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A reflection on international human
rights non-governmental organizations'
approach to promoting socio-economic
rights: lessons from a South African
experience

By

Ramin Pejan
McGill Faculty of Law
Institute of Comparative Law
McGill University, Montreal

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Abstract

This thesis, by reviewing a human rights project implemented by the Association for Water and Rural Development (AWARD), a South African based non-governmental organization (NGO), seeks to address the ongoing discussion regarding the role of international human rights NGOs in promoting socio-economic rights, adding a local perspective to this debate. It argues that international human rights NGOs working on socio-economic rights issues need to evaluate their approaches to promoting socio-economic rights, including their methodologies and strategies, and to engage more substantively with local NGOs concentrating on these issues. Namely, this thesis reviews a recent article written by Kenneth Roth, the Executive Director of Human Rights Watch (HRW), expressing HRW's views on promoting socio-economic rights. In order to support its main arguments, this thesis, using AWARD's human rights project, introduces a clear conceptual framework for economic and social rights that focuses on the right to water, and considers various methodological approaches for promoting socio-economic rights.

Résumé

Le mémoire évalue un projet liant le droit de la personne et la question de l'accès à l'eau implémentée par une organisation non-gouvernementale Sud Africaine, L'Association for Water and Rural Development (AWARD) et se propose de contribuer au débat sur le rôle des organisations internationales non-gouvernemental dans la promotion des droits socio-économiques. Le mémoire avance que les organisations internationales de droit de la personne oeuvrant dans le domaine des droits socio-économiques doivent reformuler leur stratégie dans la promotion des droits socio-économiques ainsi que dans le but de favoriser une collaboration plus importante avec les ONG locales. Plus particulièrement, le mémoire se réfère à un article du directeur exécutif de Human Rights Watch (HRW), Kenneth Roth, portant sur la perspective de HRW envers la promotion des droits socio-économiques. La thèse principale développée dans ce mémoire se base sur le projet de droit de la personne conçu par AWARD pour articuler une vision sur les droits socio-économiques liés au droit de l'accès à l'eau et considère plusieurs méthodologies et approches en vue de promouvoir les droits socio-économiques.

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I. Introduction

Non-Governmental Organization (NGO) X (X) focuses on the promotion and development of the right to adequate water stemming from the Constitution of the country in which it is working. X is located in a rural area and it conducts several fact-finding investigations into the communities within this area, including various villages. It quickly documents a number of issues related to water security. For example, among other things, X finds that little girls are fetching water as early as 3:00 A.M. and returning home just in time to go to school. It finds that the government takes much too long to repair broken infrastructure, such as water pumps and broken pipes. It finds that the villagers know little about the water-related legislation enacted to promote the right to water recognized in the country's constitution. And, it finds that the agriculture and forestry sectors are extracting an unsustainable amount of water from the main river supplying the area, leaving little for downstream users.

These scenarios have in fact all been documented in a recent human rights and water project initiated by the Association for Water and Rural Development (AWARD), a rural South African NGO working in the water sector, which focuses on human rights, development, ecological and policy issues relating to water security. AWARD is a small organization established at the democratic transition of the apartheid regime in 1993. It is located in southeastern Limpopo Province in northeastern South Africa, near Mozambique (see map 1 in Appendix A). Its staff has a mixed disciplinary background, allowing the organization to address multiple facets of water security, including law, ecology, hydrology, education and public policy. One key concept pervades AWARD's

work and objectives: *giving a voice to the voiceless*— both to the previously disenfranchised and to the environment.¹

AWARD's main challenge in developing its human rights and water project was how to consider the numerous water security issues it documented from a human rights perspective. Although international human rights law has repeatedly reaffirmed economic and social rights, such as the rights to health and housing, as indivisible with civil and political rights,² many scholars and practitioners remain sceptical with regard to the implementation and monitoring of such rights.³ Accordingly, AWARD in implementing its human rights project has been faced with questions that are far from settled in practice and theory. These include defining a human rights approach to water security, including obligations and violations, and discerning what methodologies it would use to promote the right to water, including what actions it would take when it documented violations. In addition, as a local NGO, it wanted to ensure its participation in the broader debate in South Africa and the international context concerning the role of human rights NGOs in promoting socio-economic rights and voicing concerns stemming from its local perspective.

¹ See AWARD's web site, online: AWARD <www.award.org.za> (stating that AWARD's mission "is to develop and test new and appropriate ways of managing water to address issues of water security in the catchment, both through wise resource management and equitable allocation. We do this by adopting a research-based approach to implementation that is holistic and integrated and that accommodates the meaningful participation of the inhabitants of the catchment.").

² See generally *Universal Declaration on Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess, Supp. No. 13, UN Doc. A/810 (1948) (listing civil, political and socio-economic rights); *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23, Part I, para. 5 (1993) (stating that, "all human rights are universal, indivisible and interdependent and interrelated."); Asbjørn Eide, Catrina Krause & Allan Rosas, eds., *Economic, Social and Cultural Rights* (Dordrecht: Martinus Nijhoff Publishers 2001), 7 [hereinafter Eide et. al] (asserting that, "[a]n integrated approach to international human rights as an indivisible whole is necessary.").

³ See Ramin Pejman, "The Right to Water: The Road to Justiciability," (2004) 36 G.W. Int'l L.R. 1181; also Henry Steiner & Philip Alston, *International Human Rights in Context: Law, Politics and Morals*, 2nd ed. (New York: Oxford University Press, 2000).

This thesis argues that international human rights NGOs working on socio-economic rights issues need to significantly evaluate their approaches to promoting socio-economic rights, including their methodologies and strategies. It argues that the limited analytical reflection and general hesitancy of Northern-based international human rights NGOs promoting socio-economic rights is rooted in, among other things, a Northern-based historical bias in regard to these rights. It calls for international NGOs to engage more substantively with local NGOs concentrating on these issues in order to consider sufficiently the plurality of perspectives in the socio-economic rights debate and to understand their own biases and partialities better.

By presenting AWARD's human rights project, this thesis introduces a clear conceptual framework for economic and social rights that focuses on the right to water, and considers various methodological approaches for promoting socio-economic rights. In particular, it employs AWARD's human rights and water project as a case study to address the emerging dialogue on the mainstream human rights agenda pertaining to the role of international human rights NGOs in promoting socio-economic rights. Importantly, it seeks to vocalize a position rooted in a local perspective—a perspective that has been insufficiently vocalized in this significant debate.

In order to better situate AWARD's human rights project within the emerging discussion of the appropriate role for NGOs promoting socio-economic rights, this thesis begins by reviewing and evaluating a recent article by Kenneth Roth, the director of Human Rights Watch (HRW), an American-based international human rights NGO, in which he expresses his concerns and suggestions with regard to the role of HRW and

other similar NGOs in monitoring the realization of economic and social rights.⁴ It will also address articles by Leonard Rubenstein, the Executive Director of Physicians for Human Rights, and Mary Robinson, the former United Nations High Commissioner for Human Rights and former President of Ireland, who have published responses to the issues Roth has raised.⁵ Although this thesis focuses mainly on the right to adequate water, the ensuing discussion also benefits and advances a better understanding of how to implement socio-economic right generally.

1.1 Roadmap of Thesis

Section two will discuss the theoretical, practical and contextual significance of addressing the role of NGOs in promoting socio-economic rights. It places the ensuing discussion within the broader context of international relations, notably the expanding role of non-state actors in influencing the development of human rights norms. Next, after summarising Roth's article and Rubenstein's and Robinson's responses, it provides a brief background to HRW and some examples of its work promoting socio-economic rights in South Africa. It then proceeds to evaluate Roth's main arguments regarding HRW's socio-economic rights strategy. Finally, section two concludes by exploring the cause of Western based international human rights NGOs' general hesitancy and lack of analytical reflection in promoting socio-economic rights. Among other things, it argues

⁴ Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization" (2004) 26 Hum. Rts. Q. 63; see also Kenneth Roth, "Response to Leonard S. Rubenstein" (2004) 26 H.R. Quart. 873. This thesis will refer to Roth's arguments interchangeably with HRW's arguments as HRW's view on how to monitor socio-economic rights, as posted on their web site, mirrors Roth's arguments. Furthermore, it focuses primarily on HRW to situate its arguments because Roth's paper provides comprehensive insights into HRW's approach and strategy towards the promotion of socio-economic rights, and because HRW is the largest and arguably most powerful North American based international human rights NGO.

⁵ Leonard S. Rubenstein, "How International Human Rights Organizations Can Advance Economic, Social, and Cultural Rights: A Response to Kenneth Roth" (2004) 26 Hum. Rts. Q. 845; Mary Robinson, "Advancing Economic, Social, and Cultural Rights: The Way Forward" (2004) 26 Hum. Rts. Q. 866.

for a more legitimate and substantive dialogue between local-based NGOs, like AWARD, and international NGOs, like HRW, in monitoring and developing human rights methodology.

Section three introduces AWARD's human rights and water project. It provides a description of the social demographics and water security status surrounding AWARD and the general political and legal context in South Africa, summarizing South Africa's legal developments relating to the right to water. It reviews post-apartheid water laws, South Africa's Constitution, local government and environmental related legislation and relevant Constitutional Court jurisprudence on socio-economic rights. Finally, it describes briefly some of the important objectives of AWARD's human rights project, including the various methodologies it employed.

Section four provides an overview of AWARD's main human rights project output: a human rights framework regarding the right to water. The human rights framework facilitated the implementation of AWARD's various methodologies, including conducting workshops, initiating dialogue with government workers and elected officials and evaluating South Africa's efforts to realize the right to water. After describing the objectives of the framework, this section reviews the sources of the framework in international human rights law followed by a review of all elements of the framework.

Section five provides examples of the application of AWARD's human right framework. It focuses on AWARD's use of the framework both to critique government legislations and policies with regard to realizing the right to water, and to critique water security issues AWARD observed in the field. By providing examples from AWARD's

human rights project, this section demonstrates the range of potential issues and violations stemming from government action or inaction.

II. Theoretical, Contextual and Practical Implications of Analyzing the Role of NGOs in Promoting Socio-Economic Rights

2.1 Contextual Issues

Before addressing Kenneth Roth and HRW's position on socio-economic rights, it is necessary to outline a number of preliminary contextual issues concerning the significance of HRW in shaping and guiding the normative development of socio-economic rights and human rights generally.

In the past few decades, a number of scholars in the fields of international law and international relations (IR) have questioned the notion of absolute state sovereignty. Prominent international law academics have increasingly considered IR theory and engaged in an inter-disciplinary analysis of issues of sovereignty, regime formation, power and the role of rules and/or norms in international society.⁶ Legal scholars, such as Anne-Marie Slaughter and Harold H. Koh, have used and built on IR theories like liberalism and social constructivism to challenge the traditional conception of the nation state as sole actors in the international arena as well as the idea that only nation states interests' shape international law.⁷

⁶ See Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6 Eur. J. Int'l L. 503; Harold H. Koh, "Why do Nations Obey International Law?" (1997) 106 Yale L.J. 2599; Abram Chayes & Antonia Handler Chayes, *The New Sovereignty* (Cambridge: Harvard University Press 1995); Thomas Franck, *The Power of Legitimacy Among Nations* (New York Oxford: Oxford University Press 1990). See also Ann-Marie Slaughter, Andrew S. Tulumello and Stephen Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92 A.J.I.L. 367 (for a good summary of scholarship seeking to merge these fields).

⁷ See Slaughter, *ibid.* at 35-36. Slaughter proposes that liberal IR theory offers a more accurate analytical framework for understanding the depth and complexity of actors and laws that influence the transnational legal process. Accordingly, she builds on separation of power doctrine and argues that the "liberal" nation state is disaggregated, composed of multiple centres of political authority representing individuals and groups in domestic society and more likely to engage in law with other liberal states. Furthermore, "the proliferation of transnational economic and social transactions creates links between each of these institutions and individuals and groups in transnational society." *Ibid.* at 36. See also Koh, *ibid.* Koh draws from constructivist theory which explores how ideational factors, such as culture, norms, and nationalism, shape and define actors interests. Specifically, Koh focuses on the role of norms in the formation of national identities, and specifically how norms affect compliance with international regimes. Koh explains:

Accordingly, in an increasingly interdependent world that has seen a change in the participatory landscape of transnational interaction, the emerging role of non-state actors such as NGOs and International Organizations (IOs) challenges traditional state-centric models with regard to international relations and international norm formation.⁸ Many international law scholars have referred to this evolving participatory landscape when advocating their views of the international system.

As a result of this broadened view of international society, IR and international law scholars have studied the mechanisms and effects of transnational networks in shaping international norm formation, including international human rights law.⁹ For example, Koh has advocated the study of transnational legal process that he defines as:

the theory and practice of how public and private actors - nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals - interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.¹⁰

Building on the idea of a transnational legal process, scholars of various disciplines have illustrated that based on the political and social environment in a State, transnational

[a]s governmental and non-governmental transnational actors repeatedly interact within the transnational legal process, they generate and interpret international norms and then seek to internalize those norms domestically... By interpreting global norms, and internalizing them into domestic law, that process leads to reconstruction of national interests, and eventually national identities. *Ibid.* at 2651 & 2659.

⁸ See Julie Mertus, "From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society" (1999) 14 Am. U. Int'l L. R. 1335, 1347; Daniel C. Thomas, "International NGOs, State Sovereignty, and Democratic Values" (2001) 2 Chi. J. Int'l L. 389; see also Karsten Nowrot, "The Rule of Law in the Era of Globalization: Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law" (1999) 6 Ind. J. Global Leg. Stud. 579 (putting forth various ways in which NGOs participate in international decision-making, including providing examples of NGOs proposing draft conventions and participating in the drafting of number of treaties.).

⁹ See Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders* 23-29 (Ithaca: Cornell University Press, 1998); see also Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) (Risse et al.).

¹⁰ Harold H. Koh, "The 1994 Roscoe Pound Lecture: Transnational Legal Process" (1996) 75 Neb. L. Rev. 181, 183-184.

networks will use a variety of techniques and methods to influence State conduct with the objective of seeking rule-consistent behaviour where human rights norms are institutionalized and habitualized.¹¹ This particular theme will be revisited below in section 2.4(e) and (f) evaluating the usefulness of HRW's shaming methodology in the realm of socio-economic rights.

a. The Rise of NGOs

NGO activity has existed throughout history. Although the term NGO has become crystallized over the past few decades, formal civil society organizations similar to what we now conceive as NGOs have been in place for centuries.¹² For example, the anti-slavery movement witnessed the creation of numerous NGOs throughout the world, including in the United States, Britain and France, many of which undoubtedly influenced slavery's abolishment.¹³ With the advent of the League of Nations and the International Labour Organization (ILO) soon after the turn of the century, NGOs began to engage with established international institutions.¹⁴ For example, "[e]ven without a constitutional directive to do so, the League often invited NGOs to participate in meetings."¹⁵

It was not until after World War II, however, that NGO involvement in international society began to increase dramatically. Among other things, NGOs played a large part in pushing for human rights language in the U.N. Charter.¹⁶ Specifically,

¹¹ Thomas Risse & Kathryn Sikkink, "The socialization of international human rights norms into domestic practices: introduction" in Risse et al., *supra* note 9 at 1, 32.

¹² See Steve Charnovitz, "Two Centuries of Participation: NGOs and International Governance" (1997) 18 Mich. J. Int'l. L. 183.

¹³ *Ibid.* at 192 (other areas of early NGO involvement was for the promotion of peace and worker solidarity).

¹⁴ *Ibid.* at 213.

¹⁵ *Ibid.* at 222.

¹⁶ *Ibid.* at 249.

article 71 of the U.N. Charter allows for an official mechanism for NGO involvement with the U.N. Social and Economic Council (ECOSOC) and paved the way for NGO involvement throughout the U.N. system.¹⁷

After the 1970s, NGOs have been particularly active in the areas of human rights and environmental law. For example, 225 accredited NGOs participated in the 1972 Stockholm environmental conference and were permitted to make formal statements.¹⁸ In the area of human rights, NGOs truly proliferated. NGOs were involved in the drafting of the Convention on the Rights of the Child (CRC) among other treaties.¹⁹ International human rights NGOs, such as HRW and Amnesty International, came into being and began to apply pressure directly on governments. Perhaps the 1992 U.N. Conference on Environment and Development (UNCED) witnessed a milestone in NGO activity, where over 650 NGOs succeeded in influencing much of the Conference's outputs.²⁰

Accordingly, today's international human rights NGOs, like HRW, are major players in the realm of international human rights law, and more generally the transnational legal process, both in terms of influencing the content and understanding of human rights law and in terms of monitoring the realization of human rights at all stages of the socialization process.²¹ Building on decades of work and experience, international NGOs are proposing new ideas, approaches and solutions to human rights issues, and are actively involved in debating the promotion and implementation of human rights norms

¹⁷ *Ibid.* at 258.

¹⁸ *Ibid.* at 262.

¹⁹ See Cynthia Price Cohen, "The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child" (1990) 12 Hum. Rts. Q. 137.

²⁰ See Charnovitz, *supra* note 12 at 265.

²¹ See Risse & Sikkink, *supra* note 11; see also Keck and Sikkink, *supra* note 9; Mertus, *supra* note 8 at 1368.

at the domestic and international level.²² Their actions and decisions have widespread influence on the development and future of international human rights norms. NGOs, like HRW, have the ability to make great strides in the implementation and development of socio-economic rights.

However, with increasing power comes potential danger. It is not always clear whether NGO activity results in a positive development in promoting human rights.²³ In this regard, many commentators have also questioned the democratic accountability of international NGOs, both externally and internally.²⁴ Critics often refer to international NGOs' lack of legal status in the international community and resulting lack of accountability to any sort of constituency or legal entity. It is argued that this lack of democratic legitimacy undermines the credibility of international NGOs as representative of people's values and beliefs.²⁵ In addition, scholars have raised issues concerning internal mechanisms governing NGOs, such as the inherently biased procedure under which directors are chosen.²⁶

²² See Mertus, *supra* note 8 at 1368; see also Cohen, *supra* note 19 at 139-47.

²³ See Adelle Blackett, "Globalization, Accountability, and the Future of Administrative Law: Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct" (2001) 8 Ind. J. Global Leg. Stud. 401 (questioning the positive contribution of corporate codes of conduct and in turn the role that NGOs played in supporting and contributing to such codes). Blackett states that, "[i]n sum, corporate self-regulatory initiatives have been better at spotlighting selected, often poignant examples of certain kinds of labor rights abuses than at exposing the layers of complexity surrounding compliance with labor standards while crafting broadly satisfying solutions." *Ibid.* at 431. Consequently, Blackett questions whether the significant role played by NGOs has been an overall positive development. She reveals that, "[s]ome NGOs have contributed to this selectivity by facilitating media sensationalization of the 'plight' of workers in developing countries without promoting a deeper understanding of the material conditions in those particular places." *Ibid.* at 430.

²⁴ See Paul Wapner, "The Democratic Accountability of Non-Governmental Organizations: Introductory Essay: Paradise Lost? NGOs and Global Accountability (2002) 3 Chi. J. Int'l L. 155; See also Thomas, *supra* note 8; Kenneth Anderson, "The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Non-Governmental Organizations", (2001) 2 Chi. J. Int'l L. 371.

²⁵ See Anderson, *ibid.* at 382-383.

²⁶ See Wapner, *supra* note 24 at 157.

Consequently, when the director of a major international NGO takes a contentious position on a human rights issue, it may have serious repercussions. It is for this reason that scholars, the full array of civil society and other actors must seriously scrutinize HRW's stance with regard to socio-economic rights and juxtapose HRW's views and actions against the backdrop of other socio-economic initiatives on both the local and global level.

2.2. An Overview of HRW

HRW is the largest US-based human rights organization and one of the largest in the world. As of March 2004, HRW employed a staff of 190, not including its fellows, interns, volunteers and members.²⁷ Furthermore, in 2004, HRW had total expenditures of US \$23,042,643, and a total support and revenue of US \$37,139,018.²⁸ Similar to the United Nations human rights special procedures, HRW has both thematic and country-specific focuses, concentrating on over 70 countries and in important areas such as children's rights, women's rights, and HIV/AIDS.²⁹ It is clear that HRW, with its capacity, budget, experience and reputation, is powerful and deeply influential.

HRW's methodology is primarily based on shaming. The extensive fact-finding missions it conducts throughout the world and ensuing publicity it creates around these missions "helps to embarrass abusive governments in the eyes of their citizens and the world."³⁰ Pursuing this shaming methodology, HRW has had many successes advocating for human rights. Some notable examples include its documentation of atrocities and other gross human rights violations in Rwanda, its campaign to ban landmines, exposing

²⁷ See HRW web page, online: HRW <www.hrw.org>.

²⁸ See HRW Financial Statements, *ibid*.

²⁹ *Ibid*.

³⁰ *Ibid*.

the treatment of gays, lesbians and bisexuals in American schools and its continuing work in Afghanistan.

HRW's extraordinary record and influence in promoting human rights, however, should not prevent continuing discussion and dialogue with regard to its actions and positions towards human rights issues. HRW's power and strength as a human rights organization can be negative to the development of human rights norms if it maintains controversial and questionable positions towards human rights issues.

However, HRW's primary work has been in the field of civil and political rights. With regard to socio-economic rights, HRW's policy mirrors Roth's position outlined below. In this connection, HRW maintains that, "[w]e conduct research and advocacy on economic, social and cultural rights using the same methodology that we use with respect to civil and political rights and subject to the same criteria, namely, the ability to identify a rights violation, a violator, and a remedy to address the violation."³¹ The following section summarises Roth's article on the role of NGOs in promoting economic, social and cultural rights, as well as Leonard Rubenstein and Mary Robinson's response to Roth's article. It then reviews some of HRW's socio-economic rights work in South Africa in order to present concrete examples of its methodology. As both Roth's and HRW's positions on socio-economic rights are synonymous, this thesis will refer to them interchangeably.

³¹ *Ibid.*

2.3. A Summary of Ken Roth's article

Roth raises a number of key issues and concerns about the role of HRW and other similarly situated NGOs in promoting socio-economic rights.³² His main argument can be summarised as follows:

Human Rights Watch's experience has led me to believe that there are certain types of ESC [Economic, Social and Cultural] issues for which our methodology works well and others for which it does not. In my view, understanding this distinction is key for an international human rights organization such as Human Rights Watch to address ESC rights effectively. Other approaches may work for other types of human rights groups, but organizations such as Human Rights Watch that rely foremost on shaming and the generation of public pressure to defend rights should remain attentive to this distinction.³³

In support of his argument, Roth raises a few assertions. First, he argues that the promotion of socio-economic rights has been inadequate, confessing, "I must admit to finding the typical discussion of ESC rights rather sterile."³⁴ Furthermore, he has found that the advice that other practitioners and scholars have given on promoting socio-economic rights at the countless conferences he has attended "reduces to little more than sloganeering."³⁵

Second, Roth implies that the main obstacle for HRW in promoting socio-economic rights is that they often require the reallocation of resources, which results in a situation of trade-off between rights. In this regard, Roth states that "merely advocating greater respect for ESC rights—simply adding our voice to that of many others demanding a particular allocation of scarce resources—is not a terribly effective role for

³² Although Roth and HRW discuss cultural rights, this article will only focus on economic and social rights.

³³ Roth, *supra* note 4 at 64.

³⁴ *Ibid.* at 64.

³⁵ *Ibid.* at 65.

international human rights groups such as Human Rights Watch.”³⁶ He argues that the voice of international NGOs advocating for certain allocation of resources “has less legitimacy than that of the country’s residents.”³⁷

Roth does not identify whether he is contemplating financial resources, natural resources, social resources, political resources or any other type of resource, or all of the above. He does imply, however, that by “allocation of scarce resources” he means trade-offs between rights -- if you spend money on housing this would draw money away from healthcare. He argues that “[i]n an imperfect world in which the fulfillment of one ESC right *is often* at the expense of another, however, [an outsider’s] voice insisting on a particular tradeoff has less legitimacy than that of the country’s residents.”³⁸

Third, in order to avoid getting tangled in allocation of finite resources issues, Roth proposes that an international human rights NGOs like HRW should alternatively focus on problems based on discriminatory and arbitrary conduct. Roth states that:

If one accepts that international human rights organizations like [HRW] are at our most powerful in the realm of ESC rights when we focus on discriminatory or arbitrary conduct *rather than* matters of pure distributive justice, guidance for ESC work is provided.³⁹

Focusing on these types of violations allows for the clarity of violation, violator, and remedy needed to facilitate HRW’s shaming methodology.⁴⁰

Regrettably, Roth is unclear about his definition of arbitrary conduct. He does, however, provide some practical examples to clarify his arguments. In this manner, Roth, in one instance, defines arbitrary conduct as a situation where “the money is

³⁶ *Ibid.* at 65.

³⁷ *Ibid.*

³⁸ *Ibid.* at 65 [emphasis added].

³⁹ *Ibid.* at 71 [emphasis added].

⁴⁰ *Ibid.* at 69.

available but is clearly being misspent.”⁴¹ Roth thus acknowledges that legitimate criticisms can be made regarding issues that stem from the allocation of resources in the realm of policy, planning and implementation of socio-economic rights if they are based in the misspending of available financial resources. This acknowledges the important language in the International Covenant on Economic, Social and Cultural Rights (ICESCR) requiring states to progressively realize the rights delineated in the Covenant with their “maximum available resources.”⁴²

Fourth, as stated above, Roth argues that the best methodology for HRW and other similarly situated human rights NGOs is to promote socio-economic rights through shaming. Roth sets forth:

In my view, the most productive way for international human rights organizations, like Human Rights Watch, to address ESC rights is by building on the power of our methodology... the core of our methodology is our ability to investigate, expose, and shame. We are at our most effective when we can hold governmental (or, in some cases, nongovernmental) conduct up to a disapproving public... In my view, to shame a government effectively—to maximize the power of international human rights organizations like Human Rights Watch—clarity is needed around three issues: violation, violator, and remedy.⁴³

Accordingly, Roth advocates that violation, violator, and remedy are clearest when focusing on issues of arbitrary and discriminatory conduct as described above.

Roth, in advocating shaming as the appropriate methodology for HRW to promote socio-economic rights, dismisses alternative methodologies or strategies. In taking this position, Roth acknowledges and dismisses other methodologies mostly because HRW

⁴¹ *Ibid.* at 70.

⁴² *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 999 U.N.T.S. 171, art. 2(1) (entered into force 23 March 1976).

⁴³ Roth, *supra* note 4 at 67-68.

would not be productive engaging in them.⁴⁴ These other methodologies include advocating for resources needed to realize socio-economic rights, engaging in litigation, pressing for broad national plans and providing technical assistance.⁴⁵ A more thorough discussion of Roth's reasoning for dismissing other methodologies will take place below when evaluating his position on shaming as the best methodology for NGOs like HRW.

a. Leonard Rubenstein and Mary Robinson's Responses to Roth

Leonard Rubenstein presents a relatively straightforward response to Roth's article. He argues mainly that although shaming is an effective and important strategy for international human rights organizations, these organizations could do more than the limited role that Roth envisions for HRW by focusing primarily on this methodology. In this respect, Rubenstein presents three strategies:

First, in collaboration with organizations in developing countries, they should engage in analysis and lobbying to influence the design of systems of services so they fulfill the rights at stake. Second, they should advocate for the resources essential to fulfill economic, social, and cultural rights. Third, their monitoring activities—the naming and shaming—should be premised on specific obligations states have, rather than being restricted to conduct that is arbitrary or discriminatory, to assure attention to some of the most serious, chronic violations of economic, social, and cultural rights.⁴⁶

Rubenstein's first strategy advocates that international NGOs have an important function to play in "building institutions, systems, international agreements and structures that may either prevent violations or hold perpetrators accountable," a strategy that departs from naming and shaming.⁴⁷ He argues that international human rights organizations in collaboration with organizations based at the national and local levels in

⁴⁴ *Ibid.* at 67.

⁴⁵ *Ibid.*

⁴⁶ Rubenstein, *supra* note 5 at 849.

⁴⁷ *Ibid.* at 850.

developing countries can “perform analyses on how systems can be designed to comply with human rights obligations, identify areas where the likelihood of noncompliance with obligations is high, and lobby for structures and design features to incorporate them in policies and programs.”⁴⁸ These advocacy methods “rely mostly on public education, coalition building, campaigning, and lobbying, often over an extended period of time.”⁴⁹

Rubenstein’s second strategy departs from Roth’s position that HRW is not in a good position to advocate for increased resource allocations to realize socio-economic rights. Rubenstein argues that although in theory a trade-off of rights resulting in a zero-sum game situation may occur, “that is not how these decisions tend to play out.”⁵⁰ He argues that on a practical level pressure to realize any right “tends to enlarge the pot.”⁵¹ Accordingly, he advocates that human rights organizations could do much to demand the allocation of scarce resources both domestically and from the international community. He specifies that NGOs could couple their analytical skills with local activists in the “tough work of analysing budgets and spending decisions and to assist domestic organizations in their work to increase those investments.”⁵²

Arguably, Rubenstein’s main critique of Roth is what he considers Roth’s limited definition of violations. Specifically, Rubenstein states:

First, I believe rights will be advanced more quickly and effectively by holding states accountable for their specific obligations in the [ICESCR] (ending discrimination is one of these) than on a general standard like arbitrariness. Second, while some arbitrary conduct by government may well be worth challenging, that lens may lead human rights organizations to

⁴⁸ *Ibid.* at 854.

⁴⁹ *Ibid.* at 851.

⁵⁰ *Ibid.* at 858.

⁵¹ *Ibid.*

⁵² *Ibid.* at 859.

overlook the undeniable priority of using resources to realize the rights of the worst-off members of society.”⁵³

In this respect, Rubenstein also critiques Roth’s failure to discuss core obligations, non-derogable, immediate obligations under the ICESCR (e.g. to ensure the basic minimum amount of a right immediately).⁵⁴

Mary Robinson, in her response, discusses both Rubenstein and Roth’s articles and presents a much more neutral commentary. She outlines some important challenges and limitations for NGOs in promoting socio-economic rights. In particular she calls on the human rights community to develop the debate initiated by Roth and to add different perspectives to this ongoing discussion. She stresses that by working collaboratively with local civil society, including domestic NGOs, international human rights NGOs “can strengthen the hand of these organizations and also obtain the legitimacy of voice that Roth finds to be absent when international human rights organizations on their own address the ESC violations of national governments.”⁵⁵

Robinson also observes that extremely complex systems are necessary to realize socio-economic rights. She warns that “[t]he progressive realization of ESC rights requires a complex interaction of policies and programs in a wide range of sectors and institutions.”⁵⁶ In addition, she cautions that, although necessary, a multi-disciplinary effort to ensure water security produces many potential obstacles. This includes “[p]roblems of precision in how human rights standards can be applied in different policy making situations.”⁵⁷

⁵³ *Ibid.* at 861.

⁵⁴ *Ibid.* at 862.

⁵⁵ Robinson, *supra* note 5 at 871.

⁵⁶ *Ibid.* at 871.

⁵⁷ *Ibid.* at 868.

Finally, Robinson makes clear that international human rights NGOs should undertake multiple strategies in addition to naming and shaming in promoting socio-economic rights. In this regard, she argues, “Rubenstein’s view, which I strongly support, is that international human rights organizations employ many other strategies beyond ‘naming and shaming’ such as capacity building and litigation.”⁵⁸

b. HRW’s Socio-Economic Work in South Africa

Most of HRW’s focus on socio-economic rights in South Africa has been on the right to health and the right to education. In this regard, Roth raises two examples in his article. First, he focuses on the South African government’s decision not to extend critical mother-to-child HIV transmission drugs to the population, despite having adequate supplies of the drugs.⁵⁹ Second, he cites HRW’s report concerning the failure of the government to prevent violence against girls in South African schools.⁶⁰ In this report, HRW noted that “[s]chool authorities rarely challenge the perpetrators, and many girls interrupt their education or leave school altogether because they feel vulnerable to sexual assault.”⁶¹

Other examples of HRW’s South African socio-economic work include its report on the inadequacy of access to education for rural farm worker children.⁶² The report set forth a scathing criticism of schools located on rural farms, and questioned the

⁵⁸ *Ibid.* at 869.

⁵⁹ Roth, *supra* note 4 at 70.

⁶⁰ *Ibid.*, citing Press Release, HRW, “South Africa: Sexual Violence Rampant in Schools: Harassment and Rape Hampering Girls’ Education” (27 Mar. 2001) online: HRW <www.hrw.org/press/2001/03/sa-0327>.

⁶¹ *Ibid.*

⁶² Press Release, HRW, “South Africa: Government Fails Rural Children” (3 June 2004) online: HRW <<http://hrw.org/english/docs/2004/06/03/safric8724.htm>>.

government's inaction in addressing this issue in light of its significant efforts to increase access to education throughout the country.⁶³

Regarding the right to health, HRW has questioned policies dealing with children's healthcare, as well as HIV/AIDS issues focusing on women's health. In a recent report, HRW documented "how government inaction and misinformation from high-level officials have undermined the effectiveness of South Africa's program to provide rape survivors with post-exposure prophylaxis (PEP)—antiretroviral drugs that can reduce the risk of contracting HIV from an HIV-positive attacker."⁶⁴

On another occasion, HRW collaborated with the Aids Law Project, based out of the University of Witwatersrand, to comment on a children's bill before the South African Parliament.⁶⁵ In particular, HRW found that "problems in obtaining consent on behalf of unaccompanied children and those whose parents or guardians refused to consent to medical treatment barred some children from receiving post-rape medical services, including lifesaving PEP."⁶⁶ In this context, HRW proposed legislative changes to ensure medical care and treatment for children.

It is clear that HRW has made some important comments on socio-economic rights in South Africa, and generally throughout the world. However, HRW has refrained from commenting about, or researching, many socio-economic rights' issues, such as adequate participation in decision-making that will be discussed in more detail below. In particular, as this thesis makes clear, HRW has summarily avoided commenting on the

⁶³ *Ibid.*

⁶⁴ See Press Release, HRW, "South Africa: HIV-Prevention Program Fails Rape Survivors (4 March 2004) online: HRW < <http://hrw.org/english/docs/2004/03/04/safric7930.htm>>.

⁶⁵ See HRW, "South Africa: Safeguarding Children's Rights to Medical Care" *Submission on the Children's Bill to the Portfolio Committee on Social Development in the National Assembly* (27 July 2003)

⁶⁶ *Ibid.*

right to water in South Africa, an important constitutional right and human rights issue that most South Africans consider a priority for the government to address.

2.4 HRW's Position on Socio-Economic Rights

Roth's article raises legitimate and important points when it sets forth that an international NGO like HRW is in a weak position to argue matters of pure distributive justice in foreign countries.⁶⁷ Furthermore, he was correct to focus on discrimination and arbitrary conduct as an alternative to distributive justice issues for HRW's efforts. However, Roth insufficiently details his strategy for promoting socio-economic rights. Namely, he does not define clearly his focus on arbitrary conduct; he does not sufficiently address the role of HRW in using alternative methodologies other than shaming; and he does not consider adequately a broader framework for evaluating violations. Finally, some of Roth's arguments are inaccurate and deficient, considering the current state of development in international human rights law focusing on socio-economic rights. Nevertheless, whether one is in agreement with Roth or not, the thoughtfulness of his article and its value in spurring necessary dialogue in the field of socio-economic rights is undeniable.

The following discusses Roth's/HRW's position in promoting socio-economic rights. Importantly, this section provides a background for the reader to compare examples from AWARD's human rights and water project, elaborated in sections three, four and five below, against HRW's approach to socio-economic rights. Accordingly, it seeks to outline and build on Roth's important and legitimate points regarding HRW's socio-economic rights strategy, as well as specify some deficiencies in his arguments.

⁶⁷ Roth, *supra* note 4 at 69.

a) Dangers of categorization

Generally, it is problematic to cluster all socio-economic rights into one category when discussing both substantive and procedural aspects of implementing these rights. For example, the right to water, although sharing many similarities conceptually with the right to housing, raises very different issues and problems with regard to implementation, especially with regard to monitoring and enforcement. This would include, among other things, clear linkages between water and natural resource management and environmental law, which are not as pertinent with regard to, for example, shelter-related issues. Thus, when Roth makes general conclusions on how HRW can deal with socio-economic rights, he should be sensitive to the complexities that attach to each category of socio-economic rights.

b) The typical discussion about socio-economic rights is rather sterile

Roth makes a bold statement in declaring that the typical discussion about socio-economic rights is sterile and amounts to little more than sloganeering. In addressing his claim, however, it is important to address two aspects of the development of socio-economic rights: the conceptual development of the substance of socio-economic rights and the practical issues that arise with regard to implementation.

Contrary to Roth's claims, there have been key conceptual developments of substantive social and economic rights through a number of forums, including the UN human rights system, national jurisprudence, academic scholarship and NGOs.⁶⁸ Importantly, the Committee for Economic, Social and Cultural Rights (CESCR) has

⁶⁸ See Allan Rosas & Martin Scheinin, "Implementation Mechanisms and Remedies" in Eide et. al, *supra* note 2 at 425 (listing some of the NGOs that are active in economic and social rights, including, the Center on Economic and Social Rights (CESR) (New York), Centre on Housing Rights and Evictions (COHRE) (Utrecht/Geneva), Oxfam network (Oxford) and FoodFirst Information and Action Network (Heidelberg)). *Ibid.* at 431-432.

adopted a tripartite typology system for identifying state obligations that serves as an important analytical tool when reflecting on the implementation of socio-economic rights.⁶⁹ The three components of the tripartite typology are the obligations to respect, protect and fulfil each substantive socio-economic right, all of which are discussed thoroughly in section 4.3(c)(ii). Furthermore, all of the above mentioned forums have contributed to the development of the content and scope of various economic and social rights.⁷⁰ Much of the substantive development with regard to the right to water will be elaborated in the ensuing discussion of the proposed human rights framework.

In the realm of practical implementation, however, progress has been more limited. For example, although there have been projects seeking to monitor national implementation of the right to water, not enough has been done to seek out the challenges faced at the local level throughout the varying political, social and economic backdrops of the world.⁷¹ In this sense, Roth's criticism holds some degree of truth, although it is clear that the work that various organizations have done surpasses a "sterile" debate.

⁶⁹ See Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerpen: Intersentia, 2003) (discussing the nature and development of the typologies used by the Committee for Economic, Social and Cultural Rights. Sepúlveda provides a background and analysis regarding scholarly debate about the nature of socio-economic obligations).

⁷⁰ See e.g. Eide et. al, *supra* note 2 (deconstructing selected economic and social rights in order to provide a clear conceptual basis, including discussions about scope, obligations and violations of each right. These include the right to food, the right to adequate housing, the right to education and the right to work and rights in work.).

⁷¹ For example, a few initiatives can be highlighted with regard to the right to water. See e.g. The Report of the International Fact-Finding Mission on Water Sector Reform in Ghana (April 26th to May 9th 2002), online: CESR <www.cesr.org> (The Ghana Report is an excellent example of a multi-disciplinary team working together towards the common goal of water security. It highlighted many issues with regard to Ghana's efforts to provide water security, focusing mainly on the issue of privatization. Other sub-issues included human rights issues, gender issues, and regulatory and legal frameworks. Unfortunately, this fact-finding mission focused little on human rights frameworks and did not elaborate much on how a human rights approach could benefit the discourse in Ghana on water security. Furthermore, it concentrated on water service issues while neglecting important resource management issues.).

c) Much of the difficulty associated with promoting socio-economic rights stem from allocation of resource arguments

Although Roth's position to avoid entangling HRW in allocation of resource arguments is understandable, it warrants criticism. As outlined above, Roth argues that it is difficult to advocate for the fulfilment of any socio-economic right because doing so often entails a situation of trade-off of rights. This trade-off between rights, although a possible outcome, is not always the case. For example, many of the issues raised by a human rights approach to water security are not necessarily linked to tradeoffs of rights issues or allocation of resource issues. As Rubenstein makes clear, a human rights approach "has a lot to say about how [needs] are provided, whom they reach, what their implications are for others, and [importantly] whether people affected by the decisions participate in making them."⁷²

Neither Roth nor Rubenstein recognize, however, that placing the realization of one socio-economic right at the expense of another ignores an essential aspect of these rights -- namely that they are interdependent and indivisible.⁷³ Often, fulfilling one right fulfils aspects of another or, on the flip side, the violation of one right has a direct impact on another right. The indivisible nature of rights provides a powerful tool when advocating for economic and social rights and should not be dismissed or avoided in any discussion on promoting socio-economic rights. Advocates can use one objective as a strong bargaining tool, for example, clean drinking water, to reinforce or promote multiple, corollary objectives, such as contributing to health, having adequate housing

⁷² Rubenstein, *supra* note 5 at 852.

⁷³ See for example, General Comment 15 of the Committee on Economic, Social and Cultural Rights (CESCR), U.N. ESCOR, 29th Sess., Agenda Item 3, U.N. Doc. E/C.12/2002/11 (2003), paras. 3, 6-7.

and ensuring access to education. This theme serves as a major aspect of AWARD's human rights project and framework as discussed below.

d) Roth's definition of violations

Roth's acknowledgment that legitimate criticisms can be made on issues that stem from allocation of resources if they are based in the misspending of available financial resources is an important observation. While certain governmental decisions may be rooted in the allocation of resources, if the "scarcity" of adequate resources is not an issue, a certain degree of criticism of government actions is appropriate.⁷⁴ There are two reasons for this: first, it is not costly for the government to address many socio-economic rights issues; and/or second, the government, as in South Africa, may possess adequate resources, namely in their financial budget, to deal with most socio-economic rights problems. In this respect, much of AWARD's human rights work focuses on issues involving allocation of resources in a manner where insufficient funds or resources were not a hindering factor or an excuse for governmental inaction. Unfortunately, Roth fails to elaborate on situations of arbitrary conduct where adequate resources are available, and to provide sufficient examples to present a clear picture of potential violations.

Furthermore, focusing on violations rooted in discriminatory and arbitrary conduct also allows HRW to critique issues other than those rooted in the allocation of resources. In this regard, Roth sides with many commentators who have noted that primarily focusing on allocation of resource issues when discussing socio-economic rights is inadequate. This is because such a narrow focus does not consider the breadth of

⁷⁴ See Roth, *supra* note 4 at 65. Roth stated that, "similar tradeoffs of scarce resources can arise in the realm of civil and political rights. Building prisons or creating a judicial system can be expensive. However, my experience has been that international human rights organizations implicitly recognize these tradeoffs by avoiding recommendations that are costly."

obligations and violations of socio-economic rights that do not implicate allocation of resource issues.⁷⁵ As will be illustrated below, although Roth's focus on discriminatory and arbitrary conduct as violations does not initially seem to conform with the specific obligations to respect, protect and fulfil developed in international human rights law, it does in fact correspond conceptually with this tripartite typology.

Although this author's thesis advocates the use of specific obligations, it does not agree wholeheartedly with Rubenstein's viewpoint, described above, that arbitrary conduct, as defined by Roth, does not correspond to the established specific obligations in international human rights law. This issue will be revisited comprehensively in section four when discussing the nature of specific obligations created by a human rights approach.

One area, however, in which the author of this thesis and Rubenstein are in agreement, is with respect to Roth's failure to discuss HRW's role in addressing core obligations.⁷⁶ In fact, Roth did not mention core obligations. Human rights law considers compliance with core obligations as an immediate priority for governments, and monitoring these was an important strategy for AWARD. This issue will be discussed in detail in section four.

⁷⁵ See Asbjørn Eide, "Economic, Social and Cultural Rights as Human Rights" in Eide et al., *supra* note 2. Eide writes:

It may now have become clearer why the allegation that economic and social rights differ from the civil and political is that the former requires the use of resources by the state, while the obligations for states to ensure the enjoyment of civil and political rights does not require resources. This is a gross oversimplification. The argument is tenable only in situations where the focus on economic and social rights is on the tertiary level (the obligation to fulfil), while civil and political rights are observed on the primary level (the obligations to respect). This scenario is, however, arbitrary. *Ibid.* at 24-25.

⁷⁶ Rubenstein, *supra* note 5 at 862.

Finally, although Roth was correct to point out the importance of discussing discriminatory and arbitrary conduct in the realm of socio-economic rights, he fails to address violations of socio-economic rights that are neither based on arbitrary or discriminatory conduct nor in allocation of resources. Importantly, Roth does not address the role of HRW in monitoring and exploring socio-economic rights issues stemming from lack of public participation in decision-making. This includes seeking to define what all stakeholders consider legitimate participation in creating socio-economic rights policies and strategies, and also helping to address how governments can truly ensure inclusive participatory methods in the realization of socio-economic rights.

e) The Role of Shaming in Promoting Socio-Economic Rights

A few comments should also be made regarding HRW's proposed methodology to deal with socio-economic rights violations, namely that of shaming. In this connection, Roth is correct to stress that shaming has been HRW's most effective methodology, especially taking into account HRW's successful work in promoting civil and political rights. This methodology is supported by both legal and IR scholars who have analysed methods that transnational networks, such as NGOs, use to influence State conduct.⁷⁷ As Rubenstein sets forth, shaming has become a universal methodology for all types of NGOs as well as for a variety of other institutions and organizations, such as UN agencies and special procedures, community-based organizations and national human rights commissions.⁷⁸

In this connection, Thomas Risse and Kathryn Sikkink present a theoretical framework of the norms' socialization process, the goal of which "is for actors to

⁷⁷ See generally Risse & Sikkink, *supra* note 11.

⁷⁸ Rubenstein, *supra* note 5 at 848.

internalize norms, so that external pressure is no longer needed to ensure compliance.”⁷⁹ Pursuant to their theory, transnational human rights networks, including NGOs, have certain “socialization” tools at their disposal depending on the stage in which a State has recognized and complied with human rights norms.⁸⁰ It is necessary to elaborate on this model in order to evaluate the usefulness of HRW’s shaming methodology in promoting socio-economic rights.

Risse and Sikkink argue that shaming plays a vital role throughout all stages of their framework. Importantly, they label the third stage of the norm socialization process as “tactical concessions.” In this stage, norm-violating states seek “cosmetic” changes to pacify increasing international criticism of their human rights record.⁸¹ By making concessions and responding to external and internal pressure, States no longer deny the validity of international human rights norms and are more susceptible to criticism regarding these norms. It is in this phase that Risse and Sikkink argue that shaming “becomes a particularly effective communicative tool of the transnational advocacy network.”⁸² States in this phase, by making tactical concessions and giving some recognition to international human rights norms are more susceptible to shaming. Shaming may have the effect of relegating States “to an outgroup (human rights violators), which they often resent, and sometimes feel is sufficiently disturbing for either their international image or their domestic legitimacy that they are willing to make

⁷⁹ See Risse & Sikkink, *supra* note 11 at 11. Admittedly, this definition assumes the universality of human rights norms and implicates cultural relativist arguments, in that the ultimate goal of the socialization process is the recognition of these universal human rights norms in the domestic setting.

⁸⁰ Risse & Sikkink propose five stages of socialization of human rights norms: repression, denial, tactical concession, prescriptive status, and rule-consistent behaviour. *Ibid.* at 20.

⁸¹ *Ibid.* at 25.

⁸² *Ibid.* at 26.

human rights concessions.”⁸³ It is also effective in the fourth stage of the model, “prescriptive status,” where the “validity claims of the norm are no longer controversial, even if the actual behavior continues violating the rules.”

Despite the strong support for HRW’s shaming methodology both practically and theoretically, some questions should be raised pertaining to its role in the realm of socio-economic rights, including whether placing shaming as the centrepiece for promoting socio-economic rights is an effective strategy for international human rights NGOs.⁸⁴

First, Risse and Sikkink’s framework, as well as HRW’s application of its shaming methodology, have focused primarily on civil and political rights. Unfortunately, the substance of socio-economic norms is not as developed as civil and political norms in terms of practical implementation and conceptual development, both in international and domestic law. This suggests that, in addition to shaming, transnational networks, including international human rights NGOs, have an important role to play in providing valuable guidance and experience in terms of the development and clarification of the content of socio-economic norms. South Africa provides a clear example, as it has placed the right to water in the constitution and set in place many institutions and mechanisms to realize this right; yet, there remains much uncertainty as to what the right to water entails, as little guiding precedent exists.

Second, Risse and Sikkink make clear that although necessary, shaming is not the only methodology that actors in transnational networks should use; other methodologies might include, for example, more conciliatory dialogue between governments and

⁸³ *Ibid.* at 27.

⁸⁴ See generally Rubenstein, *supra* note 5 at 849.

transnational network actors.⁸⁵ Rubenstein, supported by Robinson, also critiques Roth's overwhelming focus on shaming, and advocate for the use of "roles beyond naming and shaming."⁸⁶ As mentioned above, a diversified strategy is arguably necessary in order to effectively promote socio-economic rights. It is thus important to analyze Roth's position on alternative strategies in promoting socio-economic rights.

f) Alternative Strategies to Promote Socio-Economic Rights

Although it is important that Roth recognizes the limits of other methodologies, his consideration of their potential utility is insufficient and questionable. In this connection, it was demonstrated above that Roth's hesitation to advocate or push for compliance with socio-economic rights outside of situations of arbitrary and discriminatory conduct was based, to some degree, on his limited view that doing so would always involve reallocation of resource and trade-off of rights issues. However, Roth does not consider the important strategy of stressing the inter-relationship of rights. Nor does he adequately explore compliance with socio-economic rights in situations where allocation of resources, including arbitrary decisions regarding the allocations of available resources, was not at issue. For example, he does not discuss promoting participation in decision-making processes. Finally, as Rubenstein argues, NGOs may in fact play a powerful role in demanding a particular allocation of resources.

Roth's argument that international human rights organizations are not in a good position to press governments on the content of national plans to progressively realize socio-economic rights is also unconvincing. He explains, "[e]ven though such plans would facilitate enforcement through public shaming for failure to live up to the plan, the

⁸⁵ See Risse & Sikkink, *supra* note 11.

⁸⁶ Rubenstein, *supra* note 5 at 849.

international human rights movement is poorly placed to insist on the specifics of the plan.”⁸⁷ Unfortunately, Roth does not provide more detail as to why the international human rights movement is poorly placed to comment on specifics in national plans. Rubenstein, as discussed above, also questions Roth’s hesitancy to embrace HRW’s potential role in helping to build institutions and systems to prevent violations and increase accountability, including analysing how systems, policies, and programmes can be designed to comply with human rights obligations.

Furthermore, there is ample precedent that does not support Roth’s position to avoid commenting on the content of national plans and other legislation. Taking the right to water for example, the CESCR, in its General Comment 15, makes recommendations about elements that should be included in national plans.⁸⁸ International NGOs in the past have made valuable contributions to the potential content of socio-economic rights in national plans, such as the right to food.⁸⁹ In addition, many States have adopted national plans on various socio-economic rights. As will be discussed below, South Africa has enacted very detailed and progressive legislation with regard to the right to water that can be used as a basis for making specific suggestions to other countries involved in enacting similar legislation.

⁸⁷ Roth, *supra* note 4 at 66. Roth’s argument is strange considering that HRW has made comments on the content of legislation dealing with children’s health. See *supra* note 65.

⁸⁸ General Comment 15 gives guidance to states in order to adopt comprehensive national plans and strategies. Although it does not provide details, it does allow for a general awareness of what major themes the national plan or strategy should touch upon.

⁸⁹ See Carlos Villan Duran, “El Derecho humano a la alimentación y al agua potable el Derecho internacional,” in AGORA NORD-SUD, *GLOBALITZACIÓ I AGRICULTURA: JORNADES PER A LA SOBIRANIA ALIMENTÀRIA* (Barcelona, 2003) 162 at 17-52 (outlines that NGOs played a large role in initiating the present efforts to draft voluntary guidelines by drafting a Code of Conduct. In particular, he highlights that the Code of Conduct was specific, listing measures for national implementation.).

A few comments should also be made with regard to Roth's discussion on technical assistance. In dismissing technical assistance as a viable option, Roth articulates his main motivation advocating for a shaming methodology.⁹⁰ He declares:

[T]echnical assistance works only when governments have the will to respect ESC rights but lack the means or know-how to do so. This assistance thus is ill-suited to address the most egregious cases of ESC rights abuse- the area where, as in the civil and political rights realm, international human rights organizations would *presumably want to focus*.⁹¹

Roth thus acknowledges that HRW's methodology focuses on only the most egregious violations of socio-economic rights. In taking this position, he makes two major assumptions: first, alternative methods, such as technical assistance, cannot work alongside situations where shaming methodology is best suited; and second, socio-economic rights methodology should mirror established civil and political rights methodology.⁹²

The first assumption implies that HRW is unwilling to promote socio-economic rights where governments are willing and able to realize and recognize these rights. Working in such an enabling context with a multi-faceted methodology arguably provides the most efficient and effective platform for NGOs, including HRW, to promote and develop socio-economic based norms.

⁹⁰ Roth does not include in his discussion his definition of technical assistance in socio-economic rights. He does not make clear, for example, if this means providing training materials, commenting on public policies and strategies, supporting local NGOs and civil society, reviewing constitutional or legislative acts from the standpoint of applicable international standards. For a more elaborate discussion on technical cooperation, see Gudmundur Alfredsson, "Technical Cooperation in the Field of Economic, social and Cultural Rights" in Eide et al., *supra* note 2 at 473.

⁹¹ Roth, *supra* note 4 at 67 [emphasis added].

⁹² See also Rubenstein, *supra* note 5 at 849, 854-855 (stating that international human rights NGOs need to supplement other methodologies to their shaming strategy, and that they can often engage in various strategies at the same time).

Second, Roth has simply extended HRW's powerful shaming methodology dealing with civil and political rights to socio-economic rights without considering adequately alternative methodologies and strategies. As will be discussed below, these include among other things, raising awareness of human rights obligations to government actors, local communities, and other non-human rights focused NGOs through workshops and other forums, and linking socio-economic rights with other important objectives such as environmental protection.

It does not suffice that civil and political rights should serve as the starting point for approaching socio-economic rights. As mentioned above, one of the most important roles of NGOs working towards advancing socio-economic rights is to help contribute to norm development.⁹³ HRW is a powerful and highly capacitated NGO in terms of finance and expertise. It must move beyond its limited analytical and practical reflection on the development of socio-economic rights. If it pursues alternative methods to supplement established HRW methodology dealing with civil and political rights, HRW can have a much more flexible, dynamic, diversified and ultimately stronger position in advocating socio-economic rights.

2.5 Reinforcing Historical Paradigms and Challenging North/South Imperatives

There has been considerable debate behind the international community's decision to adopt separate covenants for civil and political rights and socio-economic rights.⁹⁴ Furthermore, the superficial categorization of generations of rights—civil and

⁹³ See Mertus, *supra* note 8.

⁹⁴ See e.g. Eide, *supra* note 75. See also Beth Lyon, "Postcolonial Law: Theory and Law Reform Conference: Discourse in Development: A Post-Colonial 'Agenda' for the United Nations Committee on Economic, Social and Cultural Rights" (2002) *Am. U.J. Gender Soc. Pol'y & L.* 535 (reviewing the debate and politics between East and West in the decision to separate these two sets of rights into distinctive treaties, even though both are included together in the Universal Declaration on Human Rights).

political rights being first generational rights while socio-economic rights are second—has reinforced the division between these two sets of rights.⁹⁵ Importantly, throughout the history of the two Covenants, the United States has played a powerful role in denying the existence and the potential justiciability of economic and social rights, ultimately illustrated by their unwillingness to ratify the ICESCR, or acknowledge the necessity for most socio-economic rights.⁹⁶ This bias towards civil and political rights continues today, as evidenced, for example, by the recent commentary of a U.S. Department of State legal counsel with regard to the CESCR's General Comment 15 on the right to water that "the derivation of a separate right to water is virtually without precedent... [T]he argument provides no justification for a unilateral alteration in the substantive content of the Covenant or in the obligations of state thereunder."⁹⁷

Unfortunately, it is difficult to determine the scope of influence of the United States' polarizing vantage point towards socio-economic rights. This hesitancy to

⁹⁵ See Dianne Otto, "Rethinking the 'Universality' of Human Rights Law" (1997) 29 Colum. Human Rights L. Rev. 1, 6, (setting forth the classification of a third generation of solidarity rights such as the right to environment, and a fourth generation of indigenous peoples rights); see also Asbjørn Eide & Allan Rosas, "Economic, Social and Cultural Rights: A Universal Challenge" in Eide et al., *supra* note 2 at 3-8. Eide and Rosas deny the notion of generations for rights. They clarify:

The history of the evolution of human rights at the national level does not make it possible to place the emergence of different human rights into clear-cut stages. Efforts to do so would in any case make it necessary to distinguish also between civil and political rights, since political rights were accepted as human rights much later than some of the civil rights, in some countries even later than economic and social rights. *Ibid.* at 4.

⁹⁶ See Philip Alston, "U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy" (1990) 84 A.J.I.L. 365. See also Frank Deale, "The Unhappy History of Economic Rights in the United States and Prospects for Their Creation and Renewal" (2000) 43 How. L.J. 281, 317 (reviewing American antipathy towards the existence of ESC rights, setting forth a number of reasons for it, including among other things, that ESC rights are not really rights but instead goals of social and economic policy and that ESC rights are foreign to traditionally recognized American Constitutional Rights); also Report of the World Summit on Food: five years later. Annex II, *Explanatory Notes/Reservations* (United States) (June 2002 Rome). The United States solely opposed the establishment of "voluntary guidelines" for the right to food referring to them as a "sterile debate". Furthermore the United States was opposed to the right to food in general, preferring the right to a standard of living adequate for health and well-being as the appropriate terms used.

⁹⁷ Michael Dennis & David Steward, "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 A.J.I.L. 462, 494.

embrace socio-economic rights, however, is reflected in the work of civil society in the United States, most importantly human rights based NGOs.⁹⁸ In this regard, the majority of American civil society organizations, from large NGOs like HRW to grass roots organizations, have, until recently, focused little on socio-economic rights as legal obligations, unlike their counterparts in Southern countries.⁹⁹ As one commentator has found, “[m]ovements for social and economic rights, as well as solidarity rights, have tended to identify themselves as aid or economic development lobbies instead of using the language of human rights.”¹⁰⁰

In addition to the United States’ reluctance to acknowledge socio-economic rights, there may be other reasons why Southern-based NGOs have been more disposed than Northern-based NGOs to tackle socio-economic rights. Higher poverty rates, for example, which are typical of developing countries, often correlate with more dire social and economic security, thus making the realization of socio-economic rights a pressing issue. Furthermore, many argue that North American and European policies exacerbate

⁹⁸ See Rhonda Capelone, “The Indivisible Source of International Human Rights: A Source of Social Justice in the U.S.” (1998/1999) 3 N.Y. City L. Rev. 59, 60, observing that although the indivisible aspects of the UDHR have “been the cornerstone of human rights movements in many parts of the world, it is virtually unknown in the United States to social justice activists and attorneys as well as to the legal establishment and the general public.”

⁹⁹ See Rosas & Scheinin, *supra* note 68 at 431, stating: “While there are many NGOs working with different human rights related issues, few have traditionally focused on economic, social and cultural rights.” Of course, this does not pertain to American-based NGOs like the Center for Economic and Social Rights who have focused solely on socio-economic rights issues. See also Lyon, *supra* note 94 at 537, stating that “southern [NGOs] have consistently advocated for including ESCRs in the civil society agenda while most international NGOs are still struggling with the decision to take up these rights.” It should be noted that the distinction North/South is used based on prior use of these terms throughout legal and political science literature. Other terms include East/West and Developing/Developed. However, the limitations of these dichotomies should be mentioned, in that they do not reflect exactly or precisely the socio-political boundaries of the plurality of nations in international society.

¹⁰⁰ See also Otto, *supra* note 95 at 39. Otto further suggests, “human rights struggles have largely been shaped by the categories of the generation developments of rights” and have accordingly “predominated in the area of civil and political rights.”

poverty in developing countries.¹⁰¹ These countries that “on paper” support the promotion and development of socio-economic rights norms often contradict themselves by actions or lack thereof.¹⁰² Thus, it may become politically disadvantageous for Northern-based NGOs to whole-heartedly concentrate on socio-economic rights and challenge the poverty-reduction strategies adopted by their own governments, although they are allegedly “independent” from government influence.

Northern-based NGOs must continue to challenge North/South imperatives and historical paradigms by focusing their attention equally to socio-economic rights, including many of the structural issues that lead to socio-economic rights violations. Furthermore, as discussed above, an arguably new and more adaptive strategy towards socio-economic rights is necessary to depart from HRW’s approach to address socio-economic rights as an extension of its established methodology dealing with civil and political rights.

2.6 Re-Considering Relationships with Local Initiatives and NGOs

Large international human rights NGOs, like HRW, when using narrow models for promoting economic and social rights, are in danger of stifling alternative voices, such as local communities and individuals, in the economic and social rights dialogue and perpetuating a mainstream perspective of human rights.¹⁰³ For example, one commentator has expressed that modern human rights discourse has been divided into an absolute category of “universality” versus “cultural relativity” broadly fitting into

¹⁰¹ See Lyon, *supra* note 94 at 555. Some of these Northern policies include, among other things, structural adjustment policies of the International Financial Institutions, liberalization of trade markets through the World Trade Organizations, continuing debt burdens to Northern countries and lack of developmental aid in relation to other spending.

¹⁰² *Ibid.* (describing colonialism as in large part “an extractive enterprise dedicated to making the human and raw material resources of the colonized world available to the colonizing economies.” Post-colonial theorists argue that this “extraction has continued unabated.”); see also Capelone, *supra* note 98 at 61.

¹⁰³ See Otto, *supra* note 95.

North/South or West/East divisions.¹⁰⁴ Unfortunately, “the debate, framed in these polarizing terms, essentially leaves the dominant Standard of Europe unchallenged...and remains defined in relation to the Standard and thereby subordinated.”¹⁰⁵ This standard therefore fails to incorporate important voices that adequately reflect, among other things, global diversity and economic and social justice.¹⁰⁶

In this connection, in order to understand better the importance of diversity in public discourse, it is useful to refer to the work of Iris Marion Young, and in particular her work on inclusion and democracy.¹⁰⁷ Young argues that a truly inclusive democracy is one that allows the broadest level of participation. Importantly, she articulates that:

A democratic public ought to be fully inclusive of all social groups because the plurality and perspectives they offer to the public helps to disclose the reality and objectivity of the world in which they dwell together... [leading] to a more comprehensive understanding that takes the needs and interest of others more thoroughly into account. ... Inclusion of and attention to socially differentiated positions in democratic discussion *tends to correct biases and situate the partial perspective of participants in debate*. Confrontation with different perspectives, interests, and cultural meanings teaches each the partiality of their own and reveals to them their own experience as perspectival.¹⁰⁸

Furthermore, it is only through inclusive participation that the adequate social knowledge necessary to effectively promote justice in a society is possible. Young argues:

Aiming to promote social justice through public action requires... an objective understanding of the society, a comprehensive account of its relations and structured processes, its material locations and environmental conditions, a detailed knowledge of

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.* at 16.

¹⁰⁶ *Ibid.* at 44. Otto instead advocates another boundary for challenging the current human rights dialogue, a transformative human rights dialogue that lies on the edges of modern discourse relying on pluralizing difference and addressing current power structures.

¹⁰⁷ Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press 2000).

¹⁰⁸ *Ibid.* at 112-113, 116 [emphasis added].

events and conditions in different places and positions, and the ability to predict the likely consequences of actions and policies. Only pooling the situated knowledge of all social positions can produce such social knowledge.¹⁰⁹

Although for the most part Young's reasoning for diversity and broad inclusion takes place within the domestic setting, the benefits and necessity of inclusion that she advocates also applies to the functioning of international human rights organizations working in developing countries. This is because the same biases and partial perspectives can occur with Western-based human rights NGOs working in developing countries, especially those who have primarily focused on civil and political rights and whose methodologies reflect this one-sided focus. In addition, their work would be more legitimate and effective if they had a comprehensive understanding of different perspectives and social structures of the countries in which they work.

In order to benefit adequately from the plurality of perspectives in the socio-economic rights debate and to recognize their own biases and partialities, international human rights NGOs, among other things, must acknowledge and respect perspectives that come from local NGOs and civil society. For example, NGOs like AWARD propose models and implement projects to promote socio-economic rights that are adequately flexible to incorporate the voices, concerns, customs and context of local groups, and at the same time build on established human rights methodology, including those focusing on civil and political rights. These voices move beyond the established boundaries of the universality debate, within both the international and domestic setting, and seek to reconcile the plurality of views, customs and traditions that any interpretation of socio-economic rights and inclusive participation must consider.

¹⁰⁹ *Ibid.* at 117.

To incorporate these voices, international NGOs need to, among other things, re-evaluate the manner in which networks, partnerships and interactions are established with “local” NGOs throughout the world. This includes the need to address two major criticisms of the relationships between international and local NGOs: 1) the relationship is hierarchical, and 2) the main purpose of local networks is to relay information.¹¹⁰ For example, Northern-based international NGOs should not influence Southern NGOs to passively adopt similar methodologies, including a heavy concentration in, and a focus on, government conduct. As some commentators have written, “[t]he tendency on the part of local African NGOs to mirror the approaches of U.S.-based [international] NGOs is undesirable, especially given that it is the local groups that are in close proximity to the real-life contexts within which human rights abuses in African countries occur.”¹¹¹ Furthermore, local NGOs should serve to do more than relay information to international NGOs.¹¹² The above two criticisms seek to remedy problems that perpetuate an absolute perspective on human rights promotion, significantly on the development of socio-economic norms and methodologies in a manner that does not wholly incorporate the voices of the local civil society.

A number of suggestions can be made to address these concerns. First, international human rights NGOs like HRW should expand their networks beyond local

¹¹⁰ See James Gathii & Celestine Nyamu, “Reflections on United States-Based Human Rights NGOs’ Work on Africa” (1996) 9 Harv. Hum. Rts. J. 285, 295. See also Rubenstein, *supra* note 5 at 855 suggesting that international NGOs should engage with local grass roots organizations throughout the world, in a manner that “requires partnership, not dominance, and international human rights organizations must respect the knowledge and capacity of local organizations.”

¹¹¹ Gathii & Nyamu, *ibid.* (further stating that “it is time African NGOs stopped replicating the confining mandates and approaches of INGOs, since these are shaped by circumstances that are specific to the INGOs’ domestic environments.”).

¹¹² *Ibid.* at 296.

NGOs whose sole thematic area of focus is human rights.¹¹³ This entails working with NGOs that have a multi-disciplinary character, and deal with socio-economic issues from other perspectives, including ecology, economy and education. This is particularly important with socio-economic rights, because the nature of these rights involves a wide range of actors and experts, and because there exist important procedural elements, such as the principle of participation, that require the participation of more than human rights civil society.¹¹⁴ These themes will be revisited in the conclusion. Furthermore, international NGOs need to focus on more than government conduct.¹¹⁵ International NGOs, like HRW, that focus on the shaming of government conduct, often fail to address the broad social problems that may contribute to violations of socio-economic rights.

The following section introduces AWARD and the context, methodology and objectives of its human rights and water project. As described below, AWARD is a rural-based South African NGO with a multi-disciplinary approach to water security. It is hoped that AWARD's practical experience in promoting water security will contribute to the fertilizations of ideas between two organizations different in structure, mandate and capacity working towards the same end. Furthermore, it is desirable that AWARD's experience will ultimately lead international human rights NGOs to a more flexible and adaptive methodology toward socio-economic rights and allow a place for substantial "local" input into the global human rights debate.¹¹⁶

¹¹³ *Ibid.* at 295.

¹¹⁴ This is also true to some extent for civil and political rights; however I argue that it is even more a reality for socio-economic rights implementation.

¹¹⁵ Gathii & Nyamu, *supra* note 110 at 293.

¹¹⁶ See Rubenstein, *supra* note 5 at 855; also Robinson, *supra* note 5 at 871.

III. An Overview of AWARD's Human Right to Water Project and the Social, Political and Legislative Context pertaining to the Realization of the Right to Water in South Africa

In order to understand the applicability of AWARD's work with regard to, among other things, addressing HRW's position on socio-economic rights, it is necessary to describe the context within which AWARD functions. Importantly, South Africa has institutionalized a number of socio-economic rights norms and has demonstrated political will to implement these norms. Reviewing some of the legislative initiatives and jurisprudence pertaining to the right to water in South Africa will allow the reader to gain a clearer understanding of AWARD's human rights project objectives and its methodologies for promoting the right to water. This is particularly relevant, because AWARD's broader objectives and methodologies must be qualified within this political, legislative and jurisprudential background.

3.1 Social Context and Water Situation Surrounding AWARD

As mentioned in the introduction, AWARD is located in rural northeastern South Africa and works primarily in the Sand River Catchment.¹¹⁷ It is difficult to find up-to-date demographic statistics for this area, as the last census dates from 1998. Nevertheless, it is clear that there is rampant poverty, due in large part to apartheid homeland schemes and forced removals. Contributing factors include high levels of unemployment, dense rural populations (176 people/km²) with limited access to arable

¹¹⁷ A catchment is another word for river basin or drainage basin. South African water legislation has divided up the management of water areas by the catchment level. This is in contrast to the provincial and municipal political boundaries. Thus, AWARD's work, although based in one catchment, falls under various municipal boundaries, adding to the complexity and challenges of the project.

land and water resources, high HIV/AIDS rates, low household income and very low literacy rates.¹¹⁸

Water is also a scarce resource in the Sand River Catchment. According to AWARD, “[t]he Sand River Catchment, not unlike a number of river basins in South Africa, has been subjected to a particular water management approach that has compromised ecological integrity, productivity and water resources over a number of decades.”¹¹⁹ The lower portion of the Sand River frequently experiences no-flow conditions and the catchment is in water deficit with insufficient water to meet current needs.¹²⁰ In addition to surface water, there is a good supply of underutilized groundwater. The result is that many villages still get water from rivers, wells, streams and unprotected springs despite available groundwater sources.¹²¹

Most villages in the catchment had basic standpipe systems installed by previous homeland governments.¹²² Unfortunately, these systems have been neglected in terms of maintenance and repair resulting in many villages not having access to adequate amounts of safe water.¹²³ In addition, there is gross inequity in accessing water for the rural poor in comparison to other sectors such as agriculture and forestry.¹²⁴ Moreover, inequitable access to water also exists between rural communities, with some communities having abundant water while others are below minimum standards.¹²⁵

¹¹⁸ Sharon Pollard & Phillip Walker, “Catchment management and water supply and sanitation in the Sand River Catchment, South Africa: description and issues” (2000) WHIRL Project Working Paper 1, online: WHIRL < <http://www.nri.org/WSS-IWRM/reports.htm> >, 4-5 [Pollard & Walker].

¹¹⁹ See AWARD’s web page, *supra* note 1.

¹²⁰ See Pollard & Walker, *supra* note 118 at 3.

¹²¹ *Ibid.* at 12.

¹²² *Ibid.* at 13.

¹²³ *Ibid.* at 12. In 2000, it was estimated that 44% of the population did not have access to minimum government standards.

¹²⁴ See AWARD web page, *supra* note 1.

¹²⁵ Pollard and Walker, *supra* note 118 at 15.

3.2 A Brief Overview of the South African Legal and Political Context Pertaining to the Right to Water

a. Background

The last ten years in South Africa have witnessed extreme political change. The apartheid regime left millions of Black Africans marginalized, voiceless and in extreme poverty. The period of transition to democracy has been “characterized by a major upheaval in all of the governing framework- from the constitution to the various policies that underscored the country’s commitment to a new, free and fair” nation.¹²⁶ South Africa has, for the most part, chosen forgiveness and the masses are eager for a new and fresh start.

This climate of reform is well evidenced in the countless policies and legislation that the new government has enacted stemming in large part from the 1996 Constitution. The Constitution has institutionalized many socio-economic rights and solidarity rights, such as the right to a healthy environment. The result has been a great deal of legal reform directed toward ensuring socio-economic goals in society.

Importantly, the new constitution and ensuing legislation decentralized the state by creating local government.¹²⁷ This decentralization process has devolved major responsibilities to the local level, including a number of government services such as providing water, sanitation and electricity.¹²⁸ The new demands have placed considerable strain and responsibility on an inexperienced local government sector. Unfortunately, local government often lacks the capacity in terms of staff and expertise to

¹²⁶ See AWARD’ web page, *supra* note 1; also David Goodman, *Fault Lines: Journeys into the New South Africa* (Berkeley and Los Angeles: University of California Press 1999).

¹²⁷ *Constitution of the Republic of South Africa 1996*, No. 109 of 1996, s. 40 [SA Constitution].

¹²⁸ *Local Government: Municipal Systems Act 2000*, No. 32 of 2000, s. 73.

implement its many responsibilities.¹²⁹ Because AWARD functions within two local municipalities, addressing local government issues influences its project objectives and methodologies.

Importantly, the Constitutional Court has not hesitated to opine on socio-economic rights violations. Notably, two recent cases are important to mention concerning the right to housing and the right to health respectively: *Government of the Republic of South Africa v. Grootboom*¹³⁰ (*Grootboom*) and *Minister of Health v. Treatment Action Campaign (TAC)*.¹³¹ The significance of these cases in contributing to the justiciability of socio-economic rights will be discussed in more detail below.

It becomes evident that during this transition period, the role of civil society, especially human rights legal expertise, is vital. South Africa has undertaken ambitious goals and aspirations toward guaranteeing many socio-economic rights without a comprehensive understanding of what the content of those rights entail. Thus, there is a necessity for NGOs and other experts to interact and help contribute to the development of these rights and to move beyond a shaming methodology.

b. A Review of Legislation and Jurisprudence in South Africa relating to the Right to Water

As already mentioned, an overview of the South African legal landscape relating to the right to water is necessary for the reader to understand some of the main issues AWARD's human rights project raises, as well as to gain insight into the development of the human rights project's objectives and methodologies discussed below.

¹²⁹ Pollard & Walker, *supra* note 118 at 5.

¹³⁰ *Gov't of Rep. of S. Afr. v. Grootboom*, 2000 (11) BCLR 1169 (CC) [*Grootboom*].

¹³¹ *Minister of Health v. Treatment Action Campaign*, 2002 (10) BCLR 1033 (CC) [*TAC*].

i. Constitution of South Africa

The Constitution provides the basis for a number of socio-economic rights, including the right to water.¹³² Important sections of the Bill of Rights include, *inter alia*, the right of everyone to “an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations,”¹³³ human dignity,¹³⁴ children’s socio-economic rights,¹³⁵ the right to equality¹³⁶ and the right to life.¹³⁷ The Constitution also obliges South Africa to respect, protect, promote and fulfill the rights in the Bill of Rights.¹³⁸

ii. National Water Policy

The National Water Policy laid the foundation for the two major water-related legislative Acts enacted in South Africa.¹³⁹ The most important aspect of the National Water Policy is the 28 Fundamental Principles it discussed.¹⁴⁰ In particular, Principle 7 conveys that the objective of the water policy is to “achieve optimum, long term, environmentally sustainable social and economic benefit for society from their [the nation’s water resources] use.” The Principles also include many key components of the two water acts discussed below, such as the Reserve (Principle 10), the abolition of the riparian principle (Principle 5), the government as custodian of the nation’s water

¹³² See SA Constitution, *supra* note 127, c. 2. In direct relation to water Article 27 (1) (b) states that “[e]veryone has the right to have access to[...] sufficient food and water.” South Africa must take “reasonable legislative and other measures, within its available resources, to achieve the progressive realization” of the right to water. Except for section 7(2)’s limitation of “available resources”, the right to water and other socio-economic rights can only be limited by section 36, “in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...”

¹³³ *Ibid.*, s. 24.

¹³⁴ *Ibid.*, s.10.

¹³⁵ *Ibid.*, s. 28.

¹³⁶ *Ibid.*, s. 9

¹³⁷ *Ibid.*, s. 11.

¹³⁸ *Ibid.* s. 7(2).

¹³⁹ South Africa, DWAF, *White Paper on a National Water Policy for South Africa* (1997).

¹⁴⁰ *Ibid.*, s. 4.1.1.

(Principle 12) and the right of all citizens to have access to basic water services (Principle 25).

iii. National Water Act and Related Strategies

The National Water Act (NWA)¹⁴¹ deals primarily with water resource management, while the Water Services Act (WSA)¹⁴² focuses on service delivery.¹⁴³ The NWA is considered one of the most progressive water-related laws in the world.¹⁴⁴ It has done much to reform the old water laws under the apartheid regime, notably eliminating riparian rights and private ownership of water by placing water resources under a public trust administered by the government on behalf of the people.¹⁴⁵ It is guided by three main principles: equity, efficiency, and sustainability.¹⁴⁶

As mentioned above, the NWA divides South Africa into 19 water management areas to be administered by an institutional framework, falling primarily under the mandate of the Catchment Management Agency (CMA).¹⁴⁷ The CMA will ideally, among other things, administer a procedure for regulating water using a system of authorizations and licenses, and elaborate on a catchment management strategy (CMS).¹⁴⁸

The NWA also establishes the Reserve, an important water management concept which it defines as “[t]he quantity and quality of water required (a) to satisfy basic human needs...; and (b) to protect aquatic ecosystems in order to secure ecologically sustainable

¹⁴¹ *National Water Act* 1998, No. 36 of 1998 (NWA).

¹⁴² *Water Service Act* 1997, No. 108 of 1997 (WSA).

¹⁴³ See Pejan, *supra* note 3 (providing a good summary of the NWA and WSA. He also argues that dividing the water services and water management into separate acts undermines the intimate relation between these two water sectors and the interdependence of the two acts.)

¹⁴⁴ See e.g. Sharon Pollard et. al, “Water resource management for rural water supply: implementing the Basic Human Needs Reserve and licensing in the Sand River Catchment” (2002) Whirl Project Working Paper 6, online: WHIRL < <http://www.nri.org/WSS-IWRM/reports.htm>>.

¹⁴⁵ NWA, *supra* note 141, Preamble & s. 3.

¹⁴⁶ *Ibid.*, s. 2.

¹⁴⁷ *Ibid.*, c. 7.

¹⁴⁸ *Ibid.*, c. 4 & s. 8.

development and use of the relevant water resource.”¹⁴⁹ Basically, before any water can be allocated to other uses, there must be sufficient amounts set aside to meet basic human needs and the sustainability of the ecological system. Furthermore, the NWA requires the Minister of Water Affairs to classify all water resources and consequently set class and resource quality objectives for all water resources, which essentially act as indicators and benchmarks for water resource quality and sustainability.¹⁵⁰

Finally, the NWA elaborates a number of offences related to non-compliance with directives and requirements of the Act. These include a failure to register water use, unlawfully and intentionally or negligently committing any act or omission that pollutes or is likely to pollute a water resource and failure to provide access to any books, accounts, documents or assets required under the Act.¹⁵¹

iv. Water Services Act and Related Strategies

The objectives of the WSA are, among other things, to provide “the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being,”¹⁵² to “provide a regulatory framework for water services institutions”¹⁵³ and to require the Minister to monitor and, if necessary, intervene in water service delivery.¹⁵⁴

¹⁴⁹ *Ibid.*, s. 1(xviii). Thus the Reserve has two aspects: the Basic Human Needs Reserve (BHNRR) and the Ecological Reserve (ER). Section 5.7 below discusses how these important water management tools fit into a human rights framework.

¹⁵⁰ *Ibid.*, ss. 2-15.

¹⁵¹ *Ibid.*, s. 151. Other important aspects of the NWA include the creation of a Water Tribunal (s. 146), setting up national monitoring and information systems (c. 14) and establishing a pricing strategy (ss. 56-7).

¹⁵² WSA, *supra* note 142, s. 2(a).

¹⁵³ *Ibid.*, s. 2(d).

¹⁵⁴ *Ibid.*, s. 2(f).

Importantly, the WSA recognizes the right of everyone to basic water supply and basic sanitation.¹⁵⁵ The Minister of Water Affairs elaborated on the basic water supply in a compulsory national standard¹⁵⁶ which guarantees a minimum quantity of 25 litres of potable water per person per day or 6000 litres per household a month at a distance within 200 metres from the household.¹⁵⁷ This basic supply is however subject to future revision and the intention is that the water services shall climb a ladder of an increasing service level for all consumers.¹⁵⁸

The main institutions charged with water delivery are the Water Service Authorities (WSAUs), which the WSA defines as any municipality “responsible for ensuring access to water services.”¹⁵⁹ In other words, local government is charged with overseeing water service delivery. In this capacity, WSAUs must engage Water Service Providers (WSPs) to provide water services to consumers. The WSAU can perform the function of WSP itself or enter into a contract or joint venture with one or more other institution to supply water.¹⁶⁰ Accordingly, the ability to contract out WSP functions allows for the privatization of water services. However, the WSAU is ultimately responsible for the performance of a WSP and must continuously monitor the adequacy of its service delivery.¹⁶¹

¹⁵⁵ *Ibid.*, s. 3(1).

¹⁵⁶ South Africa, *Regulation relating to compulsory national standards and measures to conserve water*, Gazette 22355, Regulation Gazette 7079 (8 June 2001) [National Water Standards].

¹⁵⁷ *Ibid.*, s.3(b).

¹⁵⁸ South Africa, DWAF, *Strategic Framework for Water Services* (September 2003), 27 [SFWS]. The relevance of this ladder analogy to a human rights approach to water security will be discussed in section 5.3.

¹⁵⁹ WSA, *supra* note 142, s. 1(xx).

¹⁶⁰ *Ibid.*, s. 19.

¹⁶¹ *Ibid.*, s. 27. Other important aspects of the WSA include procedures for the discontinuation of water services (s. 4(3)), water tariff standards (s. 9), and the Minister of Water Affairs role in monitoring, and potentially intervening in the functioning of WSPs (ss. 62-3).

In addition to the WSA, DWAF has set forth a water service strategy, incorporating many human rights concepts.¹⁶² The Strategic Framework for Water Services (SFWS), which, among other things recognizes the need to engage civil society and include public participation, sets forth important indicators and benchmarks for water services, clarifies the institutional framework in the water services sector and outlines the financial framework needed to ensure access to water, including the Free Basic Water Programme.¹⁶³

v. Free Basic Water Programme

In relation to WSA section 2 outlining a right to a basic water supply, the national government has issued a programme, to be administered by local government, with the general aim to supply all households with free basic water.¹⁶⁴ However, as it is not economically feasible to supply all households, the Free Basic Water Programme (FBWP) points to “poor households” as its main target¹⁶⁵ and reminds the local governments that the paramount goal is to make sure that everyone has access to water services before giving out free basic water.¹⁶⁶ The Free Basic Water Implementation Strategy states that, “the continued extension of adequate water supplies to unserved households must remain at the core of any provision of free basic water.”¹⁶⁷

vi. Local Government Related Legislation

As mentioned above, local government is responsible for an array of public services. Therefore, when analysing the water legislation in South Africa, one must also

¹⁶² SFWS, *supra* note 158.

¹⁶³ See generally SFWS, *ibid.*

¹⁶⁴ South Africa, DWAF, *Free Basic Water Implementation Strategy Document*, version 8.3, (May 2001) online: DWAF <www.dwaf.gov.za/FreeBasicWater/>.

¹⁶⁵ *Ibid.*, s. 3.2.

¹⁶⁶ *Ibid.*, s. 3.1.

¹⁶⁷ *Ibid.*

look at laws that deal with local government powers and functioning. In this regard, among others, four important legislative acts must be considered: the Constitution, the Municipal Structures Act, the Municipal Systems Act and the Local Government Act, including its related amendments and policies.

The responsibility to provide water and thus realise the right to water must be understood in relation to the constitutional division of competences between the national, provincial and local spheres of government. According to Schedule 4(B) of the Constitution “water and sanitation services limited to potable supply systems and domestic waste-water and sewage disposal systems” fall under the duties of local government.¹⁶⁸ Pursuant to the Constitution, the Municipal Structure Act¹⁶⁹ divides local government into three municipal categories, categories A (Metropolitan Municipalities), B (local municipalities) and C (District Municipalities). In rural areas, for example around the Sand River Catchment, the district municipality, as required by the WSA, acts as the WSAU and often appoints the local municipality as WSP.

The internal system of administration of a municipality is regulated by the Municipal Systems Act (Systems Act).¹⁷⁰ In ensuring that services are provided to communities, the Systems Act requires municipalities to “give effect to the provisions of the Constitution.”¹⁷¹ In this regard, it must “(a) give priority to the basic needs of the local community; (b) promote the development of the local community; and (c) ensure that all members of the local community have access to at least the minimum level of

¹⁶⁸ See also SA Constitution, *supra* note 127, s. 154(1) (stating that national and provincial government must support and strengthen the capacity of municipalities to perform their functions and the general principal of co-operative government must be taken into account by all spheres of government in solving water problems).

¹⁶⁹ *Municipal Structures Act* 1998, No. 117 of 1998.

¹⁷⁰ *Supra* note 128.

¹⁷¹ *Ibid.*, s. 73(1).

basic municipal services.”¹⁷² In addition, the provision of services must be “environmentally sustainable and be regularly reviewed with a view to upgrading, extension and improvement.”¹⁷³

Local government must also formulate Integrated Development Plans (IDPs), which are to work as a form of strategic planning for municipal and district development. The Local Government Second Amendment Act of 1996 first demanded the creation of IDPs, which was expanded on in the 1998 White Paper on Local Government (White Paper). Among other things, the White Paper elaborates that IDPs are meant to “serve as a basis for engagement between local government and the citizenry at the local level, and with various stakeholders and interest groups. Participatory and accountable government only has meaning if it is related to concrete issues, plans and resource allocations.”¹⁷⁴

vii. National Environmental Management Act (NEMA)

NEMA’s Chapter one sets out a list of important environmental law principles that are applicable to the right to water, both in terms of resource management and water delivery. These include sustainable development, precaution, integrated management, basic human needs, participation, transparency, access to information, public trust and the importance of women and youth in environmental management.¹⁷⁵ In addition, NEMA requires environmental impact assessment of any activity that may “significantly affect”

¹⁷² *Ibid.*

¹⁷³ *Ibid.*, ss. 73(2)(d) & (e).

¹⁷⁴ South Africa, *White Paper on Local Government* (1998), ss. B, 1.3 [White Paper]. Other reasons for IDPs include facilitating interaction between all three levels of government, helping to prioritize actions that are most pressing and helping municipalities to develop a holistic approach to development, including focusing on environmental sustainability. The Systems Act also elaborates on the content of the IDPs, including to contribute to the progressive realisation of the fundamental rights contained in sections 4, 25, 26, 27 and 29 of the Constitution (s. 23(c)), to set key indicators and performance targets with regard to each of its development priorities and objectives (s. 26(i) & 41) which should be reviewed annually (s. 46).

¹⁷⁵ *National Environmental Management Act* 1998, No. 107 of 1998, s. 2.

the environment.¹⁷⁶ The relevance of environmental law in promoting a right to water is discussed in section four.

viii. Constitutional Court Cases

As already mentioned, the South African Constitutional Court has addressed socio-economic rights, creating important jurisprudence and helping to deflect criticism with regard to the justiciability of these rights. This section will review the *Grootboom* and *TAC* cases and outline the pertinent aspects of the Court's holdings. Because many of the legal conclusions are similar in both cases, the legal analysis will discuss both cases together.¹⁷⁷

In *Grootboom*, a group of families comprising mostly children, brought suit to enforce their constitutional right to housing under Section 26 and violations of the rights of children under Section 28.¹⁷⁸ The families were constructively forced to leave their squatter settlement due to its deplorable living conditions, including lack of water, sewage and electricity.¹⁷⁹ They then proceeded to squat on private land, but were soon forcibly evicted because their homes were bulldozed and their possessions destroyed.¹⁸⁰ Their old space in the squatter settlement had been filled; thus, they were left homeless and stranded on a sports field.¹⁸¹ The Court held that the government's housing

¹⁷⁶ *Ibid.*, s. 24.

¹⁷⁷ See generally, Pejan, *supra* note 3 (discussing and analysing these decisions); also Sandra Liebenberg, "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?" (2002), online: Community Law Centre <http://www.communitylawcentre.org.za/ser/docs_2002/evolving_jurisprudence.pdf>; also David Bilchitz, "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence" (2003) 19 S.A.J.H.R. 1.

¹⁷⁸ *Grootboom*, *supra* note 129, para. 12. Specifically, Section 26(2), provides that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

¹⁷⁹ *Ibid.*, paras. 7-8.

¹⁸⁰ *Ibid.*, para 10.

¹⁸¹ *Ibid.*, paras. 9, 11.

programme was in violation of its Constitutional obligations because it did not consider adequately short-term needs.¹⁸²

TAC dealt with the South African government's refusal to distribute Nevirapine, a drug that reduces the risk of HIV/AIDS transmission from pregnant women to their fetuses and newborns, despite having access to an adequate stock of the drug.¹⁸³ The government cited a number of reasons for its position, including "concerns about, among other things, the safety and efficacy of Nevirapine."¹⁸⁴ The WHO, however, had approved the drug, reflecting the current medical consensus that Nevirapine had no serious side effects.¹⁸⁵ The government finally agreed to a limited distribution of the drug to two health clinics in each province, claiming that a larger-scale programme was not possible because Nevirapine was effective only if pregnant mothers used formula to feed their newborns, which raised a number of social, political and public health implications.¹⁸⁶

The Treatment Action Campaign (TAC), an HIV/AIDS advocacy group, brought suit, alleging that the government violated the constitutional right to health care under Section 27 of the Constitution by not widely distributing the pills for free and by failing to implement a comprehensive program for the prevention of mother-to-child HIV transmission.¹⁸⁷ The Court unanimously held that the government was under an

¹⁸² *Ibid.*, para. 95.

¹⁸³ *TAC*, *supra* note 130, para. 2, n.3.

¹⁸⁴ *Ibid.*, paras. 10, 14.

¹⁸⁵ *Ibid.*, para. 60.

¹⁸⁶ *Ibid.*, paras. 10, 14-15.

¹⁸⁷ *Ibid.*, para. 4. Section 27(2), the same section that provides for the right to sufficient water, is subject to the notion of progressive realization.

obligation to distribute Nevirapine for free, as well as testing and counseling as part of its overall programme to combat mother-to-child HIV transmission.¹⁸⁸

Arguably, the most important outcome of these cases is that the Court set forth a test interpreting the concept of progressive realization. In this regard, *Grootboom*, followed by *TAC*, applied a reasonableness standard in order to evaluate whether the government is complying with its constitutional obligations to realize the array of socio-economic rights.¹⁸⁹ For example, with regard to the right to housing in *Grootboom*, the Court articulated a reasonable standard as requiring the creation of “a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the State’s available means.”¹⁹⁰

The Court elaborated important elements of what would constitute a reasonable programme in *Grootboom*. First, a reasonable programme “must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.”¹⁹¹ However, although different spheres of government may be responsible for implementing the programme, the national government has the ultimate responsibility for ensuring that the programme adequately meets the State’s obligations.¹⁹² Second, any legislative measures that are taken to implement the right must be supported by “appropriate, well-directed policies and programmes implemented by the executive” that must be reasonable “both in their conception and their implementation.”¹⁹³ Third, the programme must be balanced and

¹⁸⁸ *Ibid.*, para. 95.

¹⁸⁹ *Ibid.* at paras. 35-36.

¹⁹⁰ *Grootboom*, supra note 130, para. 41.

¹⁹¹ *Ibid.*, para. 39.

¹⁹² *Ibid.*, para. 39-40.

¹⁹³ *Ibid.*, para. 42.

flexible and consider short, medium, and long term needs and cannot exclude a significant portion of society.¹⁹⁴ Importantly, the Court stated that “[i]f the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”¹⁹⁵ This served as the main basis for the Court’s decision in *Grootboom* finding the government’s housing programme unreasonable. The Court qualified this requirement, however, by stating that it did not mean “that everyone can immediately claim access” to their rights, but that the State’s duty was to expend “[e]very effort” to realize the array of socio-economic rights “as soon as reasonably possible.”¹⁹⁶ Finally, the programme must be capable of realizing the right in question within the State’s available resources.¹⁹⁷

The Court in both cases rejected the idea of a minimum core obligation for socio-economic rights.¹⁹⁸ In this manner, the *Grootboom* decision stated that it would be difficult to determine what such a minimum threshold should be, as the needs and opportunities for the enjoyment of these rights vary greatly and remain unidentified.¹⁹⁹ Furthermore, the Court foresaw difficulty in defining a minimum core, since the needs of vulnerable groups are diverse (i.e. do people need houses, or land and houses, etc.), and not enough information is available to determine the range of diverse needs.²⁰⁰ Thus it raised the issue of whether it should define the minimum core generally or in relation to the various specific groups of people.²⁰¹ However, the Court’s reasoning in rejecting

¹⁹⁴ *Ibid.*, para. 43.

¹⁹⁵ *Ibid.*, para. 44.

¹⁹⁶ *TAC*, *supra* note 131, para. 125.

¹⁹⁷ *Grootboom*, *supra* note 130, paras. 41, 46.

¹⁹⁸ *TAC*, *supra* note 131, paras. 34-35; *Grootboom*, *ibid.*, para. 32.

¹⁹⁹ *Grootboom*, para. 32.

²⁰⁰ *Ibid.*, para. 33.

²⁰¹ *Ibid.*

core obligations contained serious flaws and has been subject to much criticism.²⁰² In particular, it has adopted a very narrow definition of core obligations as only entitling people to demand basic amounts of each right immediately.²⁰³ Namely, as will become evident when reviewing the core obligations pertaining to the right to water, these obligations are clearly and broadly defined, surpassing just merely ensuring a minimum amount of each right.

3.3 Human Rights Project Description and Objectives

It is clear that large international human rights NGOs' mandates and capacity differ from small, local-based NGOs like AWARD, including the diverse social and political contexts in which international NGOs function. However, NGOs like HRW, working in varying political and social environments, need a flexible and dynamic methodology. AWARD's experience is relevant for enriching the current undernourished dialogue with regard to the role of NGOs and socio-economic rights implementation and adding a local voice to the mainstream human rights debate.

As already mentioned, few projects have sought to explore water as a human right in the field.²⁰⁴ Although the CESCR and legal scholars have contributed to a clear conceptual basis for the right to water, little has been done to evaluate the nitty-gritty aspects of implementation. In this sense, AWARD had little practical guidance in planning the details and objectives of its human rights and water project. Furthermore, AWARD had to consider the contextual factors described above in formulating its methodology and objectives. For example, in the Sand River Catchment, where AWARD is based, water privatization is not an issue because there is little economic

²⁰² See e.g. Liebenberg, *supra* note 177; also Bilchitz, *supra* note 177.

²⁰³ See e.g. *TAC*, *supra* note 131, para. 34.

²⁰⁴ See e.g. *supra* note 71 (discussing the Ghana fact-finding mission on the right to water).

incentive for private companies to commit to such a project, as few people have enough resources to pay for water in excess of a basic minimum amount that the South African government guarantees free of charge. Finally, some of AWARD's objectives implicate the use of alternative strategies in promoting the right to water, which Roth either dismisses or does not contemplate sufficiently. The following summarizes the main objectives of the project, many of which are inter-related.

The human rights project is a small undertaking. The South African Water Research Commission funded the project as a new and imperative area of research. Its total budget was Rand 196,400.00 (about US\$ 31,583.00). The first phase of the project required a clear elaboration of a human rights approach to water security followed by a desktop review/analysis of relevant legislation and policies in place to further the constitutional obligation concerning water.²⁰⁵ Other aspects of the project, such as creating learning materials and conducting workshops, will be discussed below in more detail. The author was the only lawyer working on the project and the primary author of the report stemming from the first phase. A number of AWARD interns and staff helped in conducting field research in terms of translation and setting up contacts with local councillors, the community and other governmental actors. As mentioned above, the project did not focus on privatization issues, nor did it concentrate on sanitation, both important issues with regard to the right to water.

A small field study accompanied the desktop review, encompassing three villages in the Sand-River Catchment and a number of government actors, such as officials in charge of implementing water policies and strategies. Interviewees included individual

²⁰⁵ See AWARD, *Access to Water as a Human Rights: Project Proposal*, online: AWARD <www.award.org.za>.

households, village water committees (community-based organizations (CBOs) representing the water-related concerns of the village) and local government. Limitations of the field study included the informal nature of the interviews and its small scope, reflecting some of the limitations of the project generally. Despite these limitations, the field study raised important issues and indicated areas for future research and challenges.

A key challenge to implementing socio-economic rights is the breadth of actors involved in implementing these rights. Although the right to water is a constitutional right, AWARD's experience indicates that few people working in the water sector understand what this constitutional entitlement entailed. In this regard, one key objective of the project, and more specifically the human rights framework elaborated below, is to make it easily accessible to the breadth of non-legally trained actors working in the water sector. This involved creating a framework to serve as a learning tool as a means of explaining legal concepts in a simple and accessible manner to non-lawyers and individuals with no exposure to human rights.

AWARD seeks to involve communities in their research methods in order to ultimately empower the communities it works in. The human rights project is no different. The second and third phases of the project focus on creating learning materials based on the research and human rights framework from the first phase of the project, ultimately resulting in a series of workshops with various actors involved in the water sector such as CBOs and local government councillors. The purpose is to raise capacity with regard to human rights obligations and entitlements, and to comment on issues AWARD observed in the application of the human rights framework. It is hoped that

these workshops can enhance participation, raise awareness, create space for important dialogue and contribute to compliance of constitutional obligations.

In addition, by creating a framework that is accessible to a wide range of actors and creating and conducting workshops, AWARD ultimately seeks to promote a human rights approach to water security. For example, AWARD has a great deal of expertise with regard to water management and delivery issues in the area where it functions; however, before creating an accessible human rights framework, it was unable to frame its discourse in terms of human rights or legal obligations. Preliminary efforts to share the human rights framework with government actors were positive. AWARD presented the human rights framework to some South African Department of Water Affairs and Forestry (DWAF) officials involved in promoting participation in water resource management, resulting in a very engaging and productive meeting. The officials asked many questions and created a space for dialogue about implementing their constitutional obligations.

The duration of the human right project is one year, and the project had not been finished at the time of this writing. Only three months involved monitoring the implementation of the right to water. In this sense, it is hoped that this short project will be the beginning of a long-term project promoting the implementation of the right to water. Due to the nature of socio-economic rights, specifically the concept of progressive realization discussed in more detail below, it is impossible in a few months to get an accurate picture of how government is complying and continuing to comply with many of its obligations. A single snapshot of a particular situation is often not helpful in the long-

term because forming an accurate picture of whether government is progressively realizing the right to water necessitates continuous follow-up.

Finally, it is important to note that the majority of human rights discourse on the right to water has dealt solely with water service issues, such as the termination of water supply without due process, water service privatization and other infrastructure-related issues. Water resource management issues have traditionally fallen under environmental and property law, and other disciplines. However, AWARD's project seeks to explore how to bring water management issues under the rubric of a human rights dialogue. Without adequate resource management, water service provisions cannot be met. In this connection, the human rights project focuses on important water management issues such as participation in resource management decisions and human rights implications of allocation and licensing decisions.

In summary, as will become evident, AWARD's project has commonalities with Roth's suggestions in promoting socio-economic rights, such as concentrating on discriminatory and arbitrary conduct, and moving away from commenting on difficult allocation of resource issues when resources are not available. However, the human rights project also seeks to move beyond HRW's methodology by using a broader framework for obligations and violations, and using a variety of strategies for promoting socio-economic rights, some of which have already been discussed.

The following section reviews the main output of AWARD's human rights and water project: the human rights framework. Many of the objectives of creating the human rights framework reflect the objectives of the human rights project generally.

Furthermore, a cursory knowledge of the laws and jurisprudence reviewed above will facilitate understanding the application of the human rights framework in section five.

IV. An Overview of the Human Rights Framework

4.1 A Framework for the Right to Water

The main output of the human rights project was the creation of a human rights framework in the form of a model (see Figure One in Appendix B). Discussion of the objectives of the framework, the content of the framework and its application in the human rights project will shed light on AWARDs methodology and address Roth's position on socio-economic rights.

a. Objective of Framework

Many of the objectives in creating the framework correspond to the broader goals of the human project discussed above. These include that it will be accessible to actors with little or no legal background, it will be used as a training tool and its dynamic and flexible nature will allow for an adaptive methodology.

The model seeks to make complex legal concepts accessible to the array of actors working in relation to water security issues. Most actors working with human rights and water related issues have had little or no exposure to legal concepts and have never thought of water security in terms of human rights. The broad accessibility of the framework is linked with using the framework as a learning tool and allowing for an adaptive methodology.

AWARD has used and continues to use the framework to help build capacity and convey a human rights approach throughout the Sand River Catchment and South Africa. It is primarily through the framework proposed below that AWARD has initiated dialogue with all stakeholders concerning their obligations, entitlements and other perceptions with regard to water security, and through which the human rights project has

analyzed the ground situation, legislation and policies pertaining to the right to water. AWARD has incorporated the human rights framework into learning materials with the help of its educational staff, and it has designed various educational techniques, including the use of games, to help teach the material.²⁰⁶ Furthermore, it has set up a series of workshops with key actors to initially test the learning material.

Finally, by framing the substance of a human rights approach to water into a simple and flexible model to communicate with actors and to evaluate right to water violations, AWARD is not confining itself to one methodology or one idea of promoting socio-economic rights, such as HRW's decision to only focus on arbitrary or discriminatory conduct and to engage primarily in a shaming methodology. A framework that incorporates a broader definition of obligations and violations permits AWARD to promote other methodologies dismissed by Roth, such as commenting on and providing recommendations for reform of water-related legislations, strategies and national plans of actions; expanding potential issues for litigation; and providing technical assistance, in the form of learning materials, FAQs and workshops. Furthermore, by using a common framework as a base for understanding and defining the right to water, it facilitates important dialogue between various disciplines and actors other than lawyers.

4.2 Sources for the Framework

This section reviews the sources of AWARD's human rights law framework in order to allow for a clearer understanding of its relationship to developments in human rights law. Furthermore, a thorough knowledge of the sources of the framework will facilitate an understanding of all the elements of the human rights framework as well as

²⁰⁶ Learning materials will soon be available on AWARD's website, *supra* note 1.

its application in the human rights project. As already mentioned, although the framework is tailored to the right to water, its general structure is applicable to other socio-economic rights.

The right to water has both express and implied bases in international human rights law.²⁰⁷ Unfortunately, the status of the right to water in international law remains uncertain, as many countries, notably the United States, have refused to recognize such a right.²⁰⁸ However, AWARD was not concerned about the legal status of the right to water in international human rights law, as the South African Constitution guarantees this right. Nevertheless, the human rights framework draws from two main sources in international human rights law: General Comment 15 of the CESCR²⁰⁹ and the human rights approach to development and poverty reduction.²¹⁰

Although AWARD's project focuses on the right to water within South Africa, a domestic setting, there are many reasons why the project's legal framework draws from international human rights law. First, international human rights law has developed the normative aspects of many socio-economic rights, such as the right to water, more than any forum. Furthermore, the ICESCR and other international norms relating to the

²⁰⁷ See Pejan, *supra* note 3 (reviewing sources for a right to water); See also General Comment 15, *supra* note 73 (reviewing the bases for the right to water, including environmental and human rights instruments).

²⁰⁸ See generally John Scanlon et. al, International Union for Conservation of Nature (IUCN) and Natural Resources, "Water as a Human Right?" (2004), online: IUCN <<http://www.iucn.org/themes/law/pdffdocuments/EPLP51EN.pdf>> (discussing the status of a right to water in international human rights law).

²⁰⁹ General Comment 15, *supra* note 73; See also Sepúlveda, *supra* note 69 at 41 (remarking that "General Comments are the most suitable of the Committee's tools to clarify the normative content of the Covenant because they are general in nature and provide an abstract picture of the scope of the obligations. Thus, General Comments provide the most comprehensible and clear survey of the Committee's position.")

²¹⁰ See generally UNDP, (June 2003) *Poverty Reduction and Human Rights: A Practice Note* [hereinafter UNDP, *Poverty Reduction and Human Rights*]; See also UN OHCHR, (September 2002) *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* [hereinafter *Poverty Reduction Guidelines*]; UN OHCHR (2004) *Human Rights and Poverty Reduction: A Conceptual Framework* [hereinafter OHCHR, *Human Rights and Poverty Reduction*].

protection of socio-economic rights act as “a source of interpretation for relevant constitutional norms” within South Africa and also in other countries.²¹¹

General Comment 15 on the right to water, building on prior general comments such as the right to food and the right to health, elaborates a clear interpretation of the right to water stemming from Article 11.1 and 12.1 of the ICESCR. Article 11.1 of the ICESCR provides for “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.”²¹² General Comment 15 clarifies that, “[t]he use of the word ‘including’ indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”²¹³ Furthermore, General Comment 15 links the legal bases of water to article 12 of the ICESCR pertaining to the right to health²¹⁴ and a range of international instruments, including treaties, declarations and standards.²¹⁵

²¹¹ See Sandra Liebenberg, “The Protection of Economic and Social Rights in Domestic Legal Systems” in Eide et al., *supra* note 2 at 76. Liebenberg remarks that with regard to South Africa, the Constitution requires a court, tribunal and forum to consider international law and that the provisions of the ICESCR substantially influenced the drafting of the South African Bill of Rights. In this connection, “[t]he interpretation of the Covenant by the Committee on Economic, Social and Cultural Rights through its general comments and review of state reports is thus an influential source for interpreting the economic and social rights in the Bill of Rights.” *Ibid.* See also Blackett, *supra* note 23 at 440. Blackett uses international legal developments as an illustration for rethinking corporate codes of conduct. She explains:

[b]y turning to the international ... [I do not] mean to obscure the importance of place to labor regulation, or the role of individual state and other actors in creating particular places. Rather, I turn to the international to consider a framework that crafts a complementary role for the participation of multiple actors, while retaining its effectiveness across governance levels. *Ibid.*

See also Karen Knop, “Here and There: International Law in Domestic Courts” (2000) 32 N.Y.U. J. Int’l L. & Pol. 501.

²¹² ICESCR, *supra* note 42.

²¹³ General Comment 15, *supra* note 73, para. 3.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*, para. 4.

The right to development seeks to integrate a human rights approach into the development paradigm. The main source of the right to development in international law is the Declaration on the Right to Development adopted by the UN General Assembly in 1986 by the overwhelming majority of member states, with the United States casting the sole dissenting vote.²¹⁶ The Declaration from the 1993 Second UN World Conference on Human Rights reiterated the importance of the right to development “as a universal and inalienable right and as an integral part of fundamental human rights.”²¹⁷ Despite these formulations in international law, there remains much debate about the precise nature of the right to development and its added value to the development process. The advancements and reflections stemming from the Declaration on the Right to Development are pertinent to the realization of all socio-economic rights.

The right to development is implicitly connected with other human rights, and often compared to the peoples’ right to self-determination.²¹⁸ The Declaration on the Right to Development defines this right as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”²¹⁹ Thus, the right to development is concerned with the procedural aspect of realizing an interdependent array of other human rights, to large extent the entire spectrum of civil, political, economic and social rights.

²¹⁶ Arjun Sengupta, “The Right to Development as a Human Right” (2000) Working Paper Series, No. 7, François-Xavier Bagnoud Center for Health and Human Rights, online: <http://www.hsph.harvard.edu/fxbcenter/working_papers.htm>, 1.

²¹⁷ Vienna Declaration, *supra* note 2, para. 10.

²¹⁸ See *United Nations Declaration on the Right to Development*, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986), art. 2(1) [Declaration on the Right to Development]. See also Steiner & Alston, *supra* note 3 at 1325 (noting that unfortunately, although the international community has often reaffirmed the importance of this right, there has been little consensus as to its contents, as well as “the practical consequences of the recognition of the right.”).

²¹⁹ Declaration on the Right to Development, *ibid.*, art. 1(1).

Consequently, as will be illustrated in the framework, the expanding interpretation of the right to development has increasingly demanded compliance with certain human rights principles in development-related activities, such as the principle of participation, non-discrimination, equity and accountability (see Figure Two attached in Appendix B).

The right to development is also an important element of sustainable development, an environmental law principle discussed below. In this respect, it is important to highlight the notion of equity. The Declaration on the Right to Development is replete with language pertaining to the equitable benefits of development. In particular, article 3(2) states requires states to “formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals... in the fair distribution of the benefits...”²²⁰ Importantly, equity refers both to fair distribution of the benefits of development between developed and developing countries as well as between the indigent and wealthier groups and individuals within a domestic setting.²²¹

4.3 Review of all Stages of the Framework and How They Interrelate

This section summarizes AWARD’s human rights framework.

a. The Content

The content of the right to water is the foundation of the model because it is the essence of the right. The rest of the model has the purpose of realizing the content of the

²²⁰ *Ibid*, art. 2(3).

²²¹ See Arjun Sengupta, *supra* note 216 at 13. Sengupta writes that:

[t]he essential spirit of the demand for equality would still remain in force in all forms of international cooperation envisaged in the realization of the right to development. Within a national economy, also, development as a human right, according to the Declaration on the Right to Development, has to be firmly rooted in equity... In other words, the policy programs that are designed nationally and internationally must take fully into account the concerns and the requirements of equity. *Ibid*. at 13.

right. The content implicates three relatively straightforward dimensions: *accessibility, quantity and quality*.²²² If a state does not ensure adequate levels of any of these three aspects, the right to water will be jeopardized. Furthermore, the concept of basic minimum content should be highlighted. This means the very minimum level of the above-mentioned aspects for human needs, which the South African government and the World Health Organization have defined similarly.²²³ The relatively clear content of the right to water facilitates its monitoring and implementation, and subsequently its development as a justiciable constitutional right.

b. Human Rights Principles

It is not enough to consider whether a state has complied with its obligations discussed below. One must evaluate steps to comply with obligations in a manner that also takes into consideration generally or broadly applicable human rights principles to the process of realizing all human rights. Of particular importance to the right to water and other socio-economic rights are the principles of non-discrimination/equality, participation, accountability, indivisibility of rights (see Figure Two attached in Appendix B).²²⁴ As reviewed above, these principles are drawn from a human rights approach to development. They inform the rest of the model in a number of ways. For example, legislation that insufficiently addresses participation or discrimination may not comply with obligations. In addition, as the interdependent nature of rights indicates, a violation of the right to water may contribute to the violations of another right. The

²²² General Comment 15, *supra* note 73, para. 12. It is important to note that General Comment 15 separates accessibility into four more sub-categories: physical accessibility, economic accessibility, non-discrimination, and informational accessibility. *Ibid.* at para. 12(c).

²²³ See National Water Standards, *supra* note 156.

²²⁴ See OHCHR, *Human Rights and Poverty Reduction*, *supra* note 210; also UNDP, *Poverty Reduction and Human Rights*, *supra* note 210 at 4-5.

principle of accountability confirms the necessity for adequate enforcement mechanisms and the need to stifle corruption in government. As AWARD continues to apply the framework to South Africa's efforts to realize the right to water, the synergies between the human rights principles and the rest of the model will gain clarity.

i. Non-Discrimination/Equality

Non-discrimination is the heart of much of human rights law. Because this thesis seeks to move beyond addressing non-discrimination as an aspect of promoting socio-economic rights and repeating arguments set forth by Kenneth Roth, it will not elaborate in detail on this principle.

Specifically, with regard to socio-economic rights, articles 2 and 3 of the ICESCR stress the importance of non-discrimination and equality. Article 2(2) states that the rights in the Covenant must be "exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 3 states that men and women enjoy economic and social rights equally.²²⁵

Non-discrimination, among other things, necessitates focusing on the rights of the most vulnerable and marginalized groups in society, "including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced

²²⁵ Non-discrimination and equality are fundamental human rights principles. They are articulated in countless human right treaties, instruments, declarations and standards. Notably, they are articulated in arts. 2 & 7 of the UDHR, *supra* note 2, and art. 2 of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR]. Furthermore, two major human rights treaties or based in large part on this principle: Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

persons, migrant workers, prisoners and detainees.”²²⁶ In planning strategies, policies and laws, the State must pay special attention to these groups.²²⁷

ii. Participation

The principle of participation is an important procedural element of the human rights framework, one that Roth neglected to discuss. AWARD focuses a great deal on participation in its human rights project.

As discussed above, participation is integral to help policy makers understand the plurality in society and one’s own biases and perspectival views in relation to others. In turn, this produces a more comprehensive account of society, resulting in equitable and informed policies.²²⁸ The main objective of inclusive participation, therefore, is to lead to just outcomes that do not wholeheartedly ignore vulnerable and marginalized voices. As Young summarized clearly:

In actually existing democracies there tends to be a reinforcing circle between social and economic inequality and political inequality that enables the powerful to use formally democratic processes to perpetuate injustice or preserve privilege. One means of breaking this circle, I argue, is to widen democratic inclusion. Democratic political movements and designers of democratic processes can promote greater inclusion in decision-making processes as a means of promoting more just outcomes.²²⁹

Furthermore, the principle of participation is clearly interrelated with the other human rights principles. For example, with regard to the indivisibility of all human rights, the principle of participation is invariably tied to the right to seek, receive and

²²⁶ General Comment 15, *supra* note 73, para. 16.

²²⁷ It is important to note that many environmental instruments address non-discrimination. Notably, the Rio Declaration, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. 1) (1992), reflects an emphasis on addressing vulnerable and marginalized groups in environmental matters. This includes placing special importance on the role of women (principle 20), youth (principle 21), and indigenous communities (principle 22).

²²⁸ Young, *supra* note 107 at 83.

²²⁹ *Ibid.* at 17.

impart information and the right to freedom of expression.²³⁰ In addition, the ability to participate is closely linked with the increasingly expansive interpretation of the principle of self-determination. In this connection, one commentator wrote that, “a principle of self-determination for peoples should be interpreted along lines of relational autonomy or non-domination.”²³¹ Considering this definition of self-determination, participation is a key aspect of fulfilling this right in order for people to have the ability to “decide on their goals and interpret their way of life.”²³² Finally, as will be highlighted below, participation in decision-making is also an important procedural environmental law principle.

Inclusive participation also is invariably tied to the principle of non-discrimination and accountability. As mentioned above, truly inclusive participation can address the inequitable outcomes and policies in society by giving a voice to marginalized groups and placing their needs on the political agenda. As Young argues, “[m]ore inclusion of and influence for currently under-represented social groups can help a society confront and find some remedies for structural social inequality.”²³³ Finally, inclusive participation allows for more transparency and accountability in government institutions and decision-making procedures. This is especially true if all stakeholders are aware of how and why decisions are made, and what body, individual or institution is primarily responsible for making such decisions.

²³⁰ ICCPR, *supra* note 225, art. 19(2); see also Commission on Human Rights, *Report of the Special Rapporteur on the promotion and protection of freedom of expression and opinion*, Mr. Abid Hussein, submitted in accordance with Commission Resolution 1997/26, UN Doc. E/CN.4/1998/40, para. 18 (highlighting that the right to receive and seek information encompasses “the important link between the ability of people, both individually and collectively, to participate in the public life of their communities and country, and the rights to freedom of opinion and expression, including freedom to seek and receive information.”).

²³¹ Young, *supra* note 107 at 259.

²³² *Ibid.*

²³³ *Ibid.* at 141.

It becomes important to define the scope of inclusive participation. This requires much more than participating in elections and the right to vote; it requires the participation of all segments of society in decision that affect their lives.²³⁴ Thus, participation entails input at all levels of the development process, including in the creation and drafting of policy, legislation and development plans. As one expert correctly remarked, “[t]he concept of citizen ‘voice’ implies an engagement with the state that moves beyond consultation to more direct forms of influence over spending and policy decisions.”²³⁵

Finally, arguably, the most difficult question remains: how does a government or society ensure inclusive and far-reaching participation? Among other things, two important elements can be highlighted, both of which reinforce each other: first, a strong civil society, including CBOs must exist; and second, there must be adequate representation systems in place to link communities with other levels of government.²³⁶ Many of AWARD’s projects, including its human rights project, have focused and continue to focus on these two elements. Furthermore, how to ensure that these mechanisms are adequately developed, capacitated and functioning in an effective manner presents an additional challenge.

Civil society, especially CBOs, is essential to link communities with the outside, including different levels of government. CBOs, for example, are often the only means

²³⁴ See OHCHR, *Human Rights and Poverty Reduction*, *supra* note 210 at 19; also Monte Roulier, “Local Community: Seedbed of Civil Society” in John Burbidge, ed., *Beyond Prince and Merchant: Citizen Participation and the Rise of Civil Society* (New York: Pact Publishing, 1997) at 183; also Declaration on the Right to Development, *supra* note 218, art. 8, providing “[s]tates should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.”

²³⁵ Nick Devas & Ursula Grant, “Local Government Decision-Making- Citizen Participation and Local Accountability: Some Evidence from Kenya and Uganda” (2003) 23 Public Admin. Dev. 307, 309.

²³⁶ See generally Young, *supra* note 107.

to gauge and communicate the needs, challenges, priorities and assets within a particular community. They often act as the only mechanisms in communities for all members to meet and formulate and express interests and opinions.²³⁷ As Young writes:

Civil society offers a way out of this circle [of political and social inequality], one of the only ways. However, despised or disfranchised, in a liberal society (and even sometimes in illiberal societies) people who are disadvantaged or marginalized can find each other and form associations to improve their lives through mutual aid and articulation of group consciousness.²³⁸

Furthermore, a strong civil society cannot be effective without representative structures in place, arguably through a process of decentralization. In South Africa this occurs through local government, in particular locally elected official representing Wards consisting of a number of villages. Although representation should not be the only means of participation in decision-making, it can act as an important bridge linking communities with higher levels of government and administrative structures. In this respect, “[i]nstitutions of representation help organize political discussion and decision-making, introducing procedures and a reasonable division of labour.”²³⁹ Thus, without representative structures, a strong civil society will lack an important outlet to express their opinions, suggestions and concerns; but without a strong and active civil society, representation is unlikely to foster inclusive participation.²⁴⁰

However, although appropriate fora and procedures may exist for participation, if people are unable to communicate effectively their concerns and thoughts, then they will

²³⁷ *Ibid.* at 153.

²³⁸ *Ibid.* at 165.

²³⁹ *Ibid.* at 132.

²⁴⁰ See generally *ibid.*

also be excluded from the decision-making process.²⁴¹ Young terms this phenomenon “inclusive exclusion.”²⁴² In this regard, all stakeholders involved in forming policies and making decisions must be sensitive to various modes of communication and refrain from imposing an “accepted” method of communication. Young argues that most models of democracy tend to “restrict their conception of proper political communication to arguments, the making of assertions and proposals, and providing reasons for them that they claim ought to be acceptable to others.”²⁴³ Although argument is a necessary element of public discussion in order to test claims and better evaluate positions, it also creates many exclusionary tendencies.

Notably, there are certain normative aspects of argument that tend to have negative repercussions, especially norms dealing with idiom and style.²⁴⁴ Young raises the norms of articulateness, dispassionateness, and orderliness as perpetuating an “accepted” mode of communication. For example, she explained that, “[a] norm of dispassionateness dismisses and devalues embodied forms of expression, emotion, and figurative emotions.”²⁴⁵ As a supplement to argument, Young proposes three other modes of communication: greeting, rhetoric, and narrative.²⁴⁶ These are everyday modes

²⁴¹ *Ibid.* at 55. Young calls this inclusive exclusion. She explains that, “[t]hough formally included in a forum or process, people may find that their claims are not taken seriously... . The dominant mood may find their ideas or modes of expression silly or simple, and not worthy of consideration.” *Ibid.*

²⁴² Young, *supra* note 107 at 53.

²⁴³ *Ibid.* at 56.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.* at 56-57. Young reviews how these modes of communication can serve as a powerful tool to help foster participation. For example, Young refers to rhetoric as “the way content is conveyed, as distinct from the assertive value of the content.” *Ibid.* at 65. She rejects the idea of separating rational speech from rhetorical speech as a means of distinguishing “between communicative acts that aim to further understanding and co-operation and those that operate strategically as a means of using others for one’s own end.” *Ibid.* at 66. In this capacity, Young has found three positive functions of rhetoric to accompany the use of argument in political communication. This includes that “rhetorical moves often help to get an issue on the agenda for deliberation,” something that is crucial for an inclusive democratic process. *Ibid.* at 67.

of discussion that can help to enrich “both a descriptive and normative account of public discussion and deliberations,” and facilitate diverse social and cultural groups and communities in the process of public participation.²⁴⁷ Ultimately, by facilitating and accepting the manner in which individuals and groups with diverse social and cultural backgrounds can communicate, policy makers and decision-making processes will enable more inclusive participation.

iii. Interdependency

Outlining the interdependency of the right to water with other human rights can be a very effective tool in promoting compliance. As discussed above, Roth, by pitting the fulfillment of one socio-economic right against another, dismissed this powerful strategy.²⁴⁸ A number of links between the right to water and other human rights can be outlined conceptually, including the interrelation between the right to water and the right to life, education, food, health and housing.²⁴⁹ In this connection, it is especially important for future research to explore substantially the potential link between the right to water and the right to a healthy environment. Furthermore, in addition to linking the right to water with other human rights, it is necessary to focus on common aspects of socio-economic rights with other fields of law, notably environmental law. Although, a detailed analysis between the interrelationship of water, other human rights, and environmental law is outside the scope of this thesis and AWARD’s human rights project, the following discussion highlights a few links conceptually between the right to water and the right to a healthy environment and environmental law principles.

²⁴⁷ *Ibid.* at 57.

²⁴⁸ See *supra* section 2.4(c).

²⁴⁹ See Pejan, *supra* note 3 at 1190 (summarizing the interrelationship between the right to water and other human rights); also Scanlon et al., *supra* note 208.

1. The Right to a Healthy Environment

The right to a healthy environment is potentially a significant tool to link important environmental goals with human rights objectives.²⁵⁰ Specifically, because much of long and short-term water security is inextricably linked to water resource management, it is logical to focus on environmental issues that may prevent the realization of the right to water. Without sustainable ecological practices, the long-term focus of water security becomes jeopardized. Furthermore, the right to water generally cannot be realized in a degraded or polluted environment.²⁵¹ Although it is difficult to define precisely a right to a healthy environment, it is possible to delineate two elements: first, the environment must be sufficiently healthy to ensure human well being (which can present its own set of definitional problems), including enjoyment of the broad array of human rights; and second, ensuring a healthy environment should take place within a human rights framework, namely participation in decision-making, due process, non-discrimination and the creation of legal obligations.²⁵²

²⁵⁰ Arguably, one of the most succinct efforts to define a right to a healthy environment has been the elaboration of Draft Principles and Final Report by the Special Rapporteur, Mrs. Ksentini, of the UN Sub-Commission on Human rights and the Environment. UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights and the Environment*, Final Report of the Special Rapporteur, UN Doc. E/CN.4/Sub.2/1994/9 (6 July 1994) [Ksentini Report]. The Draft Principles are divided into four Parts. Part I confirms the indivisibility of all human rights, and links a right to a healthy environment with sustainable development and other human rights principles, including non-discrimination. Part II elaborates the content of a right to a healthy environment, including a right to freedom from activities adverse to the environment, a right to protection of natural resources and access to socio-economic rights. Part III focuses on a host of procedural, and civil and political rights, including a right to have access to information, a right to participation, a right to freedom of association and a right to effective remedies and redress. Part IV sets forth state obligations, as well as duties on individual and international organizations to protect the environment. Finally, Part V concludes by requiring special attention on the most marginalized and vulnerable persons and groups, and discusses situations where derogation from the Draft Principles is acceptable.

²⁵¹ See Scanlon et al., *supra* note 208 at 22.

²⁵² See generally Ksentini Report, *supra* note 250. Furthermore, the author of this thesis believes that the right to a health environment should be a solidarity right, and not as an aspect of existing human rights.

However, although the right to a healthy environment has been enshrined in many national constitutions, including South Africa's,²⁵³ there exists scepticism towards it, including, its scope and definition, its anthropocentric nature, its legal application and potential enforcement and its practicality in light of important developments in environmental law and other human rights.²⁵⁴ Another major criticism of the right to a health environment is its potential conflict with other rights.²⁵⁵ This conflict potentially pits environmental and human interests against one another, a scenario that can be highlighted within the context of the right to water. For example, when water is scarce in one area, there may be a need to extract water for human needs in a manner that is unsustainable for ecological needs. In this sense, arguably, environmental rights contradict the demands necessary to realize the right to water.

Issues like this, however, should not detract from the general usefulness of developing the right to a healthy environment, nor should it be used as a blanket statement arguing the non-reconcilable goals and objectives of environmental and human rights objectives. Accordingly, the manner in which a right to a healthy environment can promote other human rights remains considerably underdeveloped.²⁵⁶ In addition, the

²⁵³ See SA Constitution, *supra* note 126, s. 24; also Scanlon et al., *supra* note 208 at 42-46 (compiling a list of countries that have incorporated the right to a healthy environment in their constitutions).

²⁵⁴ See generally Michael Anderson, "Human Rights Approaches to Environmental Protection: An Overview" in Alan E. Boyle & Michael R. Anderson, eds., *Human Rights Approaches to Environmental Protection* (Clarendon Press: Oxford 1996) 1-23 (listing a number of disadvantages and/or critiques of using a right to healthy environment); also Patricia Birnie & Alan Boyle, *International Law and the Environment* (Oxford University Press: 2d edition 2002), 266 (in particular addressing the critique that environmental law principles are adequate to protect the environment for human needs. In this regard, the fact that other human rights are dependent on a "healthy" environment "does not demonstrate that such action must be based on an extension of international human rights law, rather than on existing law relating to the environment or human rights.").

²⁵⁵ Birnie & Boyle, *ibid.* at 261.

²⁵⁶ See e.g. *ibid.* (observing that "[t]he narrowest but strongest argument for a human right to the environment focuses not on environmental quality, but on procedural rights, including access to environmental information, access to justice, and participation in environmental decision-making.").

value of environmental law principles in the development of a right to a healthy environment necessitates a great deal of analysis.

2. Environmental law Principles

A number of international environmental principles, both substantive and procedural, are pertinent to ensuring water security, and arguably other socio-economic objectives such as human health, food security and adequate housing. Furthermore, as mentioned above, it is necessary to think about these principles within the framework of a right to a healthy environment and the role that they can play in the development of such a right. There is no reason why one cannot use environmental law, to the extent that it correlates with objectives to ensure human well being, as a means to ensure the content of the right to a healthy environment as well as other human rights. These principles include sustainable development, both procedural and substantive elements, equitable utilization, reasonable use, non-discrimination and participation in decision-making.

Generally, human rights NGOs dealing with socio-economic rights should master and seek to use, when applicable, environmental law to reinforce their research and observations, as these two fields share many corollary objectives.²⁵⁷ The nature of socio-economic rights no longer allows human rights NGOs to ignore other fields of law. Although the status of these principles in international law remains unclear²⁵⁸ and many are principles regulating inter-state relations, the essence of these principles can be useful when analyzing a symbiotic relationship with human rights law in a domestic setting.

²⁵⁷ For example, environmental health is an important element of the right to a healthy environment. Environmental sustainability and health also can affect water and food security, both in terms of quality and quantity.

²⁵⁸ See e.g. Vaughan Lowe, "Sustainable Developments and Unsustainable Arguments" in Alan Boyle & David Freestone, eds., *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford New York: Oxford University Press 1999) 19- 37 (discussing the normative status of sustainable development and how this principle can be applied and used in courts as soft law).

Particularly, environmental and human rights organizations can do much to develop the application of these principles in a more expansive manner. Specifically, in South Africa, NEMA has enshrined many of these principles into domestic law and therefore creates binding obligations on the government.

Accordingly, sustainable development provides a useful platform to complement the efforts of a human rights approach to water security. Although there have been different interpretations of each of its elements and how they relate to each other, the following substantive and procedural elements should be mentioned: 1) sustainable utilization; 2) the right to development, including the principle of equity; 3) inter-generational equity; 4) environmental-impact assessment (EIA); and 5) public participation in decision-making.²⁵⁹ Many of these elements share similar ends with human rights law, in terms of securing water resources and in terms of substantive and procedural human rights principles.²⁶⁰

Principle 8 of the Rio Declaration refers to sustainable utilisation as the need to “reduce and eliminate unsustainable patterns of production and consumption.”²⁶¹ With regard to water security, this would mean ensuring the regulation of water use so as to ensure the sustainability of the water resource.

²⁵⁹ See Alan Boyle & David Freestone, “Introduction” in Boyle & Freestone, *ibid.* at 1-18. (tracing the development of sustainable development from the Stockholm Conference in 1972 to the Rio Conference on Environmental and Development in 1991 and its aftermath.) In this connection, the authors remark that the Rio Declaration had significant “authority and influence in the articulation and development of contemporary international law relating to the environmental and sustainable development.” *Ibid.* at 3. Furthermore, they note that none of these elements were new developments at Rio, but that the “Rio Declaration brings them together in a more systematic form...” *Ibid.* at 9; see also Rio Declaration, *supra* note 227.

²⁶⁰ See generally Dominic McGoldrick, “Sustainable Development and Human Rights: An Integrated Conception” (1996) 45 I.C.L.Q. 796.

²⁶¹ Rio Declaration, *supra* note 227.

The right to development, as discussed above, also encapsulates the principle of equity. Notably, Principle 3 of the Rio Declaration states that “[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.” As already discussed, intra-generational equity involves redressing imbalances of wealth and social opportunity between developed and developing countries, and giving priority to the needs of the poor. In this sense, it is tied closely to the human rights principle of non-discrimination, which also focuses on the needs of those most vulnerable and marginalized in society.

One of the most controversial aspects of sustainable development is inter-generational equity, also outlined in Principle 3 of the Rio Declaration. It requires “each generation to use and develop its natural and cultural heritage in such a manner that it can be passed on to future generations in no worse condition than it was received.”²⁶² Although inter-generational equity presents problems, including how it can be adjudicated, who can represent the rights of future generations and what type of relief courts may grant future generations in cases where violations are determined, it is useful in thinking about the long term sustainability of natural resources.

Sustainable development also entails important procedural elements, including EIA and participation in decision-making.²⁶³ EIA, although focusing on environmental effects of activities and projects, also indicates potential human rights issues. For example, if it is determined that a particular activity will pollute a water resource, there will be repercussions on the right to water. In this sense, human rights organizations can use this procedural tool as a means of advocating human rights objectives.

²⁶² See Rio Declaration, *ibid.*, principle 3; see also Boyle & Freestone, “Introduction”, *supra* note 259 at 12.

²⁶³ See e.g. Birnie & Boyle, *supra* note 254.

The importance of participation in decision-making as an aspect of a human rights approach has been outlined above. In this respect, participation in environmental decisions and policy-making often has important impacts on the realization of human rights. For example, communities should be able to participate in any policy regulating water resource extraction, an issue that touches on environmental and human rights issues. Furthermore, participation in environmental-decision making also serves as a basis for ensuring the principle of non-discrimination. A number of Rio Declaration principles touch upon the link between participation and non-discrimination, including the importance of widespread participation in handling environmental issues,²⁶⁴ the participation of women in decision-making,²⁶⁵ and the participation of indigenous communities in environmental management.²⁶⁶

Other important substantive environmental law principles include equitable utilization and reasonable use relating to resource exploitation and the protection of the environment. Reasonable use stands for “[t]he principle that common spaces are open for use by all nationals [and it] entails an obligation not to abuse this right or to interfere unreasonably with the freedoms of others.”²⁶⁷ Although this principle is concerned with international obligations, its content is useful in thinking of domestic actors and government obligations to regulate overuse of natural resources towards, among other things, securing established human rights. Another important principle, similar to reasonable use and intra-generational equity as a component of sustainable development, is that of equitable utilization of natural resources. This principle “entails a balancing of

²⁶⁴ Rio Declaration, *supra* note 227, principle 10.

²⁶⁵ *Ibid.*, principle 20.

²⁶⁶ *Ibid.*, principle 22.

²⁶⁷ See Birnie & Boyle, *supra* note 254 at 144.

interests and consideration of all relevant factors” in resolving disputes of resource allocation and use.²⁶⁸ Again, although typically thought of in the context of inter-state relations, equitable utilization can play an important role in the use and equitable allocation of resources within a domestic setting.

iv. Accountability/Transparency

The principle of accountability is another key tenet of a human rights framework. As discussed below, the State has the primary duty and obligation to protect, respect and fulfil human rights. In this connection, State actors must be ultimately accountable and responsible to rights holders or individuals in order to make human rights meaningful.²⁶⁹ Consequently, accountability involves establishing adequate enforcement mechanisms and remedies to redress violations.

Identifying appropriate actors or duty-holders is necessary in establishing accountability. Transparency with regard to public affairs and decisions is particularly relevant in order to identify duty holders and hold public officials accountable for their action and/or inaction.²⁷⁰ As one expert has elaborated, “[i]n order to make [accountability] possible, the programmes must be designed in a transparent manner, bringing out openly all the interrelations and linkages between different actions and actors.”²⁷¹ AWARD’s human rights project sought to empower communities to hold accountable appropriate officials, and not just critique instances where accountability was

²⁶⁸ *Ibid.* at 146. (However, remarking the potential ambiguity of this principle as factors involved in a balancing of interest are subjective and unclear. Yet, equity is “generally regarded as the primary rule of customary law governing the use and allocation of international watercourses.”).

²⁶⁹ See OHCHR, *Human Rights and Poverty Reduction*, *supra* note 210 at 16.

²⁷⁰ *Ibid.*

²⁷¹ Commission on Human Rights, Fourth Report of the Independent Expert on the Right to Development, Mr. Arjun Segupta, submitted in accordance with Commission Resolution 2002/69, UN Doc. E/CN.4/2002/WG.18/2, para. 31 [Development Expert Fourth Report].

non-existent. This involved teaching communities about the laws and structures in place for ensuring their water security.

c. Obligations

The constitutional right to sufficient water imposes legal obligations on the government. Socio-economic rights create four categories of obligations: general, specific, core and international (see Figure Three attached in Appendix B).²⁷² AWARD's human rights project focused primarily on specific, core and international obligations in applying the framework, as these are the obligations that directly stem from the Constitution. Although Roth's focus on arbitrary and discriminatory conduct touches on these four categories of obligations, he does not explain why he does not utilize the conceptually practical categorizations of legal obligations that have been subject to increasing consensus in international human rights law. The ensuing discussion raises some important consequences of Roth's decision.

i. General Obligations

Article 2 of the ICESCR has elaborated what the CESCR and many scholars have labelled general obligations of State Parties.²⁷³ Key elements include "achieving progressively the full realization of the rights" and "to the maximum of its available resources".²⁷⁴ The ICESCR thus considers general obligations as overall initiatives by State parties to progressively realize the substantive rights delineated in the Covenant

²⁷² See generally General Comment 15, *supra* note 73, s. III. For a comprehensive discussion of socio-economic rights' obligations see Sepúlveda, *supra* note 69.

²⁷³ The ICESCR provides:

Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

²⁷⁴ *Ibid.*

within their available resources and by all appropriate means. These general concepts, however, can be deconstructed into more comprehensible obligations. Although general obligations concern State parties undertakings with respect to the ICESCR, it is also useful in interpreting South Africa's general obligations toward the variety of substantive rights in its Bill of Rights.

Progressive realization is relevant to the realisation of all human rights. However, it is particularly applicable to socio-economic rights because the allocation of resources is an integral aspect of implementing these rights. In terms of socio-economic rights, the CESCR clarifies "that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time."²⁷⁵ However, this statement must be qualified. States should not use progressive realisation as an excuse for inaction, and it "imposes an obligation to move as expeditiously and effectively as possible towards" fulfilling all socio-economic rights.²⁷⁶ The CESCR has interpreted the term "to the maximum of its available resources" as creating a burden on States to demonstrate that "every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."²⁷⁷

General obligations also impose immediate requirements. This includes the obligation deriving from article 2(2) to guarantee that the right will be exercised without discrimination and the obligation to take steps toward the full realization of the right, meaning steps that are deliberate, concrete and targeted towards the full realization of the

²⁷⁵ See General Comment 3 of the CESCR, U.N. Doc. HRI/GEN/1/Rev.1 (1991), para. 9.

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.* at para. 10. See also Sepúlveda, *supra* note 69 at 315 (explaining that, "the [CESCR] stresses the importance of combating corruption that negatively affects the implementation of the rights." Furthermore, it also "implies the duty to use the resources allocated in an effective and efficient manner.").

right.²⁷⁸ Furthermore, the immediate requirement to take steps toward the full realization of the rights “entails two complementary obligations”: 1) an obligation to continuously improve conditions and 2) a prohibition of taking deliberately retrogressive measures.²⁷⁹

ii. Specific Obligations: The Tripartite Typology

General Comment 15 elaborates a tripartite typology of obligations, reiterating the formulation of many experts and other international instruments.²⁸⁰ The typology consists of the obligations to respect, protect and fulfil. Furthermore, the obligation to fulfil contains three subparts: the obligations to facilitate, provide, and promote.²⁸¹ Specific obligations form the backbone of AWARD’s human rights framework, because they provide a detailed conceptual framework to evaluate complex realities.²⁸²

Furthermore, the tripartite typology makes clear that there is an interdependence of state duties. As one expert commented: “the different layers [of obligations] cannot be analysed in isolation. All levels interrelate in a complex manner and the full protection of a given right contained in a human rights treaty cannot be achieved by relying merely on

²⁷⁸ General Comment 15, *supra* note 73, para. 17.

²⁷⁹ Sepúlveda, *supra* note 69 at 319 (noting that, “[s]tates cannot tolerate a decline in the degree of protection afforded to a particular right without taking any action to try to redress or improve the situation.”). *Ibid.* at 321. See also General Comment 15, *ibid.*, paras. 18 & 19.

²⁸⁰ Sepúlveda, *ibid.*, c. 5. See also Eide et al., *supra* note 2; Steiner & Alston, *supra* note 3; *Masstricht Guidelines on Violations of Economic, Social and Cultural Rights*, No. 6, adopted 22–26 Jan. 1997, reprinted in *The Masstricht Guidelines on Violations of Economic, Social and Cultural Rights*, (1998) 20 Hum. Rts. Q. 691.

²⁸¹ Sepúlveda, *ibid.* at 168. According to Sepúlveda, there are four different typologies that should be used based on a synthesis of the various proposals and recommendations of experts and other international human rights standards: the obligations to respect, protect, fulfil, and promote. She comments that all other proposals for typologies, such as the ‘duty to assist’ are implicit in the scope of the tripartite typology used by the CESCR. *Ibid.* However, Sepúlveda remarks that the obligation to promote should be considered a separate level of obligation because “the promotion of human rights has taken on an independent character and all human rights should be viewed as imposing this level of obligation.” *Ibid.* The CESCR, however, implicitly includes the obligation to promote as a sub-category of the obligation to fulfil, a decision that this author adheres to.

²⁸² *Ibid.* at 170 (remarking that typologies “provide us with a better understanding of the complexities of reality. They are guidelines that assist us to approach the complex interconnection and interdependencies of the duties that must be honoured in order to achieve the full protection of human rights.”).

one or two of them but must involve the performance of all levels of duties.”²⁸³ In this regard, Roth’s formulation of violations as falling under allocation of resource issues or arbitrary and/or discriminatory conduct touches on the various aspects of specific obligations.

Unfortunately, as raised in section two, Rubenstein, in critiquing Roth’s discriminatory and arbitrary categorization as too narrow and as too “general” a category of obligation fails to grasp the similarity between Roth’s formulation and the tripartite typology.²⁸⁴ Although Rubenstein is right to point out the usefulness and practicality of using the specific obligations typology and its potential role in facilitating and understanding of state obligations, his categorical dismissal of Roth’s arbitrary and discriminatory standard is based on a “misunderstanding” of its applicability.²⁸⁵ Consequently, for example, his statements that Roth’s standard is unequipped to deal with situations concerning the worst off in society have no legitimate foundation and are not based on solid analysis.

Nevertheless, Rubenstein is correct to be concerned with Roth’s own formulation of violations, and his insistence not to use the practical and established system of specific obligations. An arbitrary and discriminatory classification fails to illustrate clearly the interdependent nature of state duties and to take advantage of the practical benefits in using a clear typology of rights.

a) Obligation to Respect

²⁸³ *Ibid.* (noting the equal nature of all human rights based on the idea the “all human rights impose a variety of obligations that may be classified as obligations to respect, protect, fulfil and promote.”); See also Eide, *supra* note 75.

²⁸⁴ Rubenstein, *supra* note 5 at 861-863.

²⁸⁵ See Kenneth Roth, “Response to Leonard S. Rubenstein”, *supra* note 4.

The obligation to respect is a negative obligation, requiring that the State refrain from interfering directly or indirectly with the enjoyment of the right to water. Examples include the state refraining from depriving people of their access to socio-economic rights without justification or refraining from passing laws or engaging in conduct that effectively denies or obstructs access to the rights.²⁸⁶

b) Obligation to Protect

The obligation to protect requires the State to prevent third parties, such as individuals, groups, and corporations, from interfering with the right to water. Examples include adopting legislative measures to prevent third parties from polluting or inequitably extracting from water resources and adequately regulating privatization efforts to ensure non-discrimination and other human rights requirements.²⁸⁷

c) Obligation to Fulfil

The obligation to fulfil is arguably the most complex obligation, as much of it deals with long-term water security issues, including issues of resource allocation and institutional building, and is thus subject to progressive realization. Accordingly, this obligation requires states to adopt the necessary measures towards the full realization of the right. Furthermore, the obligation to fulfil can be sub-divided into three more categories: the obligations to facilitate, promote and provide.²⁸⁸ Importantly, the obligation to promote requires states to take steps to ensure that there is appropriate education concerning hygienic use of water, protection of water sources and methods to minimize water wastage.²⁸⁹

²⁸⁶ General Comment 15, *supra* note 73, para. 21.

²⁸⁷ *Ibid.* at paras. 23-4.

²⁸⁸ See Sepúlveda, *supra* note 69.

²⁸⁹ General Comment 15, *supra* note 73, para. 25.

Examples of the obligation to fulfil include: according sufficient recognition of this right within the national political and legal systems; adopting a national water strategy and plan of action to realize this right, including (a) monitoring water reserves, ensuring proposed developments do not interfere with access to adequate water, (b) reducing the depletion of water resources resulting from unsustainable extraction, diversion or damming, (c) having adequate response mechanisms in emergency situations, (d) increasing the efficient use of water by end-users, and (e) establishing competent institutions and appropriate institutional arrangements to carry out the strategies and programmes; ensuring that water is affordable to everyone, including adopting appropriate pricing policies such as free or low-cost water and income supplements; and facilitating improved and sustainable access to water particularly in rural and deprived urban areas.²⁹⁰

iii. Core Obligations

General Comment 15 identifies a number of core obligations that must be satisfied *immediately*.²⁹¹ These are not different in nature from specific obligations elaborated above; human rights law simply considers core obligations as more important, in the sense that non-compliance with these obligations can have severe short-term repercussions. The Committee has elaborated a number of core obligations with regard to water. It is important to note, however, that the Committee and experts have interpreted core obligations increasingly broadly, and no longer have confined them to

²⁹⁰ *Ibid.*, paras. 25-29.

²⁹¹ Paragraph 10 of General Comment 3, *supra* note 275, states that “the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party... If the Covenant were to be read in such a ways as not to establish such a minimum core obligation, it would be largely deprived of its reason d’être.”

the notion of realizing a minimum amount of a particular right.²⁹² This is in direct opposition to the South African Constitutional Court's interpretation of core obligations discussed above.

As discussed above, Roth failed to discuss the extent to which international human rights law has defined core obligations, the potential role of international human rights NGOs in monitoring core obligations, and what role NGOs can play in adding to the conceptual development of core obligations.²⁹³ Again, although Roth's formulation of an arbitrary and discriminatory standard may incorporate conceptually many core obligations, his categorization of violations fails to stress the immediacy and priority of fulfilling these obligations in relation to other specific obligations.

With regard to the right to water the CESCR has identified the following core obligations: to ensure access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent disease; to ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups; to ensure personal security is not threatened when having to physically access water; to ensure physical access to water facilities within a reasonable distance from the household and with very little waiting time; to ensure the equitable distribution of all available water facilities and services; to monitor the extent of the realization, or non-realization, of the right; to adopt and implement a national water strategy and plan of action addressing the whole population, which should include

²⁹² See e.g. Bilchitz, *supra* note 177. Furthermore, it is important to note that the elaboration of minimum essential amount of a right, a sub-category of the minimum core obligations, becomes easier depending on the clarity of the content of each right. For example, with the right to water, the content is quite clear in terms of minimum levels of accessibility, quality and quantity. Thus, there are clear indicators that serve as a basis for measuring compliance with the minimum core content.

²⁹³ See Rubenstein, *supra* note 5 at 862.

indicators and benchmarks; and to adopt relatively low-cost targeted water programmes to protect vulnerable and marginalizing groups.²⁹⁴

iv. International Obligations

States also have an international obligation not to interfere with another country's enjoyment of the right to water. This, among other things, involves refraining from taking action that would directly or indirectly affect another country's enjoyment of the right to water. Specifically, States should take steps to prevent third parties from violating the right to water of individuals and communities in other countries.²⁹⁵

d. Violations

Violations stem from the government's failure to comply with its obligations. Accordingly, the concept of violations becomes clearer as obligations are better defined. In this sense, obligations and violations can be thought of as interchangeable aspects. For example, a violation of the obligation to respect may include arbitrary or unjustified disconnection or exclusion from water services or facilities, discriminatory or unaffordable increases in the price of water and pollution or diminution of water resources affecting human health.²⁹⁶ Furthermore, as already mentioned, violations of the obligation to fulfil are more difficult to assess because of the potential subjective nature of defining progressive realisation.

e. National Implementation

National implementation translates into a country's efforts, initiatives and steps to realize the right to water based on the model above. This includes complying with the

²⁹⁴ General Comment 15, *supra* note 73, para. 37.

²⁹⁵ *Ibid.*, paras. 30-36. General Comment 15 also recommends that States should facilitate the realization of the right to water in other countries, for example, through financial and technical assistance. Furthermore, water should never be used as an instrument of political and economic pressure.

²⁹⁶ *Ibid.*, para. 44(a).

obligations mentioned above, such as enacting legislation, strategies and other implementing steps, monitoring compliance with obligations, putting in place enforcement and accountability mechanisms and providing adequate redress or remedies. Placing national implementation at the base of the model reflects that the realization of the right to water and other socio-economic rights rests at the national, provincial and local level. In this sense, AWARD's human rights project essentially focuses on South Africa's efforts to implement the human rights framework.

The following section discusses some examples from the application of the human rights framework in AWARD's project both to situations in the field and to the array of water-related legislation and policy. This allows AWARD to critique the adequacy of the government's "national implementation" to realize the right to water, to raise and highlight important water security issues from a human rights standpoint and to make recommendations concerning the realization of the right to water observed in the Sand River Catchment. As mentioned above, the application of the framework supplemented AWARD's other core methodology, namely to build capacity and teach individuals and communities about their water rights.

V. Application of the Human Rights Framework

As mentioned above, in addition to using the human rights framework as a learning tool, AWARD uses it as a basis to evaluate the government's efforts to implement the right to water. The ensuing discussion will address a few key observations stemming directly from AWARD's application of the human right framework. Each aspect of the framework that is discussed reviews two different categories of observations: the first considers some legislative and policy critiques, while the second focuses on issues AWARD observed in the Sand River Catchment.

It should be mentioned that in analyzing South Africa's legislative framework focusing on ensuring the right to water, this section seeks to challenge Roth's assertion that international human rights NGOs are not in a good position to make comments on legislation and plans of action. Many of AWARD's observations are not based on technical expertise in the field of water security, nor are the observations a result of or necessarily more legitimate because of AWARD'S local status.

Finally, this section is not intended to comprehensively review AWARD's human rights project, but to instead provide a brief sketch of some of its findings as a means of illustrating the depth of issues that arise from the right to water and to facilitate an understanding of the human rights framework. By dividing the violations into the tripartite typology, using the notion of core obligations, and focusing on human rights principles, such as participation and the interrelation of rights, AWARD has sought to utilize a comprehensive and broad-based platform to evaluate the state of water security, moving beyond Roth's relatively narrow framework.

5.1. Participation

As mentioned above, participation in decision-making is an integral human rights and environmental law principle. Generally, South Africa's water-related legislation goes a long way to ensure and promote adequate participation in decision-making procedures. Furthermore, many NGOs, including AWARD, have concentrated on building capacity in local communities and local government to enable a better understanding of the new water laws leading to more inclusive public participation.²⁹⁷

South Africa has done much to ensure adequate participation in the decision-making and planning process. To give a few examples, the NWA clarifies that the purpose of establishing CMAs "is to delegate water resource management to the regional or catchment level and to involve local communities, within the framework of the national water resource strategy."²⁹⁸ Furthermore, the CMA establishment procedure entails four broad phases that all require significant public participation from all stakeholders.²⁹⁹ These include the creation of a number of non-statutory bodies to act as a vehicle for participation.³⁰⁰ The Systems Act also seeks to ensure participation in the IDP drafting process by requiring municipalities to allow local communities to participate in the drafting process and to consult with local communities on their developmental

²⁹⁷ See AWARD's web site, *supra* note 1. One main aspect of AWARD's work under the SSP is the Public Awareness Campaign (PACAM). Accordingly, some of PACAM's main objectives include raising awareness of the South African legislative framework that guides water and natural resource management and "[t]o pilot public participatory practice and democratic principles associated with (integrated catchment management) in order to understand how inhabitants of a catchment are able to play a role in the catchment related decisions." *Ibid.* In pursuit of PACAM, AWARD has conducted, among other things, numerous workshops with a variety of actors, including water committees, government official and elected representatives.

²⁹⁸ NWA, *supra* note 141, c. 7, Preamble.

²⁹⁹ See generally South Africa DWAF, *Water Management Institutions: Overview* (Undated), online: DWAF <www.dwaf.org.za>, 12 [WMI: Overview].

³⁰⁰ See South Africa DWAF, *Proposed First Edition National Water Resource Strategy* (August 2002). These non-statutory bodies (not including formally in legislation) are elaborated in a number of other policies, governmental newsletters and strategies.

needs and priorities.³⁰¹ Furthermore, the Constitution, by decentralizing government, provides communities with the ability to use local representatives as a platform to voice their needs and concerns.

However, AWARD also observed many legislative and policy-related gaps with regard to participation. For example, in forming non-statutory bodies such as catchment forums and steering committees during the CMA establishment process, there are no guidelines concerning how stakeholders are to be identified and how participation should take place. Furthermore, it is not clear in any legislation or policies to what degree the different levels of government must provide financial and technical assistance to help build capacity in civil society in order to foster adequate public participation. Thus, although a legislative framework for participation is present, it remains unclear how government, in practice, will prevent “exclusionary” tendencies as described in section 4.3(b)(ii) above.

A number of participation-related issues also existed in the Sand River Catchment. The biggest issue was CBOs and individuals’ general lack of capacity, including knowledge of water laws. Low literacy rates make it difficult to explain and teach communities about the nature of the laws and policies that concern them, yet alone allowing communities to play a role in monitoring them. Furthermore, many concepts outlined throughout the legislation are primarily based or derived from English-oriented vocabulary. Translating these terms into equally understandable words in one of the many official traditional languages of South Africa is a tricky process, to say the least.³⁰² Unfortunately, AWARD was not aware of many efforts other than its own projects, such

³⁰¹ Systems Act, *supra* note 128, s. 29(1)(b).

³⁰² Fazila Farouk, *Report to the Open Society Foundation for South Africa Launching a Human Rights Capacity Building Programme in Limpopo Province* (January 2003), 22.

as government-sponsored activities, to help build community capacity and knowledge of water laws in order to help contribute to public participation. In this connection, government must do more to create an enabling environment for adequate participation.

Finally, as already mentioned, lack of capacity leads to human rights issues, such as poor accountability, insufficient transparency, and the inability to enforce violations of human rights. This inter-relationship was evident in the Sand River Catchment. For example, a number of community and household interviews indicated a poor understanding of what institutions were responsible for water-related problems.³⁰³ In this connection, many local government officials and elected representatives mentioned that villages do not know whom to approach for grievances.³⁰⁴

5.2. Discrimination

Non-discrimination, although a human rights principle, can also be analysed in terms of core obligations because States have an immediate obligation to ensure and prevent non-discrimination. Furthermore, as the framework makes clear, one important aspect of non-discrimination is to evaluate the extent to which legislations, policies and strategies consider marginalized and vulnerable groups.

The FBWP is one of the most impressive governmental policies with regard to extending basic water supply to those in need. As mentioned above, one of the key motives for the FBWP is to provide water to poor households and communities in

³⁰³ AWARD Interviews of village water committees and village residents in Moreku Township, Madjembeni Village and Rivoni Village (June-July 2004) notes on hold with author and AWARD. The author has not disclosed the name of interviewees in order to protect privacy [AWARD village interviews]. Of course, this is also common in developed countries, as many indigent communities do not know how to enforce violations of their basic rights, such as housing violations.

³⁰⁴ AWARD Interviews of Ward Councillors, DWAF Bushbuckridge maintenance technician and Bushbuckridge Municipality Technical Service Officials (June-July 2004) notes on hold with author and AWARD.

need.³⁰⁵ In this connection, the FBW Strategy specifies that, “[i]n many instances it is likely that only a local authority will be in a position to determine satisfactorily who is poor. It therefore seems appropriate that the definition and identification of poor households is undertaken at the local level with national guidance but local flexibility.”³⁰⁶

Unfortunately, DWAF guidelines and strategy documents do not point to any category other than poor households. By giving the responsibility to define and identify the target group for the FBWP to local authorities, DWAF and/or other national government organs should expressly include, in guidelines, vulnerable groups such as women, children, homeless, HIV/AIDS infected and others. The local level may have the expertise to identify specific groups in the population; however, they will need help in defining these. One suggestion may be to include a list of possible vulnerable groups in the guidelines and ask to what extent the needs of those groups are being met. Such a list could include: child-headed households, female-headed households, persons living in rural areas, persons living in informal settlements, homeless persons, unemployed persons, low-income and poverty stricken groups, elderly and historically disadvantaged racial groups (Africans, Coloureds and Indians).

The NWA also explicitly concentrates on discrimination, including the need to address past racial and gender discrimination.³⁰⁷ In this manner, many of its provisions focus on discrimination issues. For example, when allocating water and issuing licenses, the CMA “must take into account all relevant factors, including the need to redress the results of past racial and gender discrimination.”³⁰⁸ Furthermore, in performing its duties

³⁰⁵ See *supra* note 164.

³⁰⁶ FBW Strategy, *ibid.*, s. 9.3.

³⁰⁷ See e.g. NWA, *supra* note 141, Preamble.

³⁰⁸ *Ibid.*, s. 27(1)(b).

the CMA must “be mindful of the constitutional imperative to redress the results of past racial and gender discrimination.”³⁰⁹ In this connection, the NWA permits the Minister to issue directives to or to withhold financial assistance from the CMA if it “has acted unfairly or in a discriminatory or inequitable way towards any person within its water management area.”³¹⁰

However, the human rights project also found some discrimination-related issues stemming from the NWA. First, although the NWA has extensive provisions for monitoring compliance with its provisions, there is no explicit reference to discrimination issues.³¹¹ In this connection, the inclusion of a process for gathering information and data pertaining to the inequitable distribution of water resources and incidents of discrimination in the water resource sector is desirable. Second, related to the above-mentioned issue, the offences listed under that NWA do not adequately address discrimination. Of course, there are situations in which discrimination issues would implicitly be covered by some of the more broad offences listed in the NWA; however, the inclusion of explicit language addressing discrimination would be much stronger.³¹²

In addition to the FBWP, AWARD noticed a lack of specificity with regard to addressing vulnerable and marginalized groups in society in other laws and policies. It is important that regulations, standards, policies and strategies that are meant to implement the framework legislation, namely the NWA and WSA, substantially define and give content to the issue of equality, equity and non-discrimination. The main water institutions as well as local authorities *must* reflect upon and formulate which are the

³⁰⁹ *Ibid.*, s. 79(4)(a).

³¹⁰ *Ibid.*, s. 87(1)(b).

³¹¹ *Ibid.*, s. 137.

³¹² See generally *ibid.*, s. 151.

vulnerable or marginalized groups that might be affected by their decisions and avoid broad categorical definitions of those in need, such as “the poor.” In this sense, addressing such groups in detail, such as women and girls, should be part of a system of formulating indicators and benchmarks in the water sector.

Discrimination-related issues are also prevalent throughout the Sand River Catchment. The SAHRC wrote in its most recent report, “[i]n rural areas, *women and girl-children* still have to walk a couple of kilometres in order to access water as if this was not enough, they still have to stand in long queues for hours before they could access this basic necessity through having to fill-up their buckets. This makes them vulnerable and prone to some form of violence.”³¹³ The government’s inability to address this issue particularly has discriminatory repercussions, as women and girls are the two main groups that fetch water and are prone to bodily harm resulting from violence. In this manner, because of the particular repercussions on women and children and because discrimination issues are also core obligations, the government must address these issues immediately.

5.3. Specific Obligations

AWARD sought to review South Africa’s efforts to comply with its specific obligations, including the more difficult obligation to fulfil. As mentioned above, Roth’s classification of arbitrary and discriminatory conduct was quite broad, and therefore is encompassed within the tripartite framework. However, such a classification fails to clearly illustrate the interdependent nature of state duties and to take advantage of the practical benefits in using a clear typology of rights. By using the three categories of

³¹³ South Africa Human Right Commission, *The Right to have Access to Sufficient Water*, (Period 2000-2002, c. 9, 411 [SAHRC Report], online: SAHRC < http://www.sahrc.org.za/4th_esr_chap_9.pdf>.

specific obligations, AWARD was able to classify the issues it observed in terms of human rights violations with relative ease and clarity.

South Africa has done much to comply with its obligations to fulfil the right to water. As reviewed above, South Africa has enacted a wide array of laws, policies, and strategies related to realizing the right to water and other socio-economic rights. Although certain aspects of these laws and policies warrant criticism, the government has largely complied with its obligations to enact legislation and take steps towards implementing socio-economic rights.

South Africa has set forth an elaborate institutional framework to help ensure the right to water with regard to both water management and water service functions. Although the government still must carry out a considerable amount of work to turn these institutions into efficient and effective structures, their existence is a major step towards complying with its obligations. Furthermore, the NWA's system of classifying water resources, defining water use and requiring registration and authorization for water use will do much, among other things, to ensure the long-term sustainability of water resources, monitor water reserves and prevent the pollution and unsustainable extraction of water resources in order to ensure the right to water.

As mentioned above, one aspect of the obligation to fulfil should be "ensuring that water is affordable to everyone, including adopting appropriate pricing policies such as free or low-cost water and income supplements."³¹⁴ By adopting the free basic water policy, a pricing strategy and tariff standards to address those who cannot afford to pay for a basic minimum content of water, South Africa has sought to make water affordable to everyone.

³¹⁴ General Comment 15, *supra* note 73 at paras. 25-29.

Finally, DWAF has proposed an important strategy for the *progressive realisation* of the right to water in the water service sector. The SFWS proposes a ladder strategy for realising water security, where the first step is ensuring basic services, while higher levels of services are considered as “moving up the ladder”.³¹⁵ The SFWS considers the first step an “immediate priority” and requires the WSAU to “make sure that adequate and appropriate investments are made to ensure the progressive realisation of the right of *all* people in its area of jurisdiction to receive at least a basic level of water and sanitation services.”³¹⁶ The SFWS ladder analogy is particularly useful in explaining progressive realisation, a complex legal concepts in a more accessible manner.

However, AWARD also found some major areas for concern in South Africa’s legislative efforts. First, the water-related legislation is not clear about how water management institutions, specifically CMAs, will interact with water service institutions, namely WSAUs/local government. In this respect, the extent of CMA jurisdiction in preempting WSAU actions and decisions that may detriment water resource security remains vague. The potential lack of harmonization of roles and responsibilities between water resource and service sectors can cause serious human rights concerns, including lack of public participation, lack of transparency and accountability and serious implications with regard to the progressive realization of the right to water, as the efficiency and effectiveness of progress may become jeopardized by turf battles and confusion between mandates.

³¹⁵ SFWS, *supra* note 158, s. 4.2.

³¹⁶ *Ibid.*

Second, as already mentioned and related to the previous point, the WMAs and domestic political boundaries do not correspond.³¹⁷ It remains uncertain the extent to which this jurisdictional disjunction will affect the ability of the various structures within each boundary to interact. Similar to the harmonization issue between institutions, the boundary question may raise serious human right issues.

The human rights project also observed in the Sand River Catchment several violations of specific obligations or, at the very least, issues that needed to be addressed leading to violations. This included the confusion of roles and responsibilities between various institutions, un-cooperative government agencies, lack of communication between institutions and a general lack of capacity in local government to fulfil its obligations. Importantly, the human rights framework allowed AWARD to place these water security issues within a human right approach. The first three issues potentially violate all three specific obligations as they can lead to conduct that effectively denies or obstructs access to the right to water, as well as prevent the government from complying with many of the measures it has adopted in seeking to realize the right to water. The latter issue pertains mostly to the government's obligation to fulfill the right to water.

AWARD observed that institutions within the water service sector are confused about their precise roles and functions. For example, AWARD documented incidents where different institutions, such as local government and DWAF, both believed that they needed to fix an infrastructure-related problem.³¹⁸ This results in inefficiency and also does little to improve the ability for communities to identify and hold accountable the responsible institutions in cases of water emergencies and other problems.

³¹⁷ See also Pejan, *supra* note 3 (discussing this issue).

³¹⁸ AWARD Interview with Bushbuckridge Municipality Technical Services Directorate (21 July 2004) notes on hold with author and AWARD [BBR Technical Services Interview].

The South African Constitution places great importance on co-operative government, especially with regard to “informing one another of, and consulting one another on, matters of common interest.”³¹⁹ Despite this constitutional requirement, AWARD found that government institutions often did not cooperate with one another or adequately communicate with regard to a number of water-related functions. This lack of co-operation and communication can lead to conduct that effectively denies or obstructs access to the right to water. One example includes the Department of Health of the district municipality building clinics and not consulting about water supply with the WSAU or district municipality until after the clinic site had been chosen and built.³²⁰

Lack of capacity in local government exists on two levels: lack of human resources to deal with local government roles and responsibilities; and lack of knowledge with regard to their functions and responsibilities. Both of these have severe consequences on realizing the right to water, as local government is in charge of ensuring water services. In this respect, AWARD interviewed many government officials, included elected representatives, who declared that no national or provincial government agency conducted workshops to help train them in their functions or to teach them their obligations and functions deriving from the new water laws.³²¹ It is also important to note that the SAHRC has reported that the Department of Provincial and Local Government (DPLG) has not done enough to build local government capacity, despite adequate financial resources to do so.³²²

³¹⁹ SA Constitution, *supra* note 127, s. 41(1)(h).

³²⁰ BBR Technical Service Interview, *supra* note 318.

³²¹ Award Interview of BBR Technical Services and Ward Councillors (June-July 2004) notes on hold with author and AWARD.

³²² SAHRC Report, *supra* note 313, s. 7.

5.4. Core Obligations

Core obligations, as mentioned above, are of immediate priority for the government because non-compliance with these obligations can have severe short-term repercussions. Using the concept of core obligations is a simple and effective way to distinguish the most serious violations of the right to water from specific violations.

As discussed above, the Constitutional Court does not recognize core obligations as an aspect of socio-economic rights stemming from the South African Constitution. Specifically, the Court's narrow definition of core obligations as granting people the right to immediately demand access to their socio-economic rights is insufficient. The human rights framework's expansive definition of core obligations made this apparent. Nevertheless, despite the Constitutional Court's hesitancy towards adjudicating core obligations, the South African government has complied with many core obligations relating to the right to water as elaborated by the CESCR. For example, it has sought to ensure the minimum essential amount of water for individuals and communities throughout the country. In this regard, it has enacted regulations defining the minimum content of the right to water.³²³ It has also put into place low-cost targeted programmes, like the FBWP, to help ensure that indigent communities get access to water. Furthermore, as discussed above, it has complied with its immediate obligations to adopt and begin to implement a national plan of action and water strategy addressing the whole population.

³²³ See National Water Standards, *supra* note 156.

AWARD also found, however, a number of concerns with regard to the government's efforts to comply with its core obligations.³²⁴ For example, one important core obligation is for the government to monitor the extent of the realization, or non-realization, of the right. This is because, if monitoring mechanisms are not in place, it is difficult to set indicators and benchmarks, document violations and to gauge the progressive realization of the right to water. Furthermore, as with most socio-economic rights, marginalized and vulnerable groups are more susceptible to infringements of their right to water. For many reasons, such as illiteracy, lack of education and general poverty, these groups are less likely to voice violations of their right to water. They often lack the knowledge to determine complex violations and also the capacity to seek redress. Consequently, monitoring mechanisms will help to shed light on many situations where people and groups are unable to enforce violations of their right to water, let alone determine if a violation has occurred. It is unclear, however, the extent to which the government has complied with this particular obligation.³²⁵

Related to this issue is the role of the South African Human Rights Commission (SAHRC) in monitoring and assessing "the observance of human rights in the Republic."³²⁶ In furtherance of its mandate, the SAHRC has the power to, among other things, investigate and report on the observance of human rights, to take steps to secure

³²⁴ This thesis will not address the most obvious core obligation issue: that basic water supply still remains unavailable throughout the Sand-River Catchment and much of South Africa. It is potentially unproductive to focus on the unavailability of water, as it tends to preclude discussion about the structural causes and other human rights aspects that contribute to water insecurity.

³²⁵ As mentioned in section 3.2 above, both the WSA and NWA require the government to set up monitoring and information systems. However, these are limited to the content of both Acts, and do not encompass broader right to water violations and issues as evidenced in the framework.

³²⁶ SA Constitution, *supra* note 127, s. 184(1).

appropriate redress where human rights have been violated, to carry out research and to educate.³²⁷

Unfortunately, the role of the SAHRC in investigating and monitoring the right to water has been limited. In this connection, its latest report includes no information derived from investigative procedures on the ground, such as fact-finding visits to villages or townships.³²⁸ It is entirely based on requiring relevant government organs to send information to the SAHRC based on a detailed questionnaire. Although relying solely on questionnaires in order to access information is not problematic in itself, it puts a burden on the SAHRC to design a questionnaire that can gather all the necessary and relevant information to make a concise evaluation of the government's efforts to realize the right to water. Many of the report's conclusions are indeed useful; however, there is a limit to the depth of recommendations that the SAHRC can provide based only on information reported by various state organs. Furthermore, as one reoccurring theme throughout its recent report indicates, many organs of state did not provide sufficient explanation to questions, thus leaving information gaps. Although this is something that the SAHRC could comment on in its report, it does not cure the fact that the information is still missing.³²⁹

Another important issue concerning AWARD, as well as other civil society organizations working in South Africa, is whether 25 litres per person per day as a basic minimum content of water is in fact sufficient. The immediate repercussions of setting

³²⁷ *Ibid.*, s. 184(2). Section 184(3) clarifies that, "[e]ach year, the Human Rights Commission must require relevant organs of state to provide to Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."

³²⁸ See SAHRC Report, *supra* note 313.

³²⁹ See generally *ibid.* (noting throughout the report when government departments failed to provide the requested information).

the basic minimum content of the right to water too low are self-evident. Experts have argued that 25 litres is not enough for sanitation, drinking, bathing and sustenance food production.³³⁰

AWARD also identified a number of core obligation issues on the ground relating mainly to ensuring the basic minimum content of water. This included a general delay and/or failure to repair damaged water-related infrastructure, such as borehole pumps, pipes and electrical cables. In every village in which AWARD conducted interviews, there were incidents where damaged or stolen water pumps or groundwater boreholes had not been repaired, despite notification to the government officials and local representatives.³³¹ In one village, two boreholes had been broken and not repaired; one struck by lightning four months prior to the interview.³³² It is important to note, however, that insufficient resources are not the main cause of long wait times to repair damaged infrastructure.

One of the major causes of delays in repairs is excessive red tape in DWAF, amounting to arbitrary conduct as defined by Roth. As interviews with local DWAF maintenance workers indicated, the significant delay in getting parts is unnecessary. For example, when a part was broken in a borehole engine in one village, community members alerted local DWAF maintenance workers. However, although these local officials wanted to replace the part immediately, they had to go through a district office three hours away to order the part and to get permission to fix the problem. Furthermore,

³³⁰ Michael Kidd, "Not a Drop to Drink: Disconnection of Water for Non-Payment and the Right of Access to Water" (2004) 20 S.A.J.H.R. 119, 134, citing P.H. Gleick, *The Human Right to Water* (1998) 1 Water Policy 487.

³³¹ AWARD village interviews, *supra* note 303.

³³² AWARD interview of Moreku Township Water Committee members (30 June 2004) notes on hold with author and AWARD.

the district office often referred issues to the regional office, thus in effect creating three levels of bureaucracy. It was not uncommon for parts to arrive and repairs to be approved months after the initial complaint, effectively leaving villages without adequate water supply.³³³ Government could do much to remedy this issue, for example by setting up more local offices with excess parts and by giving more discretion to local officials to repair problems without external approval. Other significant causes delaying repairs and preventing maintenance include confusion of roles and responsibilities, lack of cooperation between government agencies and poor planning.

Security issues also presented major challenges to fulfilling core obligations. This is in terms of theft and vandalism to water infrastructure and, as mentioned above, dangers and violence, such as rape, while walking long distances to fetch water. The former issue prevents access to basic water supply while the latter issue leads to a failure “to ensure personal security is not threatened when having to physically access” water and “to ensure physical access to water facilities within a reasonable distance from the household and with very little waiting time.”³³⁴

5.5. Inter-relationship of the Right to Water with Other Rights

AWARD also witnessed many violations of the right to water that essentially led to violations of other socio-economic and civil and political rights. As discussed above, outlining and documenting the interdependence of human rights is one of the most powerful tools available to human rights NGOs in the realm of socio-economic rights. Often fulfilling or violating one right fulfils or violates other rights, thus negating that the realization of one socio-economic right will come at the expense of another.

³³³ AWARD interview of DWAF Bushbuckridge Technician (22 June 2004) notes on hold with author and AWARD.

³³⁴ General Comment 15, *supra* note 73, ss. 27(c) & (d).

Highlighting connections between rights can serve as a powerful advocacy strategy because it places the realization of any given right within a broader context. In other words, it becomes more difficult for the government to dismiss violations of the right to water if the right to health and education is also violated.

The right to education provides one clear example. In this connection, many of the water-related issues AWARD observed had direct repercussions on children's ability to receive an adequate education. It is often young girls that must fetch water for the family, and as indicated above, this may entail long trips in the early hours of the morning prior to attending school, and/or additional trips after school. This often leads to increased stress and exhaustion directly affecting a child's ability to focus and concentrate on studies. Furthermore, long trips after and before school takes away valuable time that could be devoted to studying and preparation for class. Finally, the affects of malnutrition resulting from insufficient and unsanitary water can lead to stunted physical and mental development and poor concentration abilities.

Thus, stressing the links between violations of the right to water and the right to education provides a more powerful narrative. The fact that children do not have access to water is problematic. However, it becomes even more difficult to ignore a lack of available water and difficulty in accessing water supply if it prevents a child from receiving a proper education.

5.6. Water Management and Human Rights

As indicated by the objectives of the human right project, AWARD sought to move beyond focusing solely on water service delivery issues from a human rights perspective by also focusing on water management principles. By focusing on water

services, human rights actors have failed to contribute meaningfully to the discussion of water resource management. This is arguably equally, if not more important than water services in ensuring the right to water. Without adequate resource management, water service provisions cannot be met.

In this connection, one of the most important water management tools in South Africa to help ensure basic amounts of water for human needs and ecological integrity is the Reserve.³³⁵ The human rights project sought to place both the Basic Human Needs Reserve (BHNR) and the Ecological Reserve (ER) within a human rights discourse in order to define the nature of these principles' legal obligations. A summary of the project's analysis of the BHNR is useful as an illustration.

As mentioned above, the BHNR is considered the amount of water at the source of the water supply needed, at the very least, to meet the basic minimum content of the right to water, as defined by the human rights framework.³³⁶ In other words, if the BHNR is not met, the basic minimum content of the right to water cannot be provided in terms of water services. AWARD has been concerned that the BHNR, currently set at 25 litres per person per day, is not high enough to meet the 25 litres requirement at the tap. This simply means, that by setting 25 litres aside at the source of the water supply, there would have to be no water loss or any other externalities for 25 litres to reach the individual person at the end of the supply line. Considering that water loss is an unavoidable reality in even the best water systems, the BHNR should be set higher than it currently is.

³³⁵ See *supra* note 149 (reviewing the Reserve).

³³⁶ The BHNR is set at 25 litres per person per day.

When looking at this through the lens of the framework detailed above, one can think of the BHNR as a necessary tool in order for the government to comply with its core obligations to “ensure access to the minimum essential amount of water.”³³⁷ This is because without ensuring adequate quantity at the source, it is impossible to ensure the basic minimum at the tap. As a core obligation, the government must see the BHNR as a short-term or immediate obligation, and not as something that is subject to progressive realisation. Thus, government should be held accountable if it is not setting aside the BHNR or if it is not setting the BHNR high enough to meet the basic minimum content “at the tap.” In addition, there should be adequate monitoring mechanisms in place to ensure that the BHNR is not jeopardized by other water uses, such as agriculture, forestry and private business.

³³⁷ See General Comment 15, *supra* note 73, at para. 37(a).

VI. Conclusion

This thesis, by reviewing AWARD's human rights and water project has sought to incorporate a local perspective into the discussion regarding the role of NGOs in promoting socio-economic rights. It has illustrated how AWARD has approached complex water security issues from a human rights perspective, and the various methodologies it has used to promote the right to water.

Faced with a wide array of factual scenarios and water security issues, AWARD's main challenge was to present the information it gathered within a human rights approach to water security. The centrepiece of AWARD's human rights project is the creation of a human rights framework, drawing from international human rights law, including the right to development. This has allowed AWARD to undertake multiple methodologies towards promoting the right to water, such as capacity building, initiating interdisciplinary dialogue and focusing on the inter-relationship of human rights. At the same time, the framework has presented a simple, flexible model to analyze critically water security issues, incorporating the growing consensus in international human rights law on how to define the content, obligations and violations of the right to water.

AWARD, in addition to focusing on substantive human rights issues, has concentrated on important procedural issues. One important aspect of AWARD's work, as evidenced in the framework, is a focus on adequate participation in decision making. In particular, this thesis argues that allowing for inclusive participation in decision-making would lead to, among other things, more just social outcomes by presenting the needs of the most vulnerable groups in society.

The framework also allows AWARD to outline future areas for research and analysis. Accordingly, this thesis stresses the need to link the right to water with other human rights, and other fields of law. Specifically, it focuses on a need to understand better the relationship between a human rights approach to water and environmental law principles. It proposes that, among other things, human rights NGOs must begin to utilize both these fields of law in order to reinforce their methodologies. Furthermore, this thesis sets forth that the right to a healthy environment could potentially act as a mechanism to bridge environmental law principles with a human rights approach to water security and other socio-economic objectives.

Unfortunately, the work of the major international human rights NGOs in the area of socio-economic rights is presently inadequate. These NGOs must acknowledge their ability to shape the development of human rights norms, and do more to legitimize socio-economic rights. International NGOs, like HRW, need to engage more meaningfully with local NGOs, like AWARD, in order to begin to systematically address socio-economic rights. It is only through such broad and substantive participation that international NGOs will begin to consider their own predispositions and biases towards their own methodologies and ideas for promoting socio-economic rights.

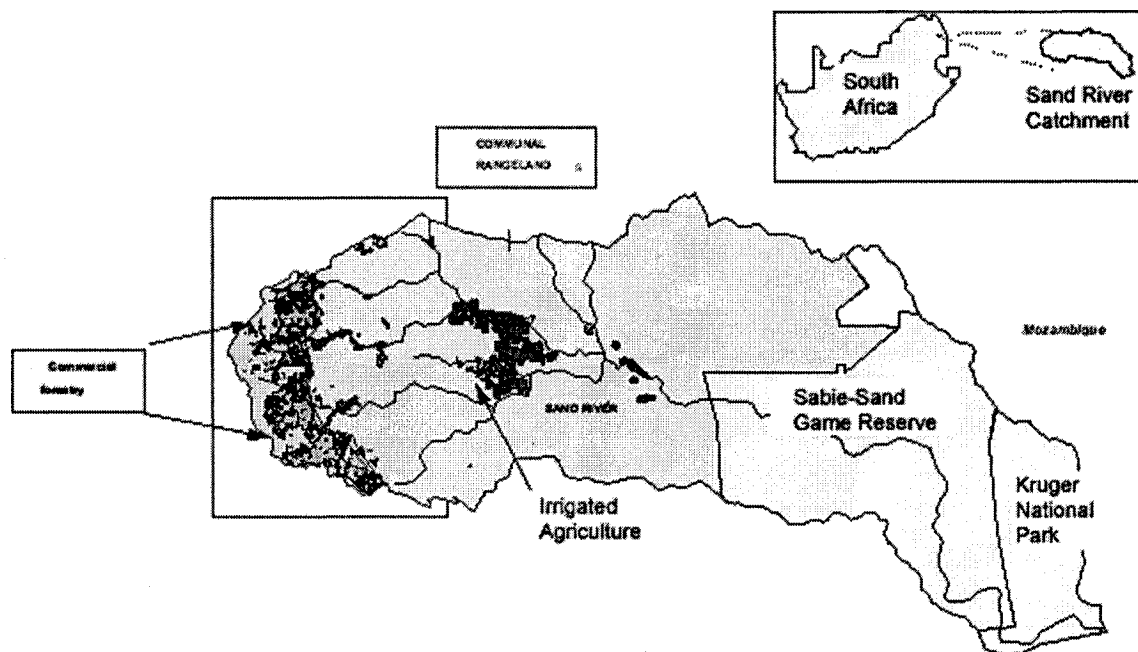
Furthermore, international NGOs need to devote more resources and time to socio-economic rights, and must begin to staff themselves with experts and practitioners with considerable experience advocating socio-economic rights, who have thought a great deal about the challenges and issues involved in promoting these rights. Importantly, international NGOs must begin to consider more diverse methodologies to promote socio-economic rights, and move beyond simply using civil and political rights

as the starting point for their strategic planning and analytical reflection. International human rights NGOs should use flexible and dynamic frameworks tailored to socio-economic rights, similar to AWARD's human rights framework, to engage in multiple strategies for promoting these rights.

It is hoped that international human rights NGOs will benefit from AWARD's framework and observations and build on their limited methodologies and conceptions of socio-economic rights. As already described, AWARD's human rights and water project budget was very small, demonstrating that an effective project can be run with relatively few resources and staff. There is no excuse for international human rights NGOs not to engage more seriously in these important activities. It is time that international human rights NGOs devote their maximum energy and effort into developing comprehensive and substantial socio-economic rights programmes and give due consideration to the indivisible nature of all human rights.

APPENDIX A- Maps

Map 1- Sand River Catchment



APPENDIX B- Figures

Figure One- The Human Rights Framework

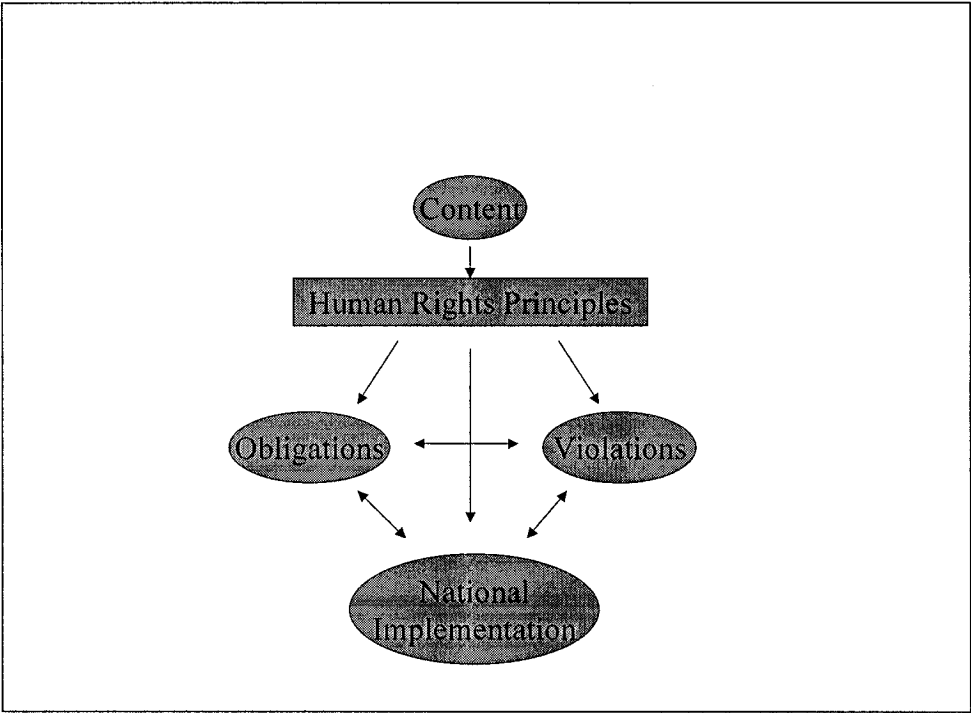


Figure Two- Human Rights Principles

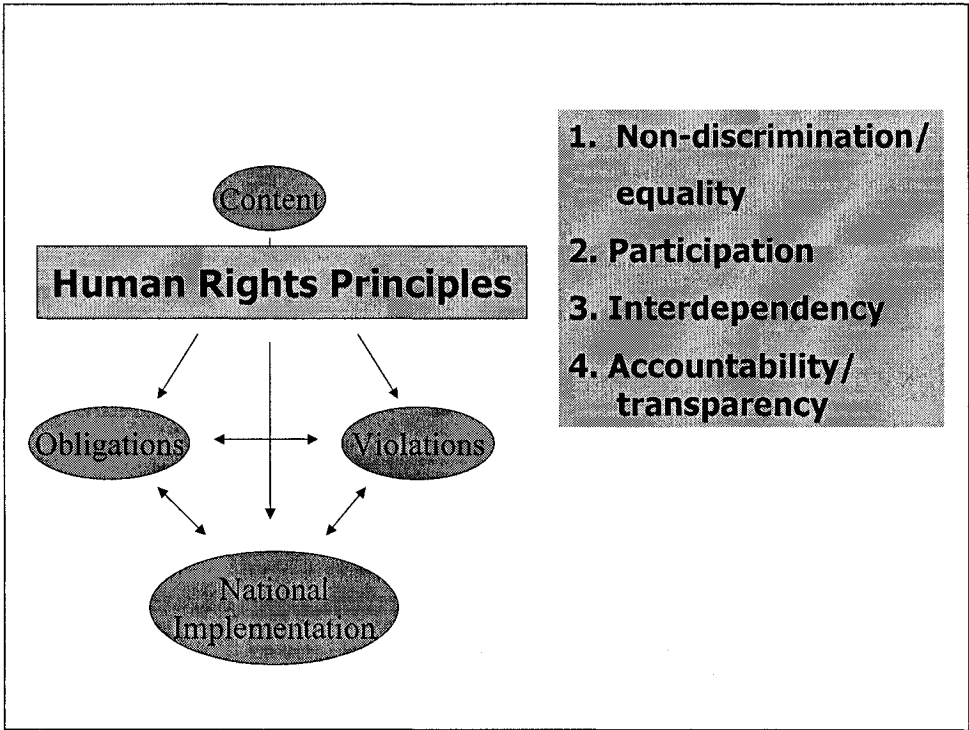
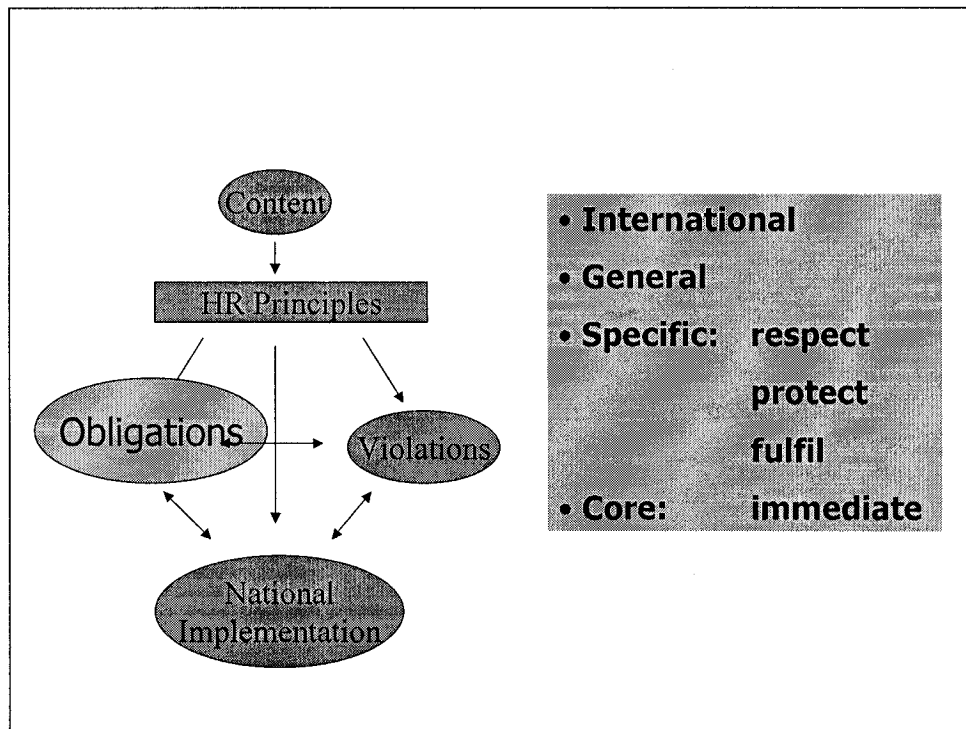


Figure Three- Human Rights Obligations



BIBLIOGRAPHY

LEGISLATION: SOUTH AFRICA

1. Laws

Constitution of the Republic of South Africa 1996, No. 109 of 1996.

Municipal Structures Act 1998, No. 117 of 1998.

Local Government: Municipal Systems Act 2000, No. 32 of 2000.

National Environmental Management Act 1998, No. 107 of 1998.

National Water Act 1998, No. 36 of 1998.

Water Service Act 1997, No. 108 of 1997.

2. Regulations, Strategies & Government Documents

Department of Water Affairs and Forestry (DWAF). *Free Basic Water Implementation Strategy Document*, version 8.3, (May 2001) online: DWAF
<www.dwaf.gov.za/FreeBasicWater/>.

———. *Proposed First Edition National Water Resource Strategy* (August 2002).

———. *Strategic Framework for Water Services* (September 2003).

———. *Water Management Institutions: Overview* (Undated), online: DWAF
<www.dwaf.org.za/>.

———. *White Paper on a National Water Policy for South Africa* (1997).

Human Right Commission, *The Right to have Access to Sufficient Water*, (Period 2000-2002, c. 9, 411 [SAHRC Report], online: SAHRC
<http://www.sahrc.org.za/4th_esr_chap_9.pdf>.

Ministry for Provincial Affairs and Constitutional Development, *White Paper on Local Government* (1998).

Regulation relating to compulsory national standards and measures to conserve water, Gazette 22355, Regulation Gazette 7079 (8 June 2001).

JURISPRUDENCE: SOUTH AFRICA

Gov't of Rep. of S. Afr. v. Grootboom, 2000 (11) BCLR 1169 (CC).

Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC).

OTHER MATERIAL: INTERNATIONAL INSTRUMENTS, RESOLUTIONS & STANDARDS

Commission on Human Rights. Fourth Report of the Independent Expert on the Right to Development, Mr. Arjun Segupta, submitted in accordance with Commission Resolution 2002/69, UN Doc. E/CN.4/2002/WG.18/2.

———. *Report of the Special Rapporteur on the promotion and protection of freedom of expression and opinion*, Mr. Abid Hussein, submitted in accordance with Commission Resolution 1997/26, UN Doc. E/CN.4/1998/40.

———. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights and the Environment*, Final Report of the Special Rapporteur, UN Doc. E/CN.4/Sub.2/1994/9 (6 July 1994).

General Comment 3 of the Committee on Economic, Social and Cultural Rights, U.N. Doc. HRI/GEN/1/Rev.1 (1991).

General Comment 15 of the Committee on Economic, Social and Cultural Rights, U.N. ESCOR, 29th Sess., Agenda Item 3, U.N. Doc. E/C.12/2002/11 (2003).

International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, No. 6, adopted 22–26 Jan. 1997, reprinted in (1998) 20 Hum. Rts. Q. 691.

Report of the World Summit on Food: five years later. Annex II, *Explanatory Notes/Reservations* (United States) (June 2002 Rome).

Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. 1) (1992).

United Nations Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986).

Universal Declaration on Human Rights, GA Res. 217(III), UN GAOR, 3d Sess, Supp. No. 13, UN Doc. A/810 (1948).

Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (1993).

OTHER MATERIALS: INTERNATIONAL ORGANIZATIONS' PUBLICATIONS AND REPORTS

UNDP. (June 2003) *Poverty Reduction and Human Rights: A Practice Note*.

UN OHCHR. (September 2002) *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*.

———. (2004) *Human Rights and Poverty Reduction: A Conceptual Framework*.

OTHER MATERIALS: NGO MATERIAL

Association for Water and Rural Development (AWARD). *Access to Water as a Human Rights: Project Proposal*, online: AWARD <www.award.org.za>.

———. Field Study Interviews (June-July 2004) notes on hold with the author and AWARD.

Farouk, Fazila. *Report to the Open Society Foundation for South Africa Launching a Human Rights Capacity Building Programme in Limpopo Province* (January 2003).

Human Rights Watch (HRW). Press Release, "South Africa: Sexual Violence Rampant in Schools: Harassment and Rape Hampering Girls' Education" (27 Mar. 2001) online: HRW <www.hrw.org/press/2001/03/sa-0327>.

———. Press Release, "South Africa: Government Fails Rural Children" (3 June 2004) online: HRW <<http://hrw.org/english/docs/2004/06/03/safric8724.htm>>.

———. "South Africa: Safeguarding Children's Rights to Medical Care" *Submission on the Children's Bill to the Portfolio Committee on Social Development in the National Assembly* (27 July 2003).

The Report of the International Fact-Finding Mission on Water Sector Reform in Ghana (April 26th to May 9th 2002), online: CESR <www.cesr.org>.

SECONDARY MATERIAL: MONOGRAPHS

Birnie, Patricia & Boyle, Alan E. *International Law and the Environment* (Oxford University Press: 2d edition 2002).

- Boyle, Alan E. & Anderson, Michael R., eds. *Human Rights Approaches to Environmental Protection* (Clarendon Press: Oxford 1996).
- Chayes, Abram & Chayes, Antonia Handler. *The New Sovereignty* (Cambridge: Harvard University Press 1995).
- Eide, Asbjørn, Krause, Catrina & Rosas, Allan, eds. *Economic, Social and Cultural Rights* (Dordrecht: Martinus Nijhoff Publishers 2001).
- Franck, Thomas. *The Power of Legitimacy Among Nations* (1990).
- Goodman, David. *Fault Lines: Journeys into the New South Africa* (Berkeley and Los Angeles: University of California Press 1999).
- Keck, Margaret E. Keck & Sikkink, Kathryn. *Activists Beyond Borders* 23-29 (Ithaca: Cornell University Press, 1998).
- Risse, Thomas, Ropp, Stephen C. & Sikkink Kathryn. *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).
- Sepúlveda, Magdalena. *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerpen: Intersentia, 2003).
- Steiner, Henry & Alston, Philip. *International Human Rights in Context: Law, Politics and Morals*, 2nd ed. (New York: Oxford University Press, 2000).
- Young, Iris Marion. *Inclusion and Democracy* (Oxford: Oxford University Press 2000).

SECONDARY MATERIAL: ARTICLES

- Alfredsson, Gudmundur. "Technical Cooperation in the Field of Economic, social and Cultural Rights" in Asbjørn, Eide, Catrina Krause & Allan Rosas, eds. *Economic, Social and Cultural Rights* (Dordrecht: Martinus Nijhoff Publishers 2001).
- Alston, Philip. "U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy" (1990) 84 A.J.I.L. 365.
- Anderson, Kenneth. "The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Non-Governmental Organizations", (2001) 2 Chi J Intl L 371.
- Anderson, Michael. "Human Rights Approaches to Environmental Protection: An Overview" in Alan E. Boyle & Michael R. Anderson, eds., *Human Rights Approaches to Environmental Protection* (Clarendon Press: Oxford 1996).

- Bilchitz, David. "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence" (2003) 19 S.A.J.H.R. 1.
- Blackett, Adelle. "Globalization, Accountability, and the Future of Administrative Law: Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct" (2001) 8 Ind. J. Global Leg. Stud. 401.
- Boyle, Alan & Freestone, David. "Introduction" in Alan Boyle & David Freestone, eds., *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford New York: Oxford University Press 1999).
- Capelone, Rhonda. "The Indivisible Source of International Human Rights: A Source of Social Justice in the U.S." (1998/1999) 3 N.Y. City L. Rev. 59.
- Charnovitz, Steve. "Two Centuries of Participation: NGOs and International Governance" (1997) 18 Mich. J. Int'l. L. 183.
- Cohen, Cynthia Price. "The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child" (1990) 12 Hum. Rts. Q. 137.
- Deale, Frank. "The Unhappy History of Economic Rights in the United States and Prospects for Their Creation and Renewal" (2000) 43 How. L.J. 281.
- Dennis, Michael & Steward, David. "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 A.J.I.L. 462.
- Devas, Nick & Grant, Ursula. "Local Government Decision-Making- Citizen Participation and Local Accountability: Some Evidence from Kenya and Uganda" (2003) 23 Public Admin. Dev. 307.
- Eide, Asbjørn. "Economic, Social and Cultural Rights as Human Rights" in Asbjørn, Eide, Catrina Krause & Allan Rosas, eds. *Economic, Social and Cultural Rights* (Dordrecht: Martinus Nijhoff Publishers 2001).
- & Rosas, Allan. "Economic, Social and Cultural Rights: A Universal Challenge" in Asbjørn, Eide, Catrina Krause & Allan Rosas, eds. *Economic, Social and Cultural Rights* (Dordrecht: Martinus Nijhoff Publishers 2001).
- Gathii, James & Nyamu, Celestine. "Reflections on United States-Based Human Rights NGOs' Work on Africa" (1996) 9 Harv. Hum. Rts. J. 285.
- Kidd, Michael. "Not a Drop to Drink: Disconnection of Water for Non-Payment and the Right of Access to Water" (2004) 20 S.A.J.H.R. 119.

- Knop, Karen. "Here and There: International Law in Domestic Courts" (2000) 32 N.Y.U. J. Int'l L. & Pol. 501.
- Koh, Harold H. "Why do Nations Obey International Law?" (1997) 106 Yale L.J. 2599.
- . "The 1994 Roscoe Pound Lecture: Transnational Legal Process" (1996) 75 Neb. L. Rev. 181.
- Liebenberg, Sandra. "The Protection of Economic and Social Rights in Domestic Legal Systems" in Asbjørn, Eide, Catrina Krause & Allan Rosas, eds. *Economic, Social and Cultural Rights* (Dordrecht: Martinus Nijhoff Publishers 2001).
- . "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?" (2002), online: Community Law Centre <http://www.communitylawcentre.org.za/ser/docs_2002/evolving_jurisprudence.pdf>
- Lowe, Vaughan. "Sustainable Developments and Unsustainable Arguments" in Alan Boyle & David Freestone, eds., *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford New York: Oxford University Press 1999).
- Lyon, Beth. "Postcolonial Law: Theory and Law Reform Conference: Discourse in Development: A Post-Colonial 'Agenda' for the United Nations Committee on Economic, Social and Cultural Rights" (2002) Am. U.J. Gender Soc. Pol'y & L. 535.
- McGoldrick, Dominic. "Sustainable Development and Human Rights: An Integrated Conception" (1996) 45 ICLQ 796.
- Mertus, Julie. "From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society" (1999) 14 Am. U. Int'l L. R. 1335.
- Nowrot, Karsten. "The Rule of Law in the Era of Globalization: Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law" (1999) 6 Ind. J Global Leg. Stud. 579.
- Pejan, Ramin. "The Right to Water: The Road to Justiciability," (2004) 36 G.W. Int'l L.R. 1181.
- Otto, Dianne. "Rethinking the 'Universality' of Human Rights Law" (1997) 29 Colum. Human Rights L. Rev. 1.
- Pollard, Sharon & Walker, Phillip, "Catchment management and water supply and sanitation in the Sand River Catchment, South Africa: description and issues" (2000) WHIRL Project Working Paper 1, online: WHIRL <<http://www.nri.org/WSS-IWRM/reports.htm>>.

- et. al, “Water resource management for rural water supply: implementing the Basic Human Needs Reserve and licensing in the Sand River Catchment” (2002) Whirl Project Working Paper 6, online: WHIRL < <http://www.nri.org/WSS-IWRM/reports.htm>>.
- Risse, Thomas & Sikkink, Kathryn. “The socialization of international human rights norms into domestic practices: introduction” in Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).
- Robinson, Mary. “Advancing Economic, Social, and Cultural Rights: The Way Forward” (2004) 26 Hum. Rts. Q. 866.
- Rosas, Allan & Scheinin, Martin. “Implementation Mechanisms and Remedies” in Asbjørn, Eide, Catrina Krause & Allan Rosas, eds. *Economic, Social and Cultural Rights* (Dordrecht: Martinus Nijhoff Publishers 2001).
- Roth, Kenneth. “Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization,” (2004) 26 Hum. Rts. Q. 63.
- . “Response to Leonard S. Rubenstein” (2004) 26 H.R. Quart. 873.
- Roulier, Monte. “Local Community: Seedbed of Civil Society” in John Burbidge, ed., *Beyond Prince and Merchant: Citizen Participation and the Rise of Civil Society* (New York: Pact Publishing, 1997).
- Rubenstein, Leonard S. “How International Human Rights Organizations Can Advance Economic, Social, and Cultural Rights: A Response to Kenneth Roth” (2004) 26 Hum. Rts. Q. 845.
- Sengupta, Arjun. “The Right to Development as a Human Right” (2000) Working Paper Series, No. 7, François-Xavier Bagnoud Center for Health and Human Rights, online: http://www.hsph.harvard.edu/fxbcenter/working_papers.htm.
- Scanlon, John et. al, International Union for Conservation of Nature (IUCN) and Natural Resources. “Water as a Human Right?” (2004), online: IUCN <<http://www.iucn.org/themes/law/pdfdocuments/EPLP51EN.pdf>>.
- Slaughter, Anne-Marie. “International Law in a World of Liberal States, (1995) 6 Eur. J. Int’l L. 503.
- , Tulumello, Andrew S. & Wood, Stephen. “International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship” (1998) 92 A.J.I.L. 367.

Thomas, Daniel C. "International NGOs, State Sovereignty, and Democratic Values"
(2001) 2 Chi. J. Int'l L. 389.

Villan Duran, Carlos. "El Derecho humano a la alimentaci ón y al agua potable el
Derecho internacional," in AGORA NORD-SUD, *GLOBALITZACI Ó I AGRICULTURA:
JORNADES PER A LA SOBIRANIA ALIMENTÀRIA* (Barcelona, 2003)

Wapner, Paul. "The Democratic Accountability of Non-Governmental Organizations:
Introductory Essay: Paradise Lost? NGOs and Global Accountability (2002) 3 Chi. J.
Int'l L. 155.