# HOLY WATER AND HUMAN RIGHTS: INDIGENOUS PEOPLES' RELIGIOUS-RIGHTS CLAIMS TO WATER RESOURCES

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*Water, perhaps more than any other natural resource, has profound religious meaning: in ceremonial uses, as a spiritual symbol, and as an object of worship. The scarcity of legal scholarship regarding the nexus between religious rights and water law is therefore curious. This paper examines that nexus and its implications in the context of indigenous peoples and international law. The international human right to water has developed as an implicit right necessary to securing jurisprudentially underdeveloped positive rights explicitly provided for under international human rights covenants, such as the right to a standard of living, but can also be built upon the foundation of broadly accepted, jurisprudentially mature civil rights, like the freedom of religion. Grounding the human right to water on such a foundation has important implications for indigenous peoples' religious-rights-based claims to water resources. The stability of such claims depends upon effective frameworks within which international tribunals can adjudicate such claims. Ultimately, this Article evaluates the development of the international human right to water, discusses the nexus of that right with religious rights in the context of indigenous peoples' water-resource claims, and proposes frameworks for evaluating those claims. The formulation and interpretation of water law requires greater consideration of the cultural meaning of water to promote cooperation within the watershed and to protect natural and cultural resources.*

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## INTRODUCTION

Water, as a sacred symbol or ceremonial source, is as universal as faith itself. Nevertheless, the spiritual character of water is largely ignored in the development, interpretation, and analysis of water law. The spiritual character of water is an inconvenient coreligionist with the objective analysis of the economics of water supply and demand and the science involved in water quality protection. Furthermore, the spiritual character of water poses a miasma of legal complications.

The legal challenges associated with the relationship between water and worship are particularly complex for indigenous communities, in part because of the spiritual connection many indigenous communities have with their traditional lands and rivers. This unique relationship between faith and geography blends complex questions of the scope and meaning of the right to life with similar questions of property rights, religious rights, and sovereignty rights.

This Article examines the religious right to water in the context of indigenous peoples under international law. Part I discusses the unique position of indigenous peoples with respect to religious claims to water. Part II evaluates the human right to water and the potential advantages of a religious-rights-based approach to the human right to water for indigenous communities. Part III addresses the implications of indigenous religious-rights-based claims to water. Part IV proposes frameworks for adjudicating indigenous religious-rights claims to water.

## I. INDIGENOUS PEOPLES AND RELIGIOUS-RIGHTS-BASED CLAIMS TO WATER RESOURCES

There are four interrelated reasons that the relationship between water and worship, with regard to indigenous communities, is particularly troublesome from a legal perspective. First, the law regarding indigenous communities has developed uniquely with respect to natural resources. This is because efforts to preserve cultural identity, including spiritual beliefs and practices, are often tied to traditionally occupied lands and natural resources. In 2001, the Inter-American Court for Human Rights (IACHR) held that the American Convention on Human Rights includes the right of indigenous peoples to protect their traditional natural resources. For example, the IACHR held that Nicaragua violated the rights of the Awas Tingni people by granting a timber concession to a logging company within the tribe's traditional area without the tribe's consent.[1] Similarly, in 2001, the African

1. Claudio Grossman & S. James Anaya, The Case of Awas Tingni v. Nicaragua*: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L. & COMP. L. 1, 1–2 (2002); *see also* Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser C) No. 79, ¶ 104(j) (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf. (explaining that the Inter-American Commission concluded that Nicaragua "has not demarcated the communal lands of the Awas Tingni Community . . . nor has it taken effective measures to ensure the property rights of the Community on its lands").

Commission on Human and Peoples' Rights found that the contamination of the Ogoni people's water supply by petroleum production operations in the Niger River delta violated the community's rights to health and a healthy environment.[2]

Second, indigenous communities have often made ceremonial or spiritual uses of water that precede all other known uses, thereby combining religious rights with claims of prior appropriation rights and questions of "reasonable and beneficial use" of water resources. Prior appropriation and reasonable and beneficial use are common legal doctrines for determining water rights in arid regions, especially in the western United States.[3] Essentially, the first person to make use of water resources has a superior claim to all other subsequent uses of water from that source, so long as the use is "reasonable and beneficial." Indigenous communities' historical use of water could support a "prior appropriation" claim superior in priority to all other water users, which would limit or preclude water-resource development if the indigenous community's religious uses of water (including in-stream uses) constitute reasonable and beneficial use of limited water resources.

The third reason that the spiritual character of water is troublesome from a legal perspective is related to traditional knowledge and ecological conservation ethics, frequently embodied in indigenous religious practices, which are often essential to effective resource management and conservation in the watershed. Moreover, indigenous peoples' religious practices often play an important role in preserving the local ecology.[4] Lawmakers and jurists must take special care, therefore, not to assume that religious claims made by indigenous peoples to water resources are solely cultural or spiritual concerns, but instead recognize that religious claims to water and religious water uses potentially represent knowledge and practice essential for sustainable resource management.

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2. Fons Coomans, *The Ogoni Case Before the African Commission on Human and Peoples' Rights*, 52 INT'L. & COMP. L.Q. 749, 754–55 (2003); *see generally African Commission on Human and Peoples' Rights Decision*, CTR. FOR ECON. AND SOC. RIGHTS (2002), http://cesr.org/downloads/AfricanCommissionDecision.pdf. The African Commission on Human and Peoples' Rights held in the Ogoni case that environmental contamination resulting from the Nigerian state petroleum company, in a joint venture with Shell Petroleum Development Corporation, violated rights guaranteed under the African Charter on Human Rights and Peoples' Rights, including the right to health, property, and a satisfactory environment. *Id.*

3. Frank J. Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 WYO. L.J. 1, 1 (1957). "Prior appropriation" essentially is the legal doctrine, widely used in the western United States, establishing water rights through a "first in time, first in right" priority system. *Id.* "Reasonable and beneficial use" is the general requirement that water appropriations not result in waste. *Id.* at 6–7.

4. Cathleen Flanagan & Melinda Laituri, *Local Cultural Knowledge and Water Resource Management: The Wind River Indian Reservation*, 33 ENVTL. MGMT. 262, 269 (2004).

Indeed, water is perhaps the resource most vulnerable to the tragedy of the commons.[5] But indigenous communities have developed solutions to the tragedy of the commons, which are implemented and enforced by religious teachings and norms. For example, certain indigenous groups in Indonesia manage crop irrigation and pest management through "water temples," where priests assign complementary roles of water diversion priority and pest control over the watershed, while village delegates meet at the temple to receive assignments and develop a sense of community with other users on the watershed. This ceremony, along with the reciprocal nature of watershed responsibilities, helps avoid the tragedy of the commons.[6] Indigenous communities make recourse to religious arguments not only to preserve their culture and access to adequate water supplies, but also to legitimize and promote effective resource-management tools developed and adapted by these communities as part of their religious worship.

Fourth, unlike many of the world's major religions, indigenous religions often center their spirituality within the context of the natural world and on particular geographic features, including water bodies.[7] Some such religious practices have become widespread in certain river basins (for example, the sacred nature of the Ganges River in the Hindu faith); whereas other river basins of equal economic and ecologic significance are sacred to only a small minority of communities within the watershed (for example, the Amazon River to the indigenous tribes within that watershed).[8] Religious water use is thus a delicate matter of political economy in that indigenous communities with religious beliefs shared or valued by the majority of society are able to gain greater traction in religion-based resource claims, while indigenous communities with marginalized religious beliefs may struggle to assert such claims where the mainstream culture does not share the same place-centric form of worship or the same reverence for water or a particular watercourse. Such marginalization of minority groups—both ethnic and religious—implicates concerns for fundamental human rights of religion and, perhaps, the complicated right to water.

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5. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243 (1968) (describing the dilemma of common pool resources, like rivers or grazing land, being degraded by individuals acting in independent and rational self-interest).

6. J. Stephen Lansing, *Balinese "Water Temples" and the Management of Irrigation*, 89 AM. ANTHROPOLOGIST 326, 329–30 (1987).

7. GREGORY CAJETE, LOOK TO THE MOUNTAIN: AN ECOLOGY OF INDIGENOUS EDUCATION 42 (1994), *available at* http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED375993.

8. B. Gopal, *Holy Ganga and the Mighty Amazon*, 16 AMAZONIANA 337, 338 (2001); *see also* Peter Gow, *River People: Shamanism and History in Western Amazonia*, *in* SHAMANISM, HISTORY AND THE STATE 90, 104 (Nicholas Thomas & Carline Humphrey eds., 1994) (illustrating that minority indigenous groups practicing ayahuasca shamanism in the Amazon depend on the river for ceremonial purposes, whereas Catholic majorities have no particular religious connection with the Amazon itself).

## II. THE HUMAN RIGHT TO WATER AND INDIGENOUS RELIGIOUS CLAIMS TO WATER

Because of the relationship between indigenous communities and their native lands and resources, as well as the unique development of international law relating to indigenous peoples, "indigenous peoples are a strong starting point for considering and understanding the human right to water and the possible implications that derive from such a right."[9] Indigenous peoples' right to water is a particularly strong starting point in the international context. Indeed, indigenous communities are often constrained with respect to water by their relationship with national governments.[10] Indigenous communities may be better served to seek independent review by asserting water-rights claims at the international level.

However, the potential efficacy of such arguments largely depends on the standing of indigenous communities in international tribunals; the enforceability and efficacy of international law; the existence of an international right to water; and the standing of indigenous communities in international courts. Recent cases brought by indigenous groups before international tribunals (such as those of the Ogoni people and Awas Tingni, discussed above), as well as the increasing influence of the World Bank Inspection Panel (which allows individuals and groups to challenge government actions funded by the World Bank, like dam building and irrigation projects, under the laws of the funded country), indicate that alternatives exist for indigenous communities to seek redress for water-resource damages.[11]

### *A. Obstacles to Indigenous Communities' Redress to International Courts*

Several obstacles confront indigenous communities seeking redress for burdens on water-related religious practices under international law. First, Western liberal political philosophy takes an "individualistic bias toward human rights conceptions . . . which impedes the recognition of collective or group rights."[12] There is, however, an increasing recognition in international legal discourse of collectively held human rights.[13]

Second, the doctrines of sovereignty and territorial integrity hinder the ability of international legal institutions to influence the internal affairs of states.[14] Nevertheless, such doctrinal hindrances to international legal interventions have occasionally given way to

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9. Leonard Hammer, *Indigenous Peoples as a Catalyst for Applying the Human Right to Water*, 10 INT'L J. ON MINORITY & GRP. RIGHTS 131, 142 (2003).

10. William Blatt, *Holy River and Magic Mountain: Public Lands Management and the Rediscovery of the "Sacred in Nature"*, 39 LAW & SOC'Y REV. 681, 682–85 (2005).

11. KOEN DE FEYTER, HUMAN RIGHTS: SOCIAL JUSTICE IN THE AGE OF THE MARKET 147–48 (2005); *see also* Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553, 570–71 (1994).

12. S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 13 HUM. RTS. Q. 403, 409 (1991).

13. *Id.* at 410.

14. *Id.*

fundamental human rights considerations, as in the case of the atrocities of World War II, as well as the genocides of Rwanda and the former Yugoslavia.

Third, international law is regularly criticized for lacking strong enforcement mechanisms. While there is some credence to these criticisms, and while there are legal justifications for avoidance or delays in compliance, states who voluntarily submit themselves to the jurisdiction of international tribunals typically comply with the decisions of those tribunals.[15] Furthermore, there is growing support in enforceable international treaties and evidence of enforcement in case law for "the idea that indigenous peoples maintain some form of consultative status over their natural resources."[16]

A fourth obstacle to indigenous peoples availing themselves of international law claims for water resources is that international law typically has been applied only with respect to claims asserted by organized states.[17] The effect of this rule has been that in international law, "indigenous peoples are still essentially invisible or, if noticed, treated legally, along with the flora and fauna of the land concerned."[18] Few indigenous communities, therefore, will have the requisite standing before international tribunals to bring a religious-rights-based claim to water resources under international law. This procedural and jurisdictional obstacle is perhaps the most daunting for indigenous communities seeking redress in an international forum. However, it need not be an insurmountable obstacle.

The International Court of Justice (ICJ) has both the discretion and the obligation to take the rights of indigenous people into consideration in any case. While the parties to an international dispute before the ICJ determine "jurisdiction," the law determines "competence." Where the law at issue raises questions as to the rights of indigenous people, it is within the purview of the ICJ to adjudicate those rights.[19] "States that conclude special agreements plainly prefer a compromise that does not allow third parties to challenge them. Precisely because there are limited rights of intervention in the procedures of the [ICJ], the [ICJ] must examine the premises that the parties consciously or unconsciously postulate for their compatibility with general international law."[20]

Furthermore, the optional protocols of the United Nations (UN) human rights covenants allow for claims to be brought by non-state actors for violations of human

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15. Oscar Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT. L. 1, 4–5 (1960).

16. Hammer, *supra* note 9, at 146–47; *see, e.g.*, U.N. Human Rights Committee, Lubicon Lake Bank v. Canada, Comm. No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (May 10, 1990), *available at* http://www.unhcr.org/refworld/docid/4721c5b42.html; U.N. Human Rights Committee, Lansman v. Finland, Comm. No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (Aug. 28, 1995).

17. W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 THE AM. J. INT'L. L. 350, 351 (1995).

18. *Id.* at 354.

19. *Id.* at 360.

20. *Id.* at 359.

rights.[21] The First Optional Protocol for the UN Convention on Civil and Political Rights, which became effective in 1976, establishes an individual complaint mechanism for human rights violations.[22] The Optional Protocol for the UN Convention on Economic, Social, and Cultural Rights provides for a similar complaint mechanism for non-state actors, but it has not yet entered into force.[23]

Alternatively, the international community could seek reform of the international rules of standing in the ICJ. There are international tribunals that do allow claims from individuals, such as the European Court for Human Rights.[24] The ICJ could adopt a similar policy, or even allow for amicus briefs from indigenous peoples in international water disputes. For example, the IACHR has heard cases in which indigenous communities have been represented directly before the court (such as the Awas Tingni case, *supra*).[25] Indeed, because of the growing body of jurisprudence in the IACHR, a "discrete body of international human rights law upholding the collective rights of indigenous peoples has emerged and is rapidly developing."[26]

Furthermore, in at least some cases, developments in international law are influencing domestic legal decisions. For example, on January 27, 2011, after eight years of litigation, the Kalahari Bushmen of Botswana prevailed in securing the right to access groundwater on their traditional lands located within a state nature reserve.[27] The decision in that case cites UN human rights instruments in interpreting domestic law relating to constitutional rights of indigenous peoples to access water on their ancestral lands.[28] International law thus may be an interpretive tool or influence on domestic constitutional obligations and may ultimately support the right of indigenous peoples to access water resources on their traditionally owned or occupied lands.

Ultimately, the successful outcomes of claims like the Awas Tingni's before the Inter-American Court of Human Rights and the Ogoni people's before the African Commission on Human and Peoples' Rights demonstrate the potential for international law to provide redress for indigenous peoples' claims to water resources.

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21. *See generally* JAVAID REHMAN, INTERNATIONAL HUMAN RIGHTS LAW (2d ed. 2010) (outlining the various optional protocols of the United Nations human rights covenants).

22. *Id.* at 121–39.

23. *Id.* at 141–43.

24. *See, e.g.*, Steel and Morris v. U.K., App. No. 68416/01, 41 Eur. H.R. Rep. 22 (2005).

25. *See* Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser C) No. 79, ¶ 104(j) (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

26. S. James Anaya & Robert A. Williams, Jr., *Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 33 (2001).

27. *Mosetlhanyane et al. v. Att'y Gen.* [2011] B.L.R. 1 at 25–27 (Jan. 27, 2011), *available at* http://www.escr-net.org/usr_doc/CKGR_judgment.pdf.

28. *Id.* at 20–24.

### *B. The Existence of an International Human Right to Water*

As recently as July 28, 2010, the UN General Assembly adopted a resolution declaring that the "right to safe and clean drinking water . . . [is] a human right that is essential for the full enjoyment of life and all human rights" (Resolution).[29] This Resolution marks a milestone in the development of an international human right to water.

However, this Resolution does not answer the questions at the heart of the debate regarding the human right to water: Must water be provided free of charge, and if so, by whom, and who covers the costs? How much water, and what quality of water, is required under such a right? Against whom is the right enforceable? Does such a right create rights in nations *vis a vis* other nations (or tribes)?

As the questions went unresolved, many nations, including the United States and China, abstained from signing the Resolution, and some even expressed concerns that the Resolution would harm efforts to establish a more concrete and clearer human right to water.[30] Most importantly, the Resolution itself is not legally binding, and thus fails to resolve concerns of those seeking legal support for claims to water resources.

A well-developed and enforceable international human right to water remains elusive, yet increasingly critical. Water and sanitation are perhaps the most significant global public health concern, with 2.3 billion people living in "water stress," (water quantity or quality prevents water supply from meeting demand during a period of time), 1 billion living without safe drinking water, and approximately 6,000 children under the age of five dying every day from water-related diseases.[31] Development of a broadly accepted and enforceable human right to water is not merely a practice in interpretive expansion of rights, but an essential component of expanding critical water services to underserved communities, thereby improving health, economic development, educational opportunities, and political liberties.[32]

#### *1. The Human Right to Water Under United Nations Declarations*

Professor Stephen McCaffrey wrote the pioneering work on the international human right to water, noting that UN human rights instruments generally do not expressly

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29. The Human Right to Water and Sanitation, G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (Aug. 3 2010).

30. John Sammis, *Explanation of Vote by John F. Sammis, U.S. Deputy Representative to the Economic and Social Council, on Resolution A/64/L.63/Rev.1, the Human Right to Water*, U.S. MISSION TO THE U.N. (July 28, 2010), http://usun.state.gov/briefing/statements/2010/145279.htm.

31. Malgosia Fitzmaurice, *The Human Right to Water*, 18 FORDHAM ENVTL. L. REV. 537, 539 (2007); *see also Water Scarcity*, INTERNATIONAL DECADE FOR ACTION, http://www.un.org/waterforlifedecade/scarcity.shtml (last visited July 25, 2011) (discussing the UN definition for "water stress").

32. Anna F.S. Russell, *International Organizations and Human Rights: Realizing, Resisting or Repackaging the Right to Water*, 9 J. HUM. RTS. 1, 3–4 (2010).

mention water, and thus an international water right must be inferred.[33] For example, Article 25 of the UN's Universal Declaration of Human Rights (HR Declaration) provides, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family."[34] This right arguably infers a right to access water, without which there is no standard of living at all.[35] However, the HR Declaration is binding only to the extent it is part of customary international law and guides interpretation of other UN documents.[36]

To the extent the HR Declaration is binding, it is likely binding only for "liberty rights" (i.e., those natural rights with which governments will not legally interfere without due process, such as freedom of speech or equal protection), and it does not extend to the so-called "welfare rights" (i.e., rights to goods or services which governments must secure or extend, such as a right to an education or to health care).[37] As such, to the extent that a right to water is framed as a liberty right under the HR Declaration, such a right would likely be considered binding upon states. Indeed, on September 30, 2010, the UN Human Rights Council (UNHRC) said that the right to water was "inextricably related to . . . the right to life and human dignity."[38] However, some commentators suggest that any water right inferred from the HR Declaration would likely be considered a non-guaranteed "welfare right."[39] The rights to life and human dignity can just as easily be categorized as liberty rights. While the September 30, 2010 UNHRC Declaration indicates a potential move toward an enforceable welfare right to water, the relatively recent development of welfare rights and their enforceability, particularly in relation to the requirement for only "progressive realization" of such rights, makes legal arguments based on those rights underdeveloped and weaker as compared to liberty-rights claims.

Article 25 of the UN Declaration on the Rights of Indigenous Peoples (IP Declaration) could also provide the basis for a "liberty" or "welfare" right to water. The IP Declaration provides that indigenous peoples "have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, [and] waters."[40] These provisions seem to provide the strongest basis for indigenous claims to water, and constitute a positive step in the direction of acknowledging the spiritual relationship these communities may have with their natural

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33. Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1, 7 (1992).

34. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

35. McCaffrey, *supra* note 33, at 7–8.

36. *Id.* at 8.

37. *Id.*

38. Human Rights and Access to Safe Drinking Water and Sanitation, G.A. Res. 15/9, U.N. Doc. A/HRC/RES/15/9 (Sept. 30, 2010).

39. *Id.*

40. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, at 10, U.N. Doc. A/RES61/295 (Sept. 13, 2007).

resources. Furthermore, the language is framed in terms of property rights, which are liberty rights with which governments cannot interfere. other than through the exercise of lawful eminent domain authority. Nevertheless, the IP Declaration is non-binding, and given its recent adoption, has little history of application in international tribunals. The IP Declaration remains important, as it will likely guide an international court's interpretation of other international law as applied to indigenous peoples.

*2. The Right to Water Under International Transboundary Watershed Law*

In his 1992 article on the human right to water, McCaffrey raised an important point as to whether "one country has a right to receive water of sufficient quality and quantity to meet the minimum needs of its population from a co-riparian state, assuming such water would be available but for the intervention of the co-riparian state."[41] McCaffrey's view is that such a duty exists because "human lives and even health should take precedence over economic development."[42] Furthermore, "[s]ince many countries lack the wherewithal to provide safe drinking water for their populations, it seems essential that the international community take a proactive approach to the prevention of foreseeable problems of this kind and to dealing with natural disasters such as droughts."[43]

Transboundary watershed law is largely based on two principles. First, co-riparian users are entitled to "reasonable and equitable utilization" of the international watershed.[44] Second, co-riparians must not cause significant harm to one another.[45] In 1997, the UN adopted the Convention on the Law of the Non-Navigational Uses of International Watercourses (Watercourses Convention), which currently has only sixteen signatories.[46] "As we move towards economic globalization, a water crisis in one area can have consequences that extend outside physical borders. Therefore, if the parent government does not have the ability to satisfy the rights of their citizens, other states must help."[47] This international obligation to help address water crises is embodied in the Watercourses Convention. The Watercourses Convention, with its emphasis on avoiding harm, ensuring reasonableness of utilization, and maintaining the primacy of human health concerns, could provide a basis for an international human right to water. Indeed, while the Watercourses Convention itself has

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41. McCaffrey, *supra* note 33, at 2.

42. *Id.* at 24.

43. *Id.* at 16.

44. Salman M.A. Salman, *The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law*, 23 INT'L J. WATER RES. DEV. 625, 628 (2007).

45. *Id.* at 633.

46. *Id.* at 632; *see generally* Gabriel Eckstein, *Development of International Water Law and the UN Watercourse Convention*, *in* HYDROPOLITICS IN THE DEVELOPING WORLD: A SOUTHERN AFRICAN PERSPECTIVE (Anthony Turton & Roland Henwood eds., 2003) (discussing the Watercourses Convention); *see also* United Nations: Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700, 700.

47. Amy Hardberger, *Whose Job Is It Anyway?: Governmental Obligations Created by the Human Right to Water*, 41 TEX. INT'L L.J. 533, 541 (2007).

not entered into effect (as it has not achieved the requisite number of signatory states), these individual principles of the Watercourses Convention have arguably reached the status of binding "customary international law,"[48] which is a "general and consistent practice of states followed by them from a sense of legal obligation to such a degree as to effectively bind states in general."[49]

However, indigenous communities could find reliance on transboundary watershed law troublesome in securing access to water resources. The Watercourses Convention is drafted to deal with co-riparian users acting as independent states. Indeed, McCaffrey's point on a human right to water based on transboundary water law is that such a right is held by states, not by individuals or communities.[50] While some indigenous communities may be able to assert themselves as states for purposes of transboundary water rights, the vast majority of indigenous communities lack the sovereignty and political influence to fully avail themselves of rights secured under transboundary water law and the Watercourses Convention.

Despite the difficulties associated with asserting a human right to water held by an indigenous community under the Watercourses Convention, "the human right to water can serve as an impetus for such groups to assert their interests and participate in the decisions that will affect their rights and influence their future."[51] Securing the right to water could secure the political influence and sovereignty necessary for these communities to avail themselves of the protections of the Watercourses Convention. Furthermore, as the three main principles of the Watercourses Convention—"equitable and reasonable utilization," "no significant harm," and communication/cooperation—move into the status of binding customary law, indigenous communities may increasingly rely on these principles, in particular the requirement that national governments consult with indigenous communities prior to any appropriation of those communities' traditionally owned or occupied lands or resources.

*3. The Right to Water Under United Nations Covenants*

United Nations declarations like the HR Declaration and IP Declaration are not the only international human rights instruments. Indeed, while these declarations are more aspirational in tone and effect, the UN has adopted human rights covenants that impose affirmative obligations on states with respect to human rights.

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48. Joseph Dellapenna, *International Law's Lessons for the Law of the Lakes*, 40 U. MICH. J.L. REFORM 747, 762–63 (2007); *but see* Aaron Schwabach, *The United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, Customary International Law, and the Interests of Developing Upper Riparians*, 33 TEX. INT'L L.J. 257, 278 (1998).

49. Jack Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1113 (1999) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102(2) (1987)).

50. McCaffrey, *supra* note 33, at 19–22.

51. Hammer, *supra* note 9, at 161.

Unlike the UN declarations described in Part II.B.1, *supra*, the UN's 1967 Covenant on Civil and Political Rights (CP Covenant) imposes an immediate obligation to ensure the rights it contains.[52] Article 6 of the CP Covenant provides that every person "has the inherent right to life." Life cannot be sustained without adequate water, and thus the CP Covenant arguably requires states to ensure access to adequate water to all people. However, many commentators view this right to life as a liberty right, which does not impose an affirmative obligation on governments to provide adequate water.[53]

A separate covenant perhaps provides a clearer nexus with a right to water, but is problematic for other reasons. The UN adopted the Covenant on Economic, Social, and Cultural Rights (ESC Covenant) in 1967 along with the HR Declaration, both considered part of the International Bill of Rights.[54] Article 11 of the ESC Covenant recognizes a right to "an adequate standard of living," which implies a right to water (at least a liberty right). The ESC Covenant, however, requires only that states "take steps . . . to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the [ESC Covenant]," and thus is practically not binding on states.[55]

A right to water was recognized in 2002, under General Comment 15 to the ESC Covenant.[56] General Comment 15 infers the right to water from other rights under the ESC Covenant, finding that the right to water is a "prerequisite for the realization of other human rights":

> [The right to water] clearly falls within the category of guarantees essential for securing an adequate standard of living . . . . The right to water is also inextricably related to the right to the highest attainable standard of health and the rights to adequate housing and adequate food. The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.[57]

Nevertheless, General Comment 15 alone likely does not support an international legal claim to water. General Comment 15 does not constitute a legally binding interpretation of the ESC Covenant.[58] Even if General Comment 15 enshrined a human

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52. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200(A) (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52 (Dec. 16, 1966).

53. *Id.* at art. 6.

54. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

55. *Id.* at art. 2(1).

56. U.N. Econ. & Soc. Council, Subcomm. on the Promotion and Prot. of Human Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: General Comment No. 15*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter *Comment 15*].

57. *Id.* at ¶¶ 1, 3.

58. Erik. B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 ECOLOGY L. Q. 957, 972 (2004).

right to water in the ESC Covenant, "it would be largely of symbolic value."[59] Additionally, the human right to water, as contemplated by General Comment 15, "seems to adopt an anthropocentric model, whereby the environment exists to serve the basic needs of human beings."[60] This "anthropocentric model" may be inconsistent with the right to water as contemplated by some indigenous communities, who may view the river as a living entity, even a divine entity, deserving of protection and consideration equal to or greater than human rights.[61]

Additionally, the ESC Covenant is a weak foundation upon which to base the human right to water, as compared to the CP Covenant. The CP Covenant contains a stronger statement with respect to state obligations, and includes an adjudicative process, as well as a binding Optional Protocol supporting individual non-state actor claims for violations of human rights.[62] The ESC Covenant is ambiguous as to state obligations, lacks adjudicative processes, and includes only a non-binding Optional Protocol for non-state actor claims, making it "normatively and jurisprudentially underdeveloped compared to the [CP Covenant]."[63]

### *C. An Independent Human Right to Water*

The human right to water could arise as an independent right if it constitutes binding "customary international law."[64] There is increasing support for the existence of that independent right. For example, the Dublin Statement, a non-binding UN document, declares that it is "vital to recognize the basic right of all human beings to have access to clean water and sanitation at an affordable price."[65] However, few countries recognize an

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59. Stephen McCaffrey, *The Human Right to Water*, *in* FRESH WATER AND INTERNATIONAL ECONOMIC LAW 108 (Edith Brown Weiss ed., 2005).

60. Hammer, *supra* note 9, at 134.

61. *See generally Indigenous Peoples' Water Declaration*, GLOBAL FAMILY FOR LOVE & PEACE, http://www.gflp.org/Environment/Indigenous%20Peoples%27%20Kyoto%20Water%20Declaration.html (last visited Sept. 4, 2011) (the Indigenous Peoples' Kyoto Water Declaration was drafted by indigenous participants at the Third World Water Forum in Kyoto, Japan in 2003).

62. International Covenant on Civil and Political Rights, *supra* note 52, at art. 2(1); *see also* Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

63. SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 163 (2d ed. 2004); *see also* Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10, 2008).

64. Dean Marshall & Janet Neuman, *Seeking a Shared Understanding of the Human Right to Water: Collaborative Use Agreement in the Umatilla and Walla Walla Basins of the Pacific Northwest*, 47 WILLAMETTE L. REV. 361, 371 (2011).

65. U.N. Int'l Conference on Water & the Env't, Dublin Statement on Water and Sustainable Dev., Princ. No. 4, U.N. Doc. A/CONF.151/PC/112 (Mar. 12, 1992) [hereinafter Dublin Statement].

independent right to water, and the right to water has likely not achieved the status of customary international law.[66]

Furthermore, the Dublin Statement, and even General Comment 15, both discuss water as a "good." General Comment 15 refers to water as a "public good."[67] The Dublin Statement provides that water has "economic value in all its competing uses and should be recognized as an economic good."[68] As such, international law likely does not view privatization as a *per se* violation of the human right to water.[69] These documents arguably undercut claims to a human right to water on any basis other than liberty rights by characterizing water as a commodity and private property.

However, Comment 15 does urge states to pay particular attention to indigenous peoples.[70] Furthermore, Comment 15 does not characterize water solely as an economic commodity, but also as a social and cultural good, which strengthens the legal basis for indigenous communities' claims to a culturally based right to water grounded in religious practice or belief.[71]

### *D. The Human Right to Water and Religious Rights*

Based on the foregoing, to formulate the strongest argument under international law supporting a human right to water, a claimant before an international tribunal should base its claim on rights contained in the CP Covenant. The argument for a human right to water should not be framed as a welfare right, as these are not widely viewed as binding, and lack strong adjudicative mechanisms or means for individual non-state-actor claims. Even if they are binding, they must be implemented only progressively and in accordance with available resources. Instead, the human right to water should be framed as a liberty right. Such rights under the CP Covenant are immediately binding upon states and have clear adjudicative processes.

An example of the success of such a liberty-rights approach to the human right to water can be found in the *Mosetlhanyane* case in Botswana, where Kalahari Bushmen secured the right to access wells traditionally used for drinking water based on their constitutionally protected right to be free from degrading or inhumane treatment.[72] Even though the national constitution of Botswana did not provide for an express welfare right to water, the Kalahari Bushmen secured a right to water based on the connection between access to water resources and an express liberty right embodied in the constitution. The court in Botswana

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66. Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates*, 4 NW. U. J. INT'L HUM. RTS. 331, 346–49 (2005).

67. *Comment 15*, *supra* note 56, at ¶ 1.

68. Dublin Statement, *supra* note 65.

69. McCaffrey, *supra* note 59, at 106.

70. *Comment* 15, *supra* note 56, at ¶ 16(d); *see also* Hammer, *supra* note 9, at 143.

71. Hammer, *supra* note 9, at 149; *see also Comment 15*, *supra* note 56, at 11.

72. *Mosetlhanyane et al. v. Att'y Gen.* [2011] B.L.R. 1 at 19-21 (Jan. 27, 2011), *available at* http://www.escr-net.org/usr_doc/CKGR_judgment.pdf.

cited General Comment 15 and the UN General Assembly's 2010 resolution acknowledging the right to water, but ultimately found a legal ground for the right in a liberty right with a corollary to Article 7 of the CP Covenant, guaranteeing rights against "inhuman or degrading treatment or punishment."[73] This portends, perhaps, the role of General Comment 15 in future cases involving the human right to water—an interpretative guide to anchoring the right to water in jurisprudentially mature liberty rights. Indeed, even though it interprets the ESC Covenant, General Comment 15 states that the human right to water "contains both freedoms and entitlements," and invokes liberty rights such as non-discrimination and the right to life in support of its finding of an international human right to water.[74]

Like the right to be free from inhumane or degrading treatment, freedom of religion is a widely acknowledged and maturely adjudicated human right. The right to freely exercise one's religion is a liberty right within the CP Covenant, and is thus immediately binding on states, and has a well-established adjudicative process. Article 18 of the CP Covenant provides that everyone "shall have the right to freedom of thought, conscience and religion. This right shall include freedom to . . . either individually or in community with others . . . manifest his religion or belief in worship, observance, practice and teaching."[75] The CP Covenant further provides that this right to religious freedom may be limited only as "prescribed by law and [as] necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[76]

Any governmental action relating to water that burdens an individual's or a community's religious practice could constitute a violation of Article 18 of the CP Covenant, which is binding on states and includes an adjudicative process. Importantly, correlative rights to religious freedom can be found under Article 12 of the American Convention on Human Rights and Article 9 of the European Convention on Human Rights, both of which would permit indigenous communities to represent themselves directly before the international tribunal.[77] Government actions to ratify or accede to these agreements burden an individual's or community's water-related religious practice, arguably giving rise to a human rights claim. Such actions could include discharge or abstraction permits, dam construction, international water treaties, and the establishment of water quality regulations.

When interpreted under the IP Declaration, religious rights under the CP Covenant provide a strong legal basis for indigenous communities to assert a religious-rights-based claim to water resources. The IP Declaration implicitly connects the religious rights of the CP Covenant to indigenous communities' rights to maintain and strengthen their "distinctive

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73. *See* International Covenant on Civil and Political Rights, *supra* note 52, at art. 7.

74. *Comment 15*, *supra* note 56, at ¶¶ 10, 13–16.

75. International Covenant on Civil and Political Rights, *supra* note 52, at art. 18(1).

76. *Id.* at art. 18(3).

77. Organization of American States, Basic Documents Pertaining to Human Rights in the Inter-American System, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.71, doc. 6, rev. 1 at 23 (1988); *see also* COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 1–19 (9th ed. 1974).

spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories and water."[78] Importantly, the IP Declaration signals the growing support for the standing of indigenous peoples before international tribunals and the legal support for human rights held collectively by indigenous communities.[79]

## III. THE IMPLICATIONS OF INDIGENOUS RELIGIOUS-RIGHTS-BASED CLAIMS TO WATER

Indigenous communities' religious-rights-based claims to water resources are not only a promising avenue for securing water rights. Such claims also carry positive and negative implications for cultural and ecological conservation, interpretation of existing water law, and resolution of water conflicts.

### *A. Religious Rights to Water and Traditional Ecological Knowledge*

Religious-rights-based claims to water provide a legal support to potentially beneficial indigenous resource-management methods. Indigenous communities may develop valuable "traditional ecological knowledge" (TEK), embodied in religious ceremonies and teachings that promote sustainable water management. TEK is a "body of knowledge, practice and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment."[80]

Failure to legally protect indigenous religious-based TEK could have adverse ecological, as well as cultural, impacts. There is an "inextricable link" between cultural and biological diversity, where the failure to protect one or both gives rise to "converging extinction crises."[81] A religious-based claim to indigenous water rights protects both cultural and biological diversity simultaneously, thus operating on both fronts of these crises.

Additionally, religious claims to water rights reinforce the legitimacy of indigenous religious-based TEK. For example, in the Katun River Basin of Siberia, the Altaians' religious beliefs prohibit the subjugation of the natural world. This belief was the basis for the Altaians' opposition to the construction of a dam on the Katun River, which holds particular religious significance for the Altaians.[82] Part of their strategy in successfully opposing the dam was informing scientists of their religious-based TEK, which included distinguishing fish species by physical characteristics, as well as their knowledge of the

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78. Declaration on the Rights of Indigenous Peoples, *supra* note 40, at art. 25.

79. Hammer, *supra* note 9, at 134.

80. FIKRET BERKES, SACRED ECOLOGY: TRADITIONAL ECOLOGICAL KNOWLEDGE AND RESOURCE MANAGEMENT 8 (1999).

81. Luisa Maffi, *Linguistic, Cultural, and Biological Diversity*, 29 ANN. REV. ANTHROPOLOGY 599, 601 (2005).

82. Kheryn Klubnikin et al., *The Sacred and the Scientific: Traditional Ecological Knowledge in Siberian River Conservation*, 10 ECOLOGICAL APPLICATIONS 1296, 1299–1300 (2005).

medicinal properties of plants that would have been harmed by dam construction.[83] A religious-rights-based claim to water would provide legally cognizable claims to protect the type of TEK employed by the Altaians—TEK that successfully influenced water policy and informed scientific knowledge.

Nevertheless, in citing case studies like that of the Katun River, there is a danger of perpetuating the myth of the "ecologically noble savage."[84] But indigenous religious beliefs and practices can have detrimental ecological effects. For example, the religious motivation behind the construction of the iconic stone statues of Easter Island arguably contributed to the ecological catastrophe that deforested and largely depopulated the island.[85]

Further, resource-management decisions based on indigenous religions can be every bit the double-edged sword as any other approach to resource management. For example, certain indigenous Muslim communities have opposed the use of treated sewage effluent (or "reclaimed water") as ceremonially impure.[86] Similarly, the Navajo Nation sued the U.S. Forest Service for desecrating a sacred site by authorizing use of reclaimed water to supplement snow during low precipitation years at a ski resort on mountains owned by the federal government, leased to a ski resort developer, but considered sacred by the Navajo.[87] Arguably, the opposition from these communities would prevent pollution from effluent with elevated nutrient and bacteria levels, and the concomitant human health impacts of such pollution. However, the opposition also creates obstacles to water recycling, regarded by many as an essential component of water-resource conservation in arid regions.[88]

### *B. Indigenous Religious Claims to Water and Interpretation of Water Law*

In addition to preserving valuable TEK, rights to water based on indigenous religious beliefs or practice legitimize water law that supports ecological preservation and sustainable water management. For example, the doctrine of beneficial use governs water appropriations in most of the western United States. The doctrine of beneficial use prohibits wasteful appropriation of water and provides that a water right is legally recognized only if

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83. *Id.* at 1300–03.

84. Kent H. Redford & Allyn M. Stearman, *Forest-Dwelling Native Amazonians and the Conservation of Biodiversity: Interests in Common or in Collision?*, 7 CONSERVATION BIOLOGY 248, 254 (1993).

85. JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED 79–119 (2005).

86. Shaukat Farooq & Zafar I. Asari, *Wastewater Reuse in Muslim Countries: An Islamic Perspective*, 7 ENVTL. MGMT. 119, 119 (1983).

87. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1062 (9th Cir. 2008).

88. *Islam and Water Management: Overview and Principles*, *in* WATER MANAGEMENT IN ISLAM 1, 7–8 (Naser I. Faruqui, Asit K. Biswas, & Murad J. Bino eds., 2001) (noting that many Muslim clerics came out in support of the use of reclaimed water under certain circumstances in a special fatwa in 1978, influenced in part by a concern for water scarcity in Muslim nations).

the water is put to a beneficial use, with non-use resulting in forfeiture of the water right.[89] Often, state water law establishes a narrow definition of beneficial use that does not recognize cultural uses of water, or even in-stream uses of water, such as stream-flow preservation.

To preserve religious water uses and water management options, including in-stream uses, the Wind River Reservation in Wyoming, encompassing the Shoshone and Arapahoe people, developed the Wind River Water Code. The Wind River Water Code provides that religious uses of water, including in-stream uses, fall within the definition of beneficial use, thereby legally protecting water rights based on ceremonial and ecological conservation uses as beneficial uses.[90] Legal arguments tying the human right to water to religious rights lend legitimacy to the Wind River approach and would support in-stream and religious uses of water as valid under the beneficial use doctrine. A right to water based on religious rights could foreclose legal challenges that require users to withdraw water from the stream or lose water rights under the common, and often wasteful, use-it-or-lose-it principle.[91]

However, assertion of religious-rights-based claims to water resources raises several potential problems. First, the religious-rights argument to ownership or control of water resources could be made as a pretext for securing an inequitable or unsustainable allocation of water. It is not difficult to imagine an irrigation district, drinking-water provider, industry, or even an indigenous community forming the "United Church of Water" solely in an effort to bolster purely secular claims to water resources.

Second, religious arguments can be asserted in a manner that could uniquely, and perhaps unfairly or unwisely, privilege religious belief. For example, in *Employment Division v. Smith*, former Oregon state employees appealed to the U.S. Supreme Court, challenging the constitutionality of a state decision to deny them unemployment benefits after being fired due to testing positive for use of peyote, an illegal narcotic used by the plaintiffs for ceremonial purposes in connection with their indigenous religious beliefs.[92] In deciding against these claimants, the Court cited precedent that government can burden religious practice, because to accept the claimants' argument would be "in effect to permit every citizen to become a law unto himself."[93] A similar concern arises in the context of religious claims to water, whereby each individual could become "a law unto himself" if religious arguments were interpreted sufficiently broadly such that water rights based on religion interfered with legitimate and necessary water allocations.

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89. Stephen F. Williams, *The Requirement of Beneficial Use as a Cause of Waste in Water Resource Development*, 23 NAT. RESOURCE J. 7, 7 (1983).

90. Cathleen Flanagan & Melinda Laituri, *Local Cultural Knowledge and Water Resource Management: The Wind River Indian Reservation*, 33 ENVTL. MGMT. 262, 269 (2004).

91. R. Lambeth Townsend, *Cancellation of Water Rights in Texas: Use It or Lose It*, 17 ST. MARY'S L.J. 1217, 1228–29 (1986).

92. 494 U.S. 872, 872 (1990).

93. *Id.* at 885.

*1. Indigenous Religious Claims to Water and Water Conflict*

As a religion with desert roots, Islam is a rich source of spiritually derived water-conservation ethics. It is against Islamic law to hoard excess water—indeed, one category of sinners expressly identified in the Koran is a man who "possessed superfluous water on a way and . . . withheld it from the travelers."[94] The Koran warns against unfair and inequitable distribution of water.[95] Islamic law provides for prioritization of water uses: first, for human health; second, for domestic animals; and third, for irrigation.[96] Islamic law includes protection of water resources for ecological purposes.[97]

Islamic law relating to water management has been a powerful influence for peace in water disputes between indigenous peoples. For example, Islamic law prioritizes water uses as described above between Berber tribes in the Atlas Mountains and Bedouin tribes in the Negev Desert.[98] Islamic law also establishes inter-tribal stakeholder involvement through "shared vision" meetings on watershed management and guides dispute resolution between rival claimants to water, including "forgiveness rituals" for breaches of water law.[99] In these exercises, negotiations related to water disputes begin with participants sharing their views of what the future would be like if negotiations succeed and if negotiations fail, and then using these statements to guide negotiations going forward.[100] Also, as noted above, Islamic law recognizes the legitimacy of water use for ecological conservation and thus could support in-stream uses and stream-loss mitigation measures.

Nevertheless, adding religion into already complicated and contentious water disputes could petrify already rigid negotiating positions in water disputes. For example, water cannot be bought or sold under a common interpretation of Islamic law, and use of water must be available to all equally.[101] While such an interpretation supports measures to expand access to water resources, this interpretation could introduce more problems than solutions. For example, a riparian state or other community stakeholder in a basin could cite that interpretation as a reason to oppose privatization of water resources or refuse to acknowledge existing water rights as anathema to that interpretation of religious law. While privatization and saleable water rights are not *per se* solutions to all water-resource challenges, they both pose potential partial solutions that could effectively be removed from the negotiation table by an interpretation of religious law. It is not difficult to imagine other ways in which a narrow and rigid interpretation of religious law by one riparian community could impede cooperative development and protection of shared water resources.

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94. *Islam and Water Management: Overview and Principles*, *supra* note 88, at 2–3.
95. *Id.*
96. *Id.*
97. *Id.*
98. Aaron T. Wolf, *Indigenous Approaches to Water Conflict Negotiations and Implications for International Waters*, 5 INT'L NEGOTIATION 357, 366–67 (2000).
99. *Id.* at 368.
100. *Id.*
101. *Id.*

## IV. LEGAL FRAMEWORKS TO ADJUDICATE INDIGENOUS RELIGIOUS CLAIMS TO WATER

Given the potential benefits and risks associated with indigenous religious-based claims to water discussed above, courts must be cautious in evaluating such claims. Courts could employ several possible frameworks in evaluating claims to water resources based on religious practice or belief, including: (1) the "substantial burden" framework; (2) the "economic analysis" framework; and (3) the "customary law" framework.

### *A. The Substantial Burden Framework*

Courts in the United States rely on a four-part inquiry, "the substantial burden" test, to evaluate claims by religious practitioners that government action unlawfully burdens religious expression or practice: (1) Does the claim involve a sincere religious belief?; (2) Does the government action impose a substantial burden on the free exercise of religion?; (3) If there is a substantial burden, does the government have a compelling interest justifying the substantial burden?; and (4) If there is both a substantial burden and a compelling interest, has the government applied the means least restrictive of religion to achieve its compelling interest?[102]

The substantial burden test arose in cases where religious minorities—Seventh-Day Adventists and Amish—were denied government benefits conditioned upon compliance with requirements antithetical to their religious beliefs (working on their Sabbath Day, in the case of the Seventh-Day Adventists) or were penalized for not complying with government requirements deemed antithetical to their religious beliefs (enrolling children in school, in the case of the Amish).[103]

The Supreme Court, in *Employment Division v. Smith*, abandoned this test in upholding the denial of employment benefits to indigenous peoples because they were fired for testing positive for peyote; however, the U.S. Congress restored the four-part substantial burden test in the Religious Freedom Restoration Act.[104]

#### *1. Benefits of the Substantial Burden Framework*

Given the inherent complexity and subjectivity of religious-rights claims, the substantial burden framework is a fairly straightforward and reasonable approach to evaluating claims made by a religious community that government has unlawfully interfered with religious expression or practice. International tribunals could apply this same four-part test to evaluate claims by indigenous peoples that government action interfering with access to water or water quality violates their right to freedom of religion under the CP Covenant.

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102. Wisconsin v. Yoder, 406 U.S. 205, 214–19 (1972); Sherbert v. Verner, 374 U.S. 398, 403–07 (1963).

103. *See Sherbert*, 374 U.S. at 403–04; *see also Yoder*, 406 U.S. at 220–21.

104. 42 U.S.C. § 2000bb (1993); *see also* Employment Division v. Smith, 494 U.S. 872, 882–84 (1990).

The claims would be stronger in the context of international law than in the context of U.S. law for three reasons. First, the CP Covenant is worded more broadly than the U.S. Constitution's First Amendment. Whereas the First Amendment limits government authority only to laws "prohibiting" the free exercise of religion, Article 18 of the CP Covenant, provides that "[e]veryone shall have the right to freedom of . . . religion. This right shall include freedom to . . . manifest his religion or belief in worship, observance, practice and teaching."[105] It was the narrow wording of the First Amendment that led to the holding in *Smith*,[106] a problem more easily avoided under the CP Covenant, making the substantial burden test a natural fit. Regional human rights conventions typically track the broad language in the CP Covenant, and often allow for direct representation of indigenous groups before adjudicative bodies established under those conventions.[107]

Second, unlike the First Amendment, the CP Covenant expressly provides that religious rights may be limited only as "prescribed by law and [as] necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[108] The CP Covenant envisions instances where religious rights may be legally burdened by the state. The substantial burden framework is designed to address such instances. The substantial burden framework is a well-developed method for balancing the interests of the state against those of the individual or religious community. The framework developed organically out of the need for more nuance than that provided for in the wording of the First Amendment. The CP Covenant provides that nuance in expressly contemplating a balance of religious liberty and other public interests, and thus lends itself textually better to the substantial burden framework than the First Amendment.

A third reason the substantial burden framework could work well in the context of international human rights is that the IP Declaration, which would guide interpretation of the CP Covenant, draws an express legal connection between the guarantee of religious rights and indigenous peoples' traditional use of water, which is referred to in Article 25 of the IP Declaration as a "distinctive spiritual relationship" with traditional water uses.[109] Thus, unlike U.S. religious-rights jurisprudence, international law contemplates a nexus between religious rights and indigenous water uses, which facilitates translation of the substantial burden test to questions of water rights.

*2. Problems with the Substantial Burden Framework*

The substantial burden framework raises potential challenges. The test requires a court to determine if a burden is "substantial." Drawing lines between substantial and insubstantial burdens in religion is especially difficult in cases of minority religions, like those

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105. International Covenant on Civil and Political Rights, *supra* note 52, at art. 18(1).

106. 494 U.S. at 878–79.

107. *See* American Convention on Human Rights and European Convention on Human Rights, *supra* note 78.

108. International Covenant on Civil and Political Rights, *supra* note 52, at art. 18(3).

109. Declaration on the Rights of Indigenous Peoples, *supra* note 40, art. 25.

of many indigenous communities. As Justice Sandra Day O'Connor noted in her concurring opinion in *Employment Division v. Smith*, guarantees of religious freedom are most precious to minority religions, as those religions face a greater risk of being affected by laws of general applicability than members of mainstream religions, whose interests are more easily asserted through political processes.[110]

Courts may view faith through the lens of mainstream religions, and thus fail to grasp the importance many indigenous faiths give to water. Such was arguably the situation in the *Navajo Nation* case, where the Ninth Circuit upheld the government's approval of discharges of treated sewage effluent onto sacred Navajo land, holding that the discharge was not a substantial burden to the Navajo religious observers.[111] The court in *Navajo Nation* arguably failed to grasp the magnitude of the Navajo Nation's burden, arguing that there cannot be a substantial burden unless the state either denies benefits or criminalizes behavior based on religious beliefs. Indeed, the dissent in *Navajo Nation* notes: "I do not think that the majority would accept that the burden on a Christian's exercise of religion would be insubstantial if the government permitted only treated sewage effluent for use as baptismal water."[112] The dissent's statement in *Navajo Nation* touches upon the central challenge to indigenous communities basing claims to water resources on arguments that their rights to water are connected to religious practice. Judges are charged with protecting minority rights, but often fail to fully understand the interests those rights are intended to protect, because judges frequently view rights from the majority or "mainstream" perspective. This "cultural dissonance" represents perhaps the greatest obstacle to indigenous peoples' religious-rights-based claims to water resources.

Finally, judges applying the substantial burden framework would struggle with a fundamental question—the definition of "religion." The U.S. Supreme Court has struggled with defining "religion" under the First Amendment for over a century, and international tribunals are unlikely to find the task any simpler.[113] This definition is elusive even outside the context of indigenous communities. With indigenous religious communities, the challenge is all-the-more difficult, in part because faith and spirituality in these communities can be starkly different, and more "place-centric" than mainstream religious communities.[114] Additionally, mainstream religions have spread into many indigenous communities, but have not entirely displaced traditional beliefs or practice. The definition of "religion" for legal purposes is difficult when those claiming a religious right are not actually active members

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110. 494 U.S. at 902 (O'Connor, J., concurring).

111. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1090 (9th Cir. 2008).

112. *Id.* at 1097.

113. *See, e.g.*, Davis v. Beeson, 133 U.S. 333, 342 (1890) (defining "religion" as having "reference to one's view of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will"); *see also* United States v. Seeger, 380 U.S. 163, 165–66 (1965) (defining religion as "a given belief that is sincere and meaningful [that] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God").

114. *See* CAJETE, *supra* note 7, at 196.

and believers of their traditional faith, but seek to preserve the culture and ideals embodied in that spiritual tradition.

The CP Covenant takes a broad approach, with Article 18 including "thought, conscience and religion."[115] Even the United States, with its much more narrowly worded First Amendment guarantee of "free exercise" of religion, has taken a broader approach to "religion." For example, in cases involving conscientious objectors to military conscription, the U.S. Supreme Court has held that "conscientious beliefs not traditionally regarded as religious may fall within the protection of the religion clauses," and any interpretation of the First Amendment that provides less than identical protection for nonreligious opinion may actually be unconstitutional.[116]

However, broad interpretations beg the question of how to define religion at all—the question is no longer, "What is religion?" but "What is not religion?" And if anything and everything can be religion, then why would (or should) laws treat religious principles differently from any other category of principles (as is the case with the CP Convention and the First Amendment of the U.S. Constitution)?

Ultimately, international tribunals evaluating government actions under the CP Covenant have the advantage of evaluating the underlying right by balancing individual and community interests in freedom of religion against other issues of public welfare. The substantial burden framework provides well-developed criteria for balancing those interests, which are relevant in determining if an indigenous community's religious beliefs and practices related to water outweigh, in some instances and to some degree, broader societal interests in water-resource development or conservation. The substantial burden framework, however, does not resolve concerns for latent judicial biases or simple misunderstanding relative to indigenous religious beliefs, nor does it address the more complicated question of how to define religion for purposes of civil rights.

### *B. The Economic Analysis Framework*

As an alternative to the substantial burden framework, international tribunals could rely on a framework for evaluating government actions impacting religion proposed by U.S. appellate judges and legal scholars, Richard Posner and Michael McConnell, which applies economic analysis tools to questions of religious rights.[117]

Economic analysis can be an effective tool in these disputes for three reasons. First, guarantees of religious freedom are mainly concerned with limiting government power (i.e., liberty rights), and thus deal with regulation, an issue of focus for economists. Second, the

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115. International Covenant on Civil and Political Rights, *supra* note 52, at art. 18(1).

116. G. Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 812 (1978); s*ee also* Gillette v. United States, 401 U.S. 437, 445–47 (1971); Welsh v. United States, 398 U.S. 333, 342–43 (1970); *Seeger*, 380 U.S. at 180–83.

117. Richard Posner & Michael McConnell, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 1 (1989).

governmental neutrality required by a guarantee of religious freedom essentially proscribes state subsidies or taxes on religion, a question that begs for economic analysis. Third, religious institutions compete with one another and with secular institutions in myriad ways (for example, education, welfare, and even environmental protection and water rights). Competition, along with regulations, taxes, and subsidies, are essentially economic concerns.[118]

Posner and McConnell proposed in their 1989 article several baselines to determine whether government actions comply with guarantees of religious freedom, including: (1) State of Nature—the condition of religion without government, which could place minority religions in a disadvantaged position; (2) efficiency—using standard economic models to determine efficient taxes and subsidies, which could be used to justify favoring or disfavoring religions to promote a secular agenda (for example, subsidizing Altaians and taxing Easter Islanders to promote better water-resource management); and (3) neutrality—requiring the government to act neutrally between religions and between religion and non-religion, which Posner and McConnell argue is the preferred baseline.[119]

To avoid inappropriate influence, the government must obey three rules: (1) minimize effects on religious practice, with effects justified only in relation to "demonstrable and unavoidable public purposes unrelated to the effects on religion"; (2) treat religious institutions or religion in general differently from other institutions or ideologies "only when necessary to minimize the effect of government action on religious practice or to achieve a public purpose unrelated to religion"; and (3) avoid "effects (even secular effects) that follow from the adoption or rejection of a religious faith."[120]

*1. Benefits of the Economic Analysis Framework*

The economic analysis framework proposed by McConnell and Posner has several advantages in its application to religious claims to water resources. First, it places religion as a co-participant in the management of water resources, neither marginalized nor exalted as a "law unto itself," but as an organization or community treated neutrally by governmental actors.

Second, by according economic value to religious uses of water, the economic analysis framework provides a means whereby government can burden religious uses of water when the need is "demonstrable and unavoidable," but provide remuneration through the government's eminent domain power and obligations. Third, unlike the substantial burden framework, the economic analysis framework avoids issues that the judiciary is ill-equipped to address, such as the sincerity of the claimant or line-drawing between degrees of burdens on religious practice.

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118. *Id.* at 3–5.
119. *Id.* at 9–12.
120. *Id.*

Finally, because the economic analysis framework avoids questions of the extent of burden on religious practice, it also minimizes (though does not eliminate) the risk that judicial biases will leave minority religions, including indigenous faiths, unprotected. Courts are ill-equipped to make determinations on how burdensome is too burdensome when it comes to minority religions, and the economic analysis framework avoids that exercise altogether, unlike the substantial burden framework.

*2. Problems with the Economic Analysis Framework*

While the economic analysis framework provides several advantages over the substantial burden framework, it remains perhaps equally problematic. Posner and McConnell wrote an article addressing questions of both the free exercise of religion and the avoidance of establishing religion. These are not universal ends, particularly for sovereign indigenous groups, who may seek to secure their cultural preservation by the legal establishment of traditional religion, or by incorporation of religious principles into formal legal instruments (for example, the Wind River Water Code). In those cases where indigenous communities have a degree of sovereignty such that these legal avenues are available, prevention of formal "establishment" of religion, a stated goal of the religiously neutral economic analysis framework, could interfere with indigenous communities' efforts to protect cultural and ecological resources.

Also, Posner and McConnell assume that tribunals have the tools to establish a "neutral" baseline, without accounting for potentially innate biases, which could lead to judges viewing neutrality (or not) from the viewpoint of mainstream religions. While the economic analysis framework is likely less vulnerable than the substantial burden framework to cultural bias, as noted above, the risk cannot be eliminated. As the *Navajo Nation*'s dissent pointed out with its example of "sewage effluent for baptismal water," judges may fail to grasp religious beliefs and practices that are not readily comparable to Western religious practices. Judicial biases may creep into evaluations under the economic analysis framework where judges claim impacts to indigenous water supplies are justified as "demonstrable and unavoidable" because they fail to grasp the relationship between water and religion.

### *C. The Customary Law Framework*

Another potential framework for courts to consider would be to examine religious claims by indigenous peoples to water resources as a "customary law" interest in water, giving rise to a sort of property right. Customary law forms a part of the law of many countries, as it is inherited from Roman and British law. To constitute valid law, "custom" must have four elements: (1) ancient; (2) reasonable; (3) certain; and (4) uniformly observable.[121]

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121. Yvette Trahan, The Richtersveld Community and Others v. Alexkor Ltd.*: Declaration of a "Right in Land" Through a "Customary Law Interest" Sets Stage for Introduction of Aboriginal Title into South African Legal System*, 12 TUL. J. INT'L & COMP. L. 565, 569 (2004).

An example of this approach can be found in South African law. The indigenous people of the Richtersveld region of South Africa possessed their land for centuries, long before European colonization, and enjoyed exclusive beneficial occupation of that land under colonial rule, until their land was largely turned over to international corporations for diamond mining.[122] Under South Africa's 1994 Restitution of Land Rights Act (RLRA), which was intended to turn back discriminatory land deals made during the apartheid regime, indigenous communities could secure title to traditional lands by demonstrating exclusive beneficial occupation for at least ten years prior to annexation by the British Crown in 1847.[123] The Richtersveld community brought suit under the RLRA, alleging that its possession of traditional lands constituted exclusive beneficial occupation for over ten years. The Land Claims Court of South Africa denied the Richtersveld community's claim, which was appealed to the South African Supreme Court.[124]

In addition to its claim under the RLRA, the Richtersveld community asserted that it had a right to the land under its own indigenous law amounting to customary law interest.[125] The community's customary law interest claim was upheld by the South African Supreme Court, which held that the Richtersveld community was entitled to restitution of its "exclusive beneficial occupation and use" of traditional land.[126]

Canadian courts have similarly recognized customary law as a potential basis for aboriginal claims to title and rights to land use. To assert such rights, indigenous communities in Canada must demonstrate four things: that (1) their ancestors were members of an organized society; (2) the organized society occupied the specific territory over which the indigenous community asserts title or right; (3) the occupation was to the exclusion of other organized societies; and (4) the occupation preceded colonization.[127] Canadian law views customary law as establishing a spectrum of interests. At one end of the spectrum, customary law would not establish any interest in the land. In the middle of the spectrum, customary law may not support title to the land, but can support a "site-specific right" to engage in ceremonial or cultural activities. At the other end of the spectrum, customary law would support the indigenous community's claim to title to the land itself.[128]

This same common law concept could be applied to indigenous claims to water resources based on religious custom. Where indigenous religious practice related to water is ancient, uninterrupted, certain, and where the water use is reasonable, indigenous communities could assert a right to water based on customary law in international courts.

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122. *Id.* at 570.
123. *Id.*; *see also* Restitution of Land Rights Act 22 of 1944 §1(xi) (S. Afr.).
124. Tranhan, *supra* note 121, at 570.
125. *Id.* at 556.
126. Richtersveld Cmty. v. Alexkor Ltd., 2003 (6) BCLR 583 (SCA) (S. Afr.).
127. Tranhan, *supra* note 121, at 571–72.
128. *Id.*

*1. Benefits of the Customary Law Framework*

The customary law framework has many benefits. It is a widely accepted and adjudicated principle in many parts of the world, and thus more easily applied on an international level than the U.S.-centric substantial burden framework or the theoretical economic analysis framework. Indeed, the Inter-American Court for Human Rights has already relied on customary law principles in holding that the American Convention on Human Rights includes the right of indigenous peoples to the protection of their traditional natural resources.[129] Furthermore, the customary law framework includes considerations of "reasonableness," which allows courts necessary discretion to avoid unsustainable or inequitable religious claims to water by indigenous communities. Additionally, by allowing for a spectrum of interests in property, the approach is sufficiently nuanced to allow multiple water uses and property rights within the same watershed.

*2. Problems with the Customary Law Framework*

This framework raises several problems. First, the elements of customary law can be very difficult to establish, particularly where colonial rule has interrupted certain customary practices; where certainty is lacking as to the customary nature of the practice; and where a practice is a relatively recent development.

Second, this framework views indigenous customs within the context of Western ideas of rights and ownership—concepts that may be incompatible. Indigenous communities may attempt to frame their customs within the context of Western "rights" in an attempt to secure resources or preserve culture. However, such a Western-rights-based approach could further exacerbate hegemonic convergence of Western or "mainstream" legal concepts of rights, religious views, and ethical considerations related to natural resources, and thus inadvertently aggravate marginalization of indigenous communities.

## CONCLUSION

Regardless of the framework used, a liberty-rights-based approach to water-resource claims (such as a religious-rights-based claim) has several advantages. First, the international human right to water lacks consensus, in part because it has been framed as a welfare right, raising concerns about state liability for water service and impacts on private property rights. A liberty-rights approach does not raise those same concerns, as liberty rights are more likely and more immediately legally binding than welfare rights and are more jurisprudentially mature. Second, the stronger legal argument of liberty-rights claims to water legitimizes and protects ecological and cultural uses of water, as in the cases of the Shoshone and Arapahoe, the Altaians, and the Bedouins and Berbers.

Third, liberty-rights claims to water resources better support communal or collectively held human rights to water, which can provide the political foundation upon which indigenous communities build increased autonomy and sovereignty. The recent

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129. Grossman & Anaya, *supra* note 1, at 1.

success of the Ogoni people, the Kalahari Bushmen in Botswana, the Awas Tingni, and the Richtersveld community demonstrates that arguments based on international law, whether applied in international tribunals or in guiding the development or interpretation of domestic law, can lead to indigenous peoples' securing liberty rights or property rights to natural resources, including water.

These cases also provide a starting point for implementing and interpreting a liberty right to water and the scope of governmental obligations under such a right. In essence, under the CP Covenant, and arguably customary international law, state parties cannot infringe an individual's or community's access to water resources of adequate quality and quantity. Such interference could include discriminatory water pricing or water disconnections based on race, ethnicity, or religion, or unduly burdening the exercise of religion.

Most importantly, liberty-rights claims appropriately introduce questions of culture into the debate on water rights. As worldwide populations grow and the climate changes, water-resource allocation and protection will become increasingly contentious. Many international watersheds, such as the Ganges, Indus, Brahmaputra, Nile, Jordan, Tigris/Euphrates, Colorado, Columbia, Great Lakes, Amazon, Rio de la Plata, Mekong, Senegal, Congo, Orange, and Amazon have several things in common, including their religious significance and the presence of indigenous communities within the river basin. To avoid or mitigate water conflict, policymakers and judges should avoid conflict and facilitate cooperative, integrated, and adaptive water-resource management by looking beyond politics, economics, and ecology, and incorporating cultural considerations—including religious considerations—in the formulation and interpretation of water law. The spiritual character of water is not inevitably divisive as a tool for zealots—holy water does not necessary lead to holy war. Instead, with the proper legal support, the spiritual character of water can be a unifying force in a river basin.