left to wonder whether there is a right that is more essential for bare human survival to merit inclusion under art 11(1) of the *ICESCR* than the human right to water.

Indeed, the CESCR approach of deriving latent human rights from other related and more explicit human rights guarantees has been accepted by other tribunals. In the European human rights system, environmental human rights have been derived from other rights such as the right to respect for private life and family life.⁷⁴ Similarly, the approach has been used in the African human rights system, where there is no explicit protection of the human right to water.⁷⁵ The regional human rights tribunal, the African Commission on Human and Peoples' Rights, used the same approach applied by the CESCR of locating an implicit human right to water in explicit provisions of the regional human rights treaty.⁷⁶ In *Free Legal Assistance Group and Others v Zaire*, the Commission held that the 'failure of the government to provide basic services such as safe drinking water and electricity ... and the shortage of medicine ... constitutes a violation of Article 16 [right to health]'.⁷⁷ Similarly, in the *SERAC* case, the Commission decided that contamination of sources of drinking water by state or non-state actors was a violation of art 16 (the right to health) and art 24 (the right

⁷² *General Comment No 15*, UN Doc E/C.12/2002/11, para 3.

⁷³ Jenny T Grönwall, *Access to Water: Rights, Obligations and the Bangalore Situation* (PhD Thesis, Linköping University, 2008) 215.

⁷⁴ For an excellent analysis and summary of these cases, see generally Ole W Pedersen, 'European Environmental Human Rights and Environmental Rights: A Long Time Coming?' (2009) 21 *Georgetown International Environmental Law Review* 73.

⁷⁵ See Takele Soboka Bulto, *Rights, Wrongs and the River Between: Extraterritorial Application of the Human Right to Water in Africa* (PhD Thesis, University of Melbourne, 2011).

⁷⁶ See generally Takele Soboka Bulto, 'The Human Right to Water in the Corpus and Jurisprudence of the African Human Rights System' (2011) 11 *African Human Rights Law Journal* (forthcoming).

⁷⁷ African Commission on Human and Peoples' Rights, *Communications 25/89, 47/90, 56/91, 100/93: World Organisation against Torture, Lawyers' Committee for Human Rights, Jehovah Witnesses, Inter-African Union for Human Rights v Zaire*, 19th sess (March 1996) [4], [47].

to a satisfactory environment).⁷⁸ In a case against Sudan, the Commission ruled that ‘the right to water [is] implicitly guaranteed under Articles 4, 16 and 22 of the *Charter* as informed by standards and principles of international human rights law’.⁷⁹ These decisions exemplify the Commission’s acceptance and application of the same logic (as that of the CESCR) of reading the human right to water into or from other explicit rights.

While the human right to water had been recognised in some domestic jurisdictions, such as India and Argentina, long before the CESCR adopted *General Comment No 15*,⁸⁰ the General Comment has also been accepted in and begun to influence domestic judicial decisions involving the human right to water. This has been seen in decisions in Argentina, where the courts have directly quoted *General Comment No 15* of the CESCR in the course of rendering decisions.⁸¹ Similarly, in South Africa, a country that is not even a party to the *ICESCR*, both the High Court⁸² and the Supreme Court of Appeal⁸³ have directly referred to and quoted *General Comment No 15* of the CESCR.

The approach of the CESCR and *General Comment No 15*, whereby the latent human right to water has been explicated, is thus not new and has been part of national or international human rights jurisprudence for some time. In any case, to exclude the human right to water from the unnamed rights envisaged by the word ‘including’ under art 11(1) of the *ICESCR* would have deviated from the rules of treaty interpretation generally. Restrictive interpretation of treaties is not an interpretative method generally accepted under international law.⁸⁴ Treaties should be interpreted in light of the overall ‘object and purpose’ of the treaty in question.⁸⁵ The object and purpose of a human rights treaty is the effective protection of human rights,⁸⁶ and the exclusion of some of the basic guarantees (such as the human right to water) from the ambit of the *ICESCR* does not have

⁷⁸ See African Commission on Human and Peoples’ Rights, *Communication No 155/96: The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, 30th sess (13–27 October 2001) 8–9.

⁷⁹ African Commission on Human and Peoples’ Rights, *Communications 279/03, Sudan Human Rights Organisation v The Sudan and Communication; 296/05, Centre on Housing Rights and Evictions v The Sudan*, 45th sess (13–27 May 2009) 125.

⁸⁰ The Supreme Court of India, for instance, had derived the human right to water from the right to life. It ruled that the right to life ‘includes the right of enjoyment of pollution free water and air for full enjoyment of life’: see *Subhash Kumar v State of Bihar* [1991] All India Reporter 420, 424 (Supreme Court of India). See Christian Courtis, ‘Argentina: Some Promising Signs’ in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) 163, 179.

⁸¹ See Courtis, above n 80, 179.

⁸² See, eg, *S v Mazibuko* [2008] ZAGPHC 106, [36], [124], [128].

⁸³ See, eg, *The City of Johannesburg & Others v L Mazibuko & Others* [2009] 3 SA 592, [17], [28], [34].

⁸⁴ See Alexander Orakhelashvili, ‘Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights’ (2003) 14 *European Journal of International Law* 529, 530; Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 1998) 636; see generally Rudolf Bernhardt, ‘Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights’ (1999) 42 *German Yearbook of International Law* 11.

⁸⁵ See *VCLT* art 31(1).

⁸⁶ Ulf Linderfalk, ‘On the Meaning of the “Object and Purpose” Criterion, in the Context of the *Vienna Convention on the Law of Treaties*, Article 19’ (2003) 72 *Nordic Journal of International Law* 429, 433–5.

the effect of promoting human rights protection. As the Inter-American Court of Human Rights emphasised:

the interpretation [of a human rights treaty] to be adopted may not lead to a result that weakens the system of protection established [by the treaty], bearing in mind the fact that the purpose and aim of that instrument is the protection of the basic rights of individual human beings.⁸⁷

It has been argued that the lack of an explicit and comprehensive provision for the human right to water in the UN human rights treaties does not imply that there was an intention to exclude the human right to water. According to Matthew Craven, the right is ‘neither here nor there’, in that there was not an intentional omission or a deliberate exclusion of the right to water from the list under art 11(1) of the *ICESCR*.⁸⁸ Keen analyses of the *travaux préparatoires* of the *ICESCR* revealed that the right to water was neither discussed⁸⁹ nor rejected⁹⁰ in the course of drafting and adoption of the *ICESCR*. Some argued that its inclusion was either assumed, just as for air, as a precondition for enjoying all other human rights, or that the drafters of the *ICESCR* did not realise that water was to become so scarce.⁹¹ The situation surrounding the omission of the human right to water from the list under art 11(1) thus represents a neutrality of the drafters towards the right, the type that was ‘neither desired nor opposed’.⁹² The absence of the human right to water from the list is therefore neither an inclusionary nor an exclusionary absence ‘but results simply from a lack of cognition/recognition’.⁹³

In conclusion, the absence of an explicit provision on the human right to water does not mean that the right to water is not guaranteed under the *ICESCR*. Instead, it can be seen as a member of the illustrative list of art 11 of the *ICESCR*. Put differently, the human right to water can be treated as an independent right, deserving of equal protection just like the other more explicit rights listed under art 11 of the *ICESCR*. The right to water is thus not dependent upon the finding of violations of other related rights but is an autonomous right that can be violated when its constituent elements are infringed. In this sense, the human right to water is no more ‘novel’ or ‘newborn’ than the more explicit rights, such as the right to food and health, of which it is an unnamed sibling under art 11 of the *ICESCR*. Therefore, the *ICESCR*’s discovery — and not an invention — of a free-standing right to water under art 11 is in consonance with the rules of treaty interpretation which emphasise the need to promote the object and purpose of the particular instrument.

⁸⁷ *Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica* [1984] 4 Inter-American Court of Human Rights (Ser A) No 4, [24].

⁸⁸ Craven, above n 7, 41.

⁸⁹ *Ibid* 40.

⁹⁰ Langford, above n 71, 439.

⁹¹ See McCaffrey, ‘The Human Right to Water’, above n 3, 94; McCaffrey and Neville, above n 40, 681.

⁹² Craven, above n 7, 38.

⁹³ *Ibid*.

IV THE DERIVATION APPROACH

In addition to the teleological (purposive) approach to interpretation it applied to art 11 of the *ICESCR*, the CESCR also employed an approach of deriving the human right to water from the other explicitly guaranteed rights. In *General Comment No 15*, it made use of art 12 of the *ICESCR* which guarantees the right to the enjoyment of the highest attainable standard of physical and mental health. Article 12(1) stipulates: ‘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.’

The CESCR has taken into account the inextricable relationship of the human right to water with other more explicit rights of the *ICESCR*, which for their realisation depend on the concomitant fulfilment of the right to water. The CESCR stated that the human right to water should be seen in conjunction with the guarantees of art 12(1), namely, ‘the right to the highest attainable standard of health’, the rights to ‘adequate housing and adequate food’, and ‘other rights enshrined in the *International Bill of Human Rights*, foremost amongst them the right to life and human dignity’.⁹⁴

This line of thought is a double-edged sword, as it carries potentially contradictory implications about the legal basis of the human right to water. On the positive side, the right to water is a necessary and inherent element of the rights to health and housing. Since the more explicit rights cannot be realised without access to an adequate quality and quantity of water, the human right to water would be treated as part and parcel of such rights as the right to health, life, housing, and dignity.⁹⁵ Thus, the right to water springs from its necessity for the realisation of other explicitly guaranteed rights.

The negative implication of the approach arises from the positive implication. Because the human right to water is protected because of its utility to other rights, the human right to water would take the form of a derivative or subordinate right, the violation of which can only be complained of when the parent rights — for instance, the right to food, health, or life — are violated. But it would not have an independent existence or protection. In the derivative sense, the relationship between the human right to water and its derivative source (parent right) is such that the former is a small subset of the latter. Its violation thus arises only when the parent right is violated in situations that involve the victim’s access to adequate quantity and quality of water. Consequently, the right to water in its derivative sense can only be guaranteed to the extent of its utility to and overlapping with the derivative source from which it springs.⁹⁶ The implication of the derivative human right to water for the duty of the states is equally problematic: the obligation it creates varies depending upon whether the right is subsumed under other human rights or is recognised as a standalone

⁹⁴ *General Comment No 15*, UN Doc E/C.12/2002/11, para 3.

⁹⁵ Cahill, ‘A Right of Unique Status’, above n 5, 394.

⁹⁶ For a more detailed critique of a similar approach to the derivation of the human right to water, see Bulto, ‘The Human Right to Water in the Corpus and Jurisprudence of the African Human Rights System’, above n 76.

right.⁹⁷ As Amanda Cahill observes, in its derivative sense, ‘surely only certain aspects of the right to water will be protected and implemented’.⁹⁸

This leaves the right on a shaky ground where it is neither fully recognised nor fully excluded from the ambit of the protection of art 12 of the *ICESCR* and related provisions. Violations of the human right to water can take place independently of the right to health, life or of dignity or housing. For instance, a state’s provision of water may fall below the amount or quality needed to realise right holders’ basic access to drinking and sanitation water, thereby violating the human right to water. However, the impact of such a scenario on the right to health or food of the right-holders might not be visible in the short term. Therefore, the derivative approach to the human right to water, taken on its own, gives a truncated and abbreviated picture of the right of its beneficiaries.

Used alongside the teleological approach of the CESC (which leads to an independent human right to water), however, the derivative approach to the human right to water offers more benefits than harms to the normative development of the right. Locating the right to water in related rights that have been accorded explicit recognition in the international human rights treaties, it provides another legal basis to argue for the protection of the human right to water. It also helps emphasise the utility of the indivisibility, interdependence and interrelatedness of human rights that was proclaimed in the *Vienna Declaration and Program of Action*.⁹⁹

V RECOGNITION THROUGH THE STATE REPORTING PROCEDURE: THE CESC CONCLUDING OBSERVATIONS AND STATES’ ACQUIESCENCE

Besides the teleological and derivative approaches to the discovery of the human right to water, the CESC also relied on and made reference to its own ‘consistent’ practice that has addressed the right to water in the course of consideration of states parties’ reports.¹⁰⁰ The CESC had criticised states, long before the adoption of *General Comment No 15*, for their various shortcomings in the national implementation of the human right to water. It raised the issue of domestic implementation of the right with states parties in the context of examination of state reports. According to Eibe Riedel, the CESC addressed the human right to water in 33 of the 114 Concluding Observations it adopted between 1993 and the adoption of *General Comment No 15* in 2002.¹⁰¹ For instance, the CESC expressed its dismay regarding the violations

⁹⁷ See generally Amy Hardberger, ‘Whose Job Is It Anyway? Governmental Obligations Created by the Human Rights to Water’ (2006) 41 *Texas International Law Journal* 533, 535.

⁹⁸ Cahill, ‘A Right of Unique Status’, above n 5, 394.

⁹⁹ It was declared that: ‘All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis’: see *Vienna Declaration and Programme of Action*, UN Doc A/Conf.157/23 (12 June 1993) para 5.

¹⁰⁰ *General Comment No 15*, UN Doc E/C.12/2002/11, para 5.

¹⁰¹ Riedel, above n 54, 25.

of the right to water in Cameroon in its 1995 concluding observations, where it stated:

The Committee regrets the lack of access to potable water for large sectors of society, especially in rural areas where only 27 per cent of the population have access to safe water (within reasonable reach), while 47 per cent of the urban population have such access. ... The Committee calls upon the State party to make safe drinking water accessible to the entire population.¹⁰²

The CESCR on another occasion raised the problem of water pollution that had negative impacts on the related rights of health and food in the Russian Federation.¹⁰³ In its 1998 Concluding Observations on the State Report of Israel, the CESCR stated:

excessive emphasis upon the State as a 'Jewish State' encourages discrimination and accords a second-class status to its non-Jewish citizens. ... This discriminatory attitude is apparent in the lower standard of living of Israeli Arabs as a result, inter alia, of lack of access to housing, [and] water ... while the Government annually diverts millions of cubic meters of water from the West Bank's Eastern Aquifer Basin, the annual per capita consumption allocation for Palestinians is only 125 cubic meters per capita while settlers are allocated 1,000 cubic metres per capita. ... [T]hat a significant proportion of Palestinian Arab citizens of Israel continue to live in unrecognised villages without access to water, electricity, sanitation and roads. ... Bedouin Palestinians settled in Israel ... have no access to water, electricity and sanitation ...¹⁰⁴

In spite of the fact that the human right to water is not an explicit component of the *ICESCR*, none of the states parties criticised by the CESCR for violating the right have denied that the right inheres in the provisions of the *ICESCR*.¹⁰⁵ It is clear that the CESCR has taken the silence on the part of *ICESCR* states parties in the face of CESCR's criticisms of their domestic implementation (or violation) of the human right to water as indicative of tacit assent by states to the fact that the *ICESCR* contains the human right to water and consequent state obligations.

However, the reporting procedure is a non-adversarial process which is heavily reliant on 'constructive dialogue' between the reporting state and the monitoring body.¹⁰⁶ The Concluding Observations of the CESCR lack the threat of enforcement, meaning states might listen to the CESCR without feeling the need to tender arguments about their domestic obligations relating to the human

¹⁰² Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Cameroon*, UN ESCOR, 21st sess, 54th mtg, UN Doc E/C.12/1/Add.40 (8 December 1999) [27], [40].

¹⁰³ Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN ESCOR, 16th sess, 25th mtg, UN Doc E/C.12/1/Add.13 (20 May 1997) [25], [38].

¹⁰⁴ Committee on Economic Social and Cultural Rights, *Concluding Observations of the Committee on Economic Social and Cultural Rights: Israel*, UN ESCOR, 19th sess, 53rd mtg, UN Doc E/C.12/1/Add.27 (4 December 1998) [10], [24], [26], [28].

¹⁰⁵ Malcolm Langford and Jeff A King, 'Committee on Economic, Social and Cultural Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 477, 509–14.

¹⁰⁶ Takele Soboka Bulto, 'Beyond the Promises: Resuscitating the State Reporting Procedure under the African Charter on Human and Peoples' Rights' (2006) 12 *Buffalo Human Rights Law Review* 57, 58.

right to water.¹⁰⁷ The argument that states' silence in the face of CESCR Concluding Observations that are critical of the degree of their domestic enforcement of the human right to water constitutes a source of binding state practice may be too slender a reed to lean on. On its own, it might prove too weak an indicator of states' acceptance of the human right to water, especially given the fact that such a 'state acquiescence' is not the result of an adversarial and evidence-based process where a real case is disputed at the international level.¹⁰⁸

Thus, the conclusion of the CESCR that its own consistent practice in its dialogue with *ICESCR* member states is strong enough on its own to give rise to state practice is questionable. However, through the use of the three outlined approaches (analytical devices) — teleological interpretation, derivative approaches to the right, and the acquiescence of states in the reporting procedure — the CESCR has established a firm legal basis for the human right to water. The combined effect of the three approaches leads to the conclusion that there is a strong normative basis for the human right to water and attendant state obligations in the *ICESCR*.

VI THE HUMAN RIGHT TO WATER OUTSIDE THE HUMAN RIGHTS REGIME

The CESCR made only a passing reference to the role of rules and principles of international law that lie beyond the mainstream human rights regime. It stated that '[t]he right to water has been recognised in a wide range of international documents, including treaties, declarations and other standards'.¹⁰⁹ While it took note of the incorporation of the right in a multiplicity of soft laws and binding treaties in *General Comment No 15*,¹¹⁰ it failed to analyse the rules and principles of related legal regimes where the human right to water is provided for in more explicit terms. Its narrow focus on the *ICESCR* has been followed by subsequent scholarship. As a result, the search for the legal basis of the right has hitherto been confined to the corpus of human rights treaties, with a special focus on the *ICESCR*. This section seeks to locate the human right to water in the related international legal regimes of environmental law and international water law, from which the human rights regime and related tribunals may borrow in order to enrich the analysis, and possible adjudication, of the human right to water.

¹⁰⁷ Generally, the 'main teeth [of the reporting procedure] — the mobilisation of shame — have been too weak a threat to ensure compliance'. See Bulto, 'The Utility of Cross-Cutting Rights', above n 42, 151–2.

¹⁰⁸ Until and unless the Optional Protocol to the *ICESCR*, which provides for a complaints procedure, comes into force, the CESCR's main tool of supervision will continue to be entirely dependent upon the non-adversarial state reporting procedure: see *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 10 December 2008, UN Doc A/RES/63/117 (not yet in force).

¹⁰⁹ *General Comment No 15*, UN Doc E/C.12/2002/11, para 4.

¹¹⁰ For an excellent description of the body of soft laws for the protection of the human rights to water, see generally Tetzlaff, above n 41; Desheng Hu, *Water Rights: An International and Comparative Study* (IWA Publishing, 2006) 97–104.

A *Acceptance and Recognition in International Environmental (Soft) Law*

The right to water has long been debated and recognised in other areas of international law, notably in international environmental law. Indeed, attempts to clarify the legal basis of a human right to water came to light a few decades ago in the context of debates on international environmental concerns. The evolution of the right to water is traced back to developments of the early 1970s.¹¹¹ The United Nations Conference on the Human Environment, held in Stockholm in 1972, identified water as one of the natural resources that needed protection. Principle 2 of the *Declaration of the United Nations Conference on the Human Environment* ('*Stockholm Declaration*') stipulated that 'the natural resources of the earth, including the air, water, land, flora and fauna ... must be safeguarded for the benefit of the present and future generations through careful planning and management, as appropriate'.¹¹²

The Stockholm Conference was followed by the United Nations Water Conference, held in Mar del Plata, Argentina, in 1977. This conference, exclusively devoted to discussion of emerging water resource problems, led to the issuing of the *Mar del Plata Action Plan*, which addressed issues such as water use efficiency, environmental health and pollution control, and regional and international cooperation.¹¹³ As the direct outcome of the Conference and as part of the Action Plan, an agreement was reached to proclaim the period 1981 to 1990 as the 'International Drinking Water Supply and Sanitation Decade', during which governments would assume a commitment to bring about substantial improvements in drinking water supply and sanitation.¹¹⁴ Resolution II on '[c]ommunity water supply' declared that '[a]ll peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs'.¹¹⁵ Cognisant that the scarcity of water may hamper the implementation of the right at the national level, Resolution II called for full international cooperation among states 'so that water is attainable and is justly and equitably distributed among the people within the respective countries'.¹¹⁶ The debate on the human right to water can be traced back to this conference and the resultant

¹¹¹ Salman M A Salman and Siobhán McInerney-Lankford, *The Human Right to Water: Legal and Policy Dimensions* (World Bank, 2004) 7. Amanda Cahill also points out that the question of whether a human right to water exists had been the subject of little attention before the past two decades: see Cahill, 'A Right of Unique Status', above n 5, 389.

¹¹² See *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1 January 1973) ch I ('*Declaration of the United Nations Conference on the Human Environment*') principle 2.

¹¹³ See *Report of the United Nations Water Conference, Mar del Plata*, UN Doc E/CONF.70/29 (25 March 1977) ch I ('*Mar del Plata Action Plan*'). The United Nations General Assembly adopted the Report of the United Nations Water Conference on 19 December 1977: see GA Res 32/158, 32nd sess, 107th plen mtg, Agenda Item 12, UN Doc A/RES/32/158 (19 December 1977).

¹¹⁴ *International Drinking Water Supply and Sanitation Decade*, GA Res 40/171, UN GAOR, 40th sess, 119th plen mtg, Agenda Item 12, UN Doc A/RES/40/171 (17 December 1985); *Mar del Plata Action Plan*, UN Doc E/CONF.70/29, 14.

¹¹⁵ *Mar del Plata Action Plan*, UN Doc E/CONF.70/29, 66.

¹¹⁶ *Ibid* 67.

resolution which, for the first time, explicitly and unequivocally recognised individuals' and groups' right to water.¹¹⁷

Since that time, water problems have been a subject of numerous international conferences. The International Conference on Water and the Environment, held in January 1992 in Dublin, Ireland, reiterated the need to recognise the right to water, but *at an affordable price*.¹¹⁸ The Dublin conference was a preparatory meeting for the United Nations Conference on Environment and Development that was held in Rio de Janeiro, Brazil, in June 1992 (the 'Rio Summit').¹¹⁹ Agenda 21 of the Rio Summit, referred to as the 'Programme of Action for Sustainable Development', included a separate chapter — Chapter 18 — on freshwater resources.¹²⁰ Chapter 18 not only endorsed the Resolution of the Mar del Plata Water Conference that all peoples have the right to drinking water but it also called this principle 'the commonly agreed premise'.¹²¹

The debates in the conferences and the emerging declarations and principles were endorsed by the United Nations General Assembly in 2000, in a resolution on the right to development.¹²² This resolution reaffirmed that, in the realisation of the right to development, 'the 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'.¹²³ This statement was considered at the time to be 'the strongest and most unambiguous' of its type in declaring a human right to water.¹²⁴

This trend of recognising the human right to water in soft laws continued unabated after the adoption of *General Comment No 15*. Numerous fora have explicitly recognised that the human right to water is a fundamental right, the enjoyment of which states are obliged to ensure. The *Abuja Declaration*, adopted by 45 African and 12 South American states at the First Africa-South America Summit in 2006, contained a commitment by participating states to 'promote the right of our citizens to have access to clean and safe water and sanitation within our respective jurisdictions'.¹²⁵ Similarly, the *Message from Beppu*, adopted by 37 states from the wider Asia-Pacific region at the First Asia-Pacific Water

¹¹⁷ See Salman and McInerney-Lankford, above n 111, 8.

¹¹⁸ The statement declared that 'it is vital to recognise first the basic right of all human beings to have access to clean water and sanitation *at an affordable price*': 'Dublin Statement on Water and Sustainable Development' (Statement adopted at the International Conference on Water and the Environment, Dublin, Ireland, 31 January 1992) principle 4 (emphasis added). However, the Dublin principles do not define the concept of affordability.

¹¹⁹ See *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol 1) (1 January 1993).

¹²⁰ *Ibid* annex II, ch 18.

¹²¹ See Salman and McInerney-Lankford, above n 111, 10 quoting *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol 1) (1 January 1993) annex II, [18.47].

¹²² See *The Right to Development*, GA Res 54/175, UN GAOR, 54th sess, Agenda Item 116(b), UN Doc A/Res/54/175 (15 February 2000).

¹²³ *Ibid* sub-para 12(a).

¹²⁴ See Salman and McInerney-Lankford, above n 111, 11–12.

¹²⁵ 'Abuja Declaration' (Declaration adopted at the First Africa–South America Summit, Abuja, Nigeria, 30 November 2006) para 22.

Summit held in Beppu, Japan, in December 2007, clearly recognised ‘the people’s right to safe drinking water and basic sanitation as a basic human right and a fundamental aspect of human security’.¹²⁶ Moreover, eight South Asian states adopted the *Delhi Declaration*, in which they recognised ‘that access to sanitation and safe drinking water is a basic right, and according national priority to sanitation is imperative’.¹²⁷ More recently, the right has been recognised by the UN General Assembly, acknowledging that access to drinking and sanitation water is a fundamental human right.¹²⁸

The biggest handicap of these declarations, principles, resolutions and action plans is the fact that they remain statements of policy that do not possess the quality of legal enforceability. While they indicate a gradually emerging trend of international opinion and state practice, and could also lead to the incremental evolution of these rules into binding treaties,¹²⁹ they do not immediately lead to binding entitlements for the beneficiaries nor to justiciable duties of the states.

However, with the passage of time, they could possibly undergo a process of hardening and evolve into binding rules,¹³⁰ and even play a catalytic role for the development of international custom,¹³¹ which is binding *erga omnes*. René-Jean Dupuy has long made the argument that the *Stockholm Declaration*, for instance, has already achieved customary status, as it commands near-consensus of the international community, and as its rules are responses to the state of hydrologic necessity.¹³² Contentious as such conclusions might be, there are indeed traces of judicial reference to the principles of the *Stockholm Declaration*.¹³³

Soft laws have also been considered to be ‘experimental response[s]’ to new challenges such as the realisation of the human right to water.¹³⁴ As Martin

¹²⁶ ‘Message from Beppu’ (Declaration adopted at the First Asia-Pacific Water Summit, Beppu, Japan, 4 December 2007) para 2.

¹²⁷ ‘Delhi Declaration’ (Declaration adopted at the Third South Asian Conference on Sanitation, Vighan Bawan, Delhi, 21 November 2008) para 1.

¹²⁸ See *The Human Right to Water and Sanitation*, UN Doc A/RES/64/292. For an analysis of this resolution, see Gerber and Chen, above n 21.

¹²⁹ Dinah Shelton, ‘Editor’s Concluding Note: The Role of Non-Binding Norms in the International Legal System’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2003) 554, 555; see generally Edith Brown Weiss, ‘Conclusions: Understanding Compliance with Soft Law’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2003) 535.

¹³⁰ Douglass Cassel, ‘Inter-American Human Rights Law, Soft and Hard’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2003) 393, 395.

¹³¹ Christine Chinkin, ‘Normative Development in the International Legal System’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2003) 21, 32.

¹³² René-Jean Dupuy, ‘Humanity and the Environment’ (1991) 2 *Colorado Journal of International Environmental Law and Policy* 201, 203.

¹³³ For instance, the Supreme Court of India quoted at length from the *Stockholm Declaration* to support its decisions on citizens’ rights and state duties. In that case, the Court ordered the closure of 29 tanneries operating on the banks of the Ganga river for failure to treat industrial effluence: see *M C Mehta v Union of India and Others* [1988] All India Reporter 1037, 1038–9 (Supreme Court of India).

¹³⁴ Mary Ellen O’Connell, ‘The Role of Soft Law in a Global Order’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2003) 100, 110.

Köppel observes, soft laws facilitate ‘learning processes or learning by doing’.¹³⁵ Accordingly, they offer states the opportunity to see the practical impacts of those rules, while maintaining the flexibility to avoid ‘unpleasant surprises’ those soft law commitments might hold.¹³⁶ In this sense, soft laws could still have legal relevance and be located ‘in the twilight zone between law and politics’.¹³⁷ As such, they may prove very effective and command more compliance as norms of international hard law.¹³⁸

Nevertheless, at least for immediate purposes, the soft laws and action plans are devoid of enforceable claims or binding state obligations.¹³⁹ Yet the debates about, and the discussions on, the right to water at these various conferences and in their resultant action plans have led towards an increased recognition of the human right to water and a fresh appraisal of the right within the framework of the corpus of international human rights law.¹⁴⁰ It also gives more credence to *General Comment No 15*, wherein the CESCR stated that the human right to water has been part of existing rules of international soft law and other treaties. In any event, recognition of the human right to water in international soft laws shows that the right is not entirely novel and that it has been accepted in the context of international environmental law.

More importantly, such norms may be precursors of international customary law with regard to *opinio juris*, if not practice.¹⁴¹ Such an outcome was envisaged by the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion.¹⁴² It stated that ‘a series of [UN General Assembly] resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule’.¹⁴³ According to the Court, soft laws such as UN resolutions, ‘can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*’.¹⁴⁴ There is thus a burgeoning trend (and hence state practice) towards recognising the human right to water at national and international levels

¹³⁵ Martin Köppel, ‘The Effectiveness of Soft Law: First Insights from Comparing Legally Binding Agreements with Flexible Action Programs’ (2009) 21 *Georgetown International Environmental Law Review* 821, 825.

¹³⁶ Kenneth W Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organization* 421, 442.

¹³⁷ Jon Birger Skjærseth, Olav Schram Stokke and Jøgen Wettestad, ‘Soft Law, Hard Law, and Effective Implementation of International Environmental Norms’ (2006) 6(3) *Global Environmental Politics* 104, 104.

¹³⁸ László Blutman, ‘In the Trap of a Legal Metaphor: International Soft Law’ (2010) 59 *International and Comparative Law Quarterly* 605, 612; Köppel, above n 135, 822; Abbott and Snidal, above n 136, 423.

¹³⁹ See generally Alan Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’ in Vera Gowlland-Debbas (ed), *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process* (Martinus Nijhoff, 2000) 25.

¹⁴⁰ Jacob Gersen and Eric Posner argue that soft laws, although not binding per se, are indicative of future intention of states, and point to the probable trend of norm emergence in relation to a particular legal topic to which it relates: see generally Jacob E Gersen and Eric A Posner, ‘Soft Law: Lessons from Congressional Practice’ (2008) 61 *Stanford Law Review* 573.

¹⁴¹ Blutman, above n 138, 617.

¹⁴² *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

¹⁴³ *Ibid* 255 [70].

¹⁴⁴ *Ibid* 254–5 [70].

in consonance with the line of interpretation taken by the CESCR in *General Comment No 15*.

B *The Human Right to Water in International Water Law*

International water law is a regime that regulates consumptive and non-consumptive use of transboundary water resources. The rules of consumptive uses of international rivers have now been compiled in the 1997 *Convention on the Law of the Non-Navigational Uses of International Watercourses* ('*Watercourses Convention*').¹⁴⁵ The *Watercourses Convention*, from its inception, was not intended to be an instrument that primarily seeks to regulate human rights of individuals and peoples living in member states' territories. The approach to the development of international water law for consumptive uses has generally been state-centric, restricting its focus to issues of inter-state rights and duties,¹⁴⁶ as opposed to individuals' and groups' rights and freedoms relative to international water resources.¹⁴⁷ The *Watercourses Convention* was thus primarily devised to 'address obligations of governments rather than being cast in terms of individual rights'.¹⁴⁸ It is indeed claimed that such state-centrism entailed deadlocks such that 'no provision regarding the right could be agreed upon' in the *Convention*.¹⁴⁹ Ellen Hey has asserted that '[t]he *Watercourses Convention* is not about ensuring that individuals and groups, both of present and future generations, have access to sufficient clean water'.¹⁵⁰

However, as adopted, the *Watercourses Convention* contains a provision that has a special normative utility in establishing the human right to water. Article 10(2) of the *Convention*, entitled 'Relationship between Different Kinds of Uses', states that a resolution of conflicts among different uses of an international watercourse should be resolved in a way that gives 'special regard ... to the requirements of vital human needs'. It is widely agreed that the 'vital human needs' provision refers to water that is required to 'sustain human life, including both drinking water and water required for the production of food

¹⁴⁵ Opened for signature 21 May 1997, UN Doc A/51/869 (not yet in force).

¹⁴⁶ The situation was apparent during the drafting process of the *Watercourses Convention*, where some members of the International Law Commission felt that it was unacceptable for the *Convention* to refer to persons other than states. They perceived the impending treaty 'to deal with relations between states and should not extend into the field of actions by natural or legal persons under domestic law': International Law Commission, *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, UN GAOR, 49th sess, Supp No 10, UN Doc A/49/10 (1994) ch III(D) ('*Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries Thereto and Resolution on Transboundary Confined Groundwater*') 133 ('*ILC Draft Articles*').

¹⁴⁷ See Neil A F Popović, 'In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment' (1996) 27 *Columbia Human Rights Law Review* 487, 494.

¹⁴⁸ McCaffrey, 'The Human Right to Water', above n 3, 100.

¹⁴⁹ Cahill, 'A Right of Unique Status', above n 5, 389.

¹⁵⁰ Ellen Hey, 'The *Watercourses Convention*: To What Extent Does It Provide a Basis for Regulating Uses of International Watercourses?' (1998) 7 *Review of European Community and International Environmental Law* 291, 292.

in order to prevent starvation'.¹⁵¹ Accordingly, the *Watercourses Convention's* provision on vital human needs 'is consistent with the human right to water'¹⁵² and the requirement for catering for such vital needs 'should be informed by the human right to water'.¹⁵³

Indeed, the phrase 'vital human needs' is a shorthand expression for the minimum core of the human right to water. As Dinah Shelton has noted, the 'vital human needs' provision is aimed at ensuring 'a guaranteed minimum amount to be provided to every person'.¹⁵⁴ This minimum supply should be calculated on a per capita basis for the population of the riparian states who are dependent for their immediate consumption, also called 'natural wants' or 'ordinary uses' as opposed to 'artificial uses' or 'extraordinary uses'.¹⁵⁵ As noted by Peter Beaumont, such a calculation would 'provide a basic minimum figure of water usage that would permit a society to survive without major health threats to its population'.¹⁵⁶ In a recent report of the International Law Association ('ILA'),¹⁵⁷ 'vital human needs', a concept borrowed from the *Convention*,¹⁵⁸ is defined as 'waters used for immediate human survival, including drinking, cooking, and sanitary needs, as well as water needed for the immediate sustenance of a household'.¹⁵⁹ As Beaumont observed, '[p]resumably drinking water is the most vital human need. It almost certainly implies water for cooking and washing to maintain public health standards, but does it go beyond this?'¹⁶⁰ According to the ILA, '[l]egal institutions have long recognized a preference in municipal law for "domestic uses" of water, or as the *Convention* describes it, "vital human needs"'.¹⁶¹ The accompanying ILA commentary states that the phrase 'vital human needs' refers to 'water needed for immediate human consumption'.¹⁶² Thus, closer scrutiny of the provision on the 'vital human

¹⁵¹ *ILC Draft Articles*, above n 146, 110; International Law Commission Working Group, *Report on the Convention on the Law of the Non-Navigational Uses of International Watercourses*, UN GAOR, 51st sess, 6th comm, Agenda Item 144, UN Doc A/51/869 (11 April 1997) 5 [8]. See also McCaffrey, *The Law of International Watercourses*, above n 8; Peter Beaumont, 'The 1997 UN Convention on the Law of Non-Navigational Uses of International Watercourses: Its Strengths and Weaknesses from a Water Management Perspective and the Need for New Workable Guidelines' (2000) 16 *International Journal of Water Resources Development* 475, 483.

¹⁵² McCaffrey, *The Law of International Watercourses*, above n 8, 369.

¹⁵³ *Ibid.*

¹⁵⁴ Dinah Shelton, 'Equity' in Daniel Bodansky, Jutta Brunneé and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 639, 648–9.

¹⁵⁵ International Law Association, 'Water Resources Law: Fourth Report' (Paper presented at the Berlin Conference, Berlin, Germany, 2004) 12.

¹⁵⁶ Beaumont, above n 151, 484.

¹⁵⁷ The International Law Association ('ILA') was founded in Brussels in 1873. Its duties are the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law. The ILA has consultative status, as an international non-governmental organisation, with a number of the United Nations specialised agencies: see International Law Association, *About Us* (2008) <http://www.ila-hq.org/en/about_us/index.cfm>. It is an organisation that heavily contributed to the development of international water law, through its studies, debates at its conferences and publications.

¹⁵⁸ International Law Association, above n 155, art 14.

¹⁵⁹ *Ibid* art 3.

¹⁶⁰ Beaumont, above n 151, 483.

¹⁶¹ International Law Association, above n 155, art 14.

¹⁶² *Ibid* 12.

needs' under art 10(2) of the *Watercourses Convention* can be considered a legal basis for the human right to water.

Unlike international environmental instruments relating to the human right to water that have so far taken the form of soft law, the provisions of the *Watercourses Convention* are binding on ratifying states. They will thus give rise to definite state obligations and enforceable individual and group rights to water. Coupled with the emerging trends of environmental law norms, international water law can therefore be used directly as a normative source of the human right to water and attendant state obligations, hence providing supportive legal authority for *General Comment No 15*.

VII CONCLUSION

The foregoing analysis has shown that the right to water as a legal entitlement is neither novel nor newborn. The ambiguity surrounding its legal basis is in part characteristic of other socioeconomic rights of the *ICESCR*, albeit aggravated in the case of the right to water by the conspicuous absence of an explicit reference to the right in the *ICESCR*. The CESCR has thus appropriately read in the right to water into the rights that are explicitly guaranteed in the *ICESCR*.

A close examination of the legal basis of the human right to water in international environmental law norms and international water law, read in conjunction with the provisions of the *ICESCR*, suggests that the right has been a longstanding embodiment in the provisions of the various treaties. That is to say — to borrow the terms of intellectual property law — the human right to water is more a discovery than an invention. It was a latent entitlement that has been waiting to be uncovered. As the analysis of the approach of *General Comment No 15* revealed, the human right to water has been an unnamed sibling of those entitlements that have been latent in the provisions on the right to an adequate standard of living in art 11 of the *ICESCR*. This has been explicated by the CESCR's purposive reading of the provision in *General Comment 15*. The propriety of this approach has been affirmed by precedent and subsequent states' acquiescence in their dialogue with the CESCR in the context of state reporting procedure, as well as through inter-state multilateral soft laws, not least in the regime of environmental law. The provision on the 'vital human needs' provision under art 10 of the *Watercourses Convention* affirms that states have indeed been willing to recognise the human right to water, a stance that has been reiterated in the General Assembly's 2010 declaration on the human right to water.

What is more, academic debate needs to move beyond the prevailing controversy surrounding the existence or absence of the human right to water. The right to water has existed since the adoption of the *ICESCR* over half a century ago. It is incumbent upon states, therefore, to translate the right into reality. Effort must now shift to analysis of the normative content of the human right to water, its implications for states' duties and the particularities associated with its domestic implementation and enjoyment.

In terms of its normative status, as affirmed in *General Comment No 15* of the CESCR, the human right to water is a legal entitlement properly so called, a freestanding right. It is not — as usually portrayed — merely a derivative right that should be protected only because of its utility as a precondition or element of related rights such as the right to health and an adequate standard of living.