Michigan Journal of International Law

Volume 28 | Issue 2

2007

Privatization and the Human Right to Water: Challenges for the New Century

Melina Williams
University of Michigan Law School

STUDENT NOTE

PRIVATIZATION AND THE HUMAN RIGHT TO WATER: CHALLENGES FOR THE NEW CENTURY

*Melina Williams**

I. INTRODUCTION: PROBLEMS ASSOCIATED WITH LACK OF ACCESS TO CLEAN WATER

Clean, safe water is a basic necessity. Water is needed not only for drinking but also for agriculture to provide food and basic hygiene,

* J.D. December 2006, University of Michigan. I would like to thank Professor Christopher McCrudden for comments on a previous draft of this Note, participants in the seminar on Globalization and Human Rights, Christine Khalili-Borna for her patient and supportive editing, and the staff of the *Michigan Journal of International Law* for making this a better paper. Of course, any mistakes are my own. I would also like to thank my husband, Matt Anton, and my parents, Beth and Frank Williams, for their support and love.

supporting health and preventing disease.[1] Estimates suggest that excluding water for agriculture, industry, or energy production, a person needs at least 100–200 liters of water per day to satisfy basic survival and health needs, which translates into thirty-six to seventy-two cubic meters of water per year.[2] Beyond meeting basic needs, many types of industry depend on water, so a country's access to water often affects development.[3] Yet a substantial portion of the world's population lacks basic access to clean water and sanitation,[4] which leads to a significant global burden of disease and death from water-borne diseases.[5] Children are particularly vulnerable to water-borne illnesses, especially poor children and children in developing countries.[6] Still, poor water conditions affect everyone, as shown by a 2003 UNESCO Report attributing 2.2 million deaths in the year 2000 to a lack of safe drinking water and sanitation.[7] This makes lack of safe drinking water the third highest cause of death in the developing world (after malnutrition and unsafe sex, both of which relate to deaths from HIV/AIDS).[8]

Public health officials and civil engineers have long been concerned about ensuring access to clean, safe water, and in recent years, lack of access to safe water has gained increasing recognition as a human rights issue.[9] This recognition is based partly on the death and disease that results

---

1. WORLD HEALTH ORG., GLOBAL WATER SUPPLY AND SANITATION ASSESSMENT 2000 1–3 (2000) [hereinafter WHO].

2. MICHAEL T. KLARE, RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT 142 (2002) (citing THE WORLD BANK, A STRATEGY FOR MANAGING WATER IN THE MIDDLE EAST AND NORTH AFRICA 11 (1994)).

3. Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1, 8 (1992).

4. In 2000, the World Health Organization estimated that 1.1 billion people did not have access to an improved water supply of at least twenty liters per day; eighty percent of those lacking minimum access were rural dwellers. More than twice that number, 2.4 billion, did not have access to sanitation. *See* WHO, *supra* note 1, at 1.

5. In 1997, the UN estimated that 2.3 billion people suffered from diseases linked to water. *See* U.N. COMM'N ON SUSTAINABLE DEV., COMPREHENSIVE ASSESSMENT OF FRESHWATER RESOURCES OF THE WORLD 39 (1997).

6. WORLD BANK, THE WORLD BANK GROUP'S PROGRAM FOR WATER SUPPLY AND SANITATION 7 (2004), *available at* http://www.worldbank.org/html/fpd/water/pdf/WSS_report_Final_19Feb. pdf; WHO, *supra* note 1, at 2; *see also* U.N. EDUC., SCIENTIFIC & CULTURAL ORG. [UNESCO], WATER FOR PEOPLE, WATER FOR LIFE 11 (2003), *available at* http://unesdoc.unesco.org/images/0012/001295/129556e.pdf.

7. Alan Hecht, *International Efforts to Improve Access to Water and Sanitation in the Developing World: A Good Start, but More is Needed*, ALI-ABA Continuing Legal Educ., SK046 ALI-ABA 321, 325 (2005) (Westlaw) (citing UNESCO, *supra* note 6).

8. *Id.*

9. *See* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion and Prot. of Human Rights, *Final Report of the Special Rapporteur Mr. El Hadji Guissé, Relationship between the Enjoyment of Economic, Social, and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation*, ¶ 18, U.N. Doc. E/CN.4/Sub.2/2004/20 (July 14, 2004) [hereinafter *Guissé Final Report*]; ECOSOC, Comm. on

from lack of such access, but the human rights perspective highlights other potential human rights problems that arise from lack of safe water. For instance, refugees may face challenges in accessing water and sanitation.[10] Similarly, lack of access to safe water in the vicinity of the home has particular impact on women and children.[11] Many children, especially girls, spend their days carrying water from distant sources rather than going to school, which impinges on their right to an education.[12] Women in some areas are more vulnerable to sexual assault if no secure sanitation facilities are available for their use.[13] In short, access to safe water and sanitation are essential components of a life of dignity.[14]

Another dimension of the interrelatedness of human rights and access to water is that interstate rivalries over water may fuel conflict and violence, potentially contributing to human rights violations.[15] Countries must often share water resources because rivers and aquifers cross political boundaries. Water disputes have contributed to past wars, such as the Arab-Israeli War of 1967.[16] In the future, the combination of limited global supplies of water, population growth, and increasing water demands from urbanization and industrialization may create or exacerbate interstate conflict.[17] These conditions could promote war, especially in regions where political relationships are already fragile or where states have already demonstrated willingness to engage in military conflict over water.[18] Agreements for sharing water resources can help avoid conflict, but as

---

Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: General Comment No. 15 (2002)*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter *General Comment 15*]; U.N. Gen. Assembly, Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* U.N. Doc. A/HRC/2/L.3 (Oct. 2, 2006). *See generally* Erik B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 ECOLOGY L.Q. 957 (2004).

10. WHO, *supra* note 1, at 35; U.N. HIGH COMM'R FOR REFUGEES, ENSURING CLEAN WATER AND SANITATION FOR REFUGEES 1 (2002) ("The common surge in death rates among refugees in the first days of displacement is largely due to the lack of clean water and proper sanitation in areas of spontaneous refugee concentration.").

11. WHO, *supra* note 1, at 35.

12. WORLD BANK, *supra* note 6, at 7.

13. *See Guissé Final Report*, *supra* note 9.

14. *Id.* ¶ 17; WHO, *supra* note 1, at 1.

15. KLARE, *supra* note 2, at 138–142. *See generally* Timothy L. Fort & Cindy A. Schipani, *Ecology and Violence: the Environmental Dimensions of War*, 29 COLUM. J. ENVTL. L. 243 (2004).

16. KLARE, *supra* note 2, at 139.

17. *Id.*

18. Some countries in water-scarce regions consider water supplies essential to their continued national survival, suggesting that threats to water supplies could be considered a justifiable cause of war. *See* KLARE, *supra* note 2, at 139–141 (quoting Moshe Sharret on Israel's view of water: "Water for Israel is not a luxury. It is not just a desirable and helpful addition to our national resources. Water is life itself.").

pressures on water supplies increase, reaching agreements and abiding by them becomes increasingly difficult.[19]

This Note considers implications for the human right to water in the context of the trend toward privatization of water supplies. Part II examines the legal bases of the right to water, and Part III discusses the potential obligations that arise from it. Part IV then looks at the interaction between the right to water and arrangements to privatize water supplies. This Note posits that human rights law does not simply support or oppose privatization of water supplies and services. Rather, bringing a human rights perspective to the problem of providing water to the world's population both clarifies the minimum obligations of governments and private companies when privatization is pursued and highlights practical difficulties that arise from privatization. The Note concludes in Part V that viewing the problem of how to ensure access to clean water for the global population through the lens of human rights clarifies goals and responsibilities and provides a legal framework for action.

II. THE HUMAN RIGHT TO WATER: BASES AND CONTOURS OF THE RIGHT TO WATER

A. *Possible Legal Bases of the Right*

Legal scholars and the human rights community have identified and increasingly recognized a human right to water over the past few decades.[20] The 1999 London Protocol on Water and Health imposes a positive legal obligation on countries to ensure access to clean water.[21] Several human rights treaties expressly recognize a human right to water, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the regional African Charter on the Rights and Welfare of the Child. As stated in CEDAW, the right to water fits under the heading of nondiscrimi-

19. *Cf.* KLARE, *supra* note 2, at 172, 182 (suggesting interstate agreements on water distribution as a way of resolving regional conflict over water supplies).

20. Maria McFarland Sanchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 FORDHAM INT'L L.J. 1663, 1725 (2004). *See generally General Comment 15*, *supra* note 9; Bluemel, *supra* note 9.

21. ECOSOC, Econ. Comm'n for Eur., *Draft Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, U.N. Doc. MP.WAT/AC.1/1999/1 (Mar. 24, 1999) (prepared for submission to the Third Ministerial Conference on Environment and Health, June 16–18, 1999), *available at* http://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/309/93/pdf/G9930993.pdf. *See also* Jennifer Naegele, *What is Wrong with Full-Fledged Water Privatization?*, 6 J.L. SOC. CHALLENGES 99, 105 (citing *Guissé Final Report*, *supra* note 9).

nation against rural women, more particularly under the right to "adequate living conditions," and is framed as a right to "water supply."[22] The CRC defines the right as a state obligation to ensure "provision of . . . clean drinking water" and places it in the context of the right to health and the state's obligation to take steps to "combat disease and malnutrition."[23] Similarly, the African Charter on the Rights and Welfare of the Child sees the right to water as relating to provision of nutrition and obligates states to take measures to "ensure the provision of adequate nutrition and safe drinking water."[24]

Although the right to water does appear in some international legal instruments, such a right does not expressly appear in the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the International Covenant on Civil and Political Rights (ICCPR).[25] By their terms, these two covenants protect the rights of humans in general, regardless of characteristics such as age or gender. Since neither of these two covenants explicitly includes the right to water in the text, if a right to water is to be found in either of them, it must be implied from textually guaranteed rights.[26]

1. ICCPR

One way to imply a right to water entails inferring it from the right to life as protected by Article 6(1) of ICCPR, which reads, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[27] This approach has intuitive appeal because water is necessary to life.[28] One difficulty with implying a

---

22. Convention on the Elimination of All Forms of Discrimination against Women art. 14, ¶ 2(h), Sept. 30, 1981, 1249 U.N.T.S. 13 [hereinafter CEDAW].

23. Convention on the Rights of the Child art. 24, ¶¶ 1, 2(c), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

24. African Charter on the Rights and Welfare of the Child art. 14(2)(c), July 11, 1990, OAU Doc. CAB/LEG/24.9/49.

25. International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. *See also* Ignacio J. Alvarez, *The Right to Water as a Human Right*, *in* LINKING HUMAN RIGHTS AND THE ENVIRONMENT 71, 72 (Romina Picolotti & Jorge Daniel Taillant eds., 2003) (noting the absence of specific mention of the right to water in the ICCPR, ICESCR, and the Universal Declaration on Human Rights); Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates*, 4 NW. U. J. INT'L HUM. RTS. 331, 334, 338 (2005). *But see* ALEX CONTE, SCOTT DAVIDSON & RICHARD BURCHILL, DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 1 (2004).

26. *See* McCaffrey, *supra* note 3, at 7. *See also* Alvarez, *supra* note 25, at 72.

27. ICCPR, *supra* note 25, art. 6(1).

28. *See* McCaffrey, *supra* note 3, at 5 (quoting an undated brochure by the UN Department for the Technological Cooperation for Development of Water Resources stating, "[n]o resource is more basic than water.").

right to water from this provision is that the text traditionally has been understood narrowly to protect the right to life only as a civil right; that is, the protection extends to arbitrary deprivations of life by the state but does not require the state to take affirmative action to guard citizens' lives.[29] Indeed, the individual cases considered by the Human Rights Committee (HRC) (one of the former enforcement mechanisms of the ICCPR[30]) have often dealt with topics such as state killings and capital punishment.[31] However, a broader reading of the right to life under ICCPR is possible. According to this view, the right to life includes a socioeconomic component and demands positive action by states.[32] This view finds support in the HRC's General Comment 6, which states:

> The Committee has noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.[33]

If one accepts this more expansive interpretation of the right to life under Article 6, then it is also reasonable to see this right as encompassing a right to water. If states have an obligation to adopt positive measures to protect the right to life, these obligations should include providing access to the means of sustaining life. This in turn would necessarily imply an obligation to ensure some access to clean water, since water is essential to human life.[34] The reference in General Comment 6 to reducing infant mor-

---

29. *Id.* at 9 (referring to Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, *in* THE INTERNATIONAL BILL OF RIGHTS 114 (Louis Henkin ed., 1981)). *See also* Hardberger, *supra* note 25, at 332.

30. The United Nations General Assembly replaced the Human Rights Committee with the Human Rights Council in April 2006. *See* G.A. Res. 60/251, ¶ 1, U.N. Doc. A/RES/60/251 (Apr. 3, 2006). Although the new Council has already expressed interest in the human right to water, it is difficult to predict the effect of this change at this early stage.

31. *See* SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 154–193 (2d ed. 2004).

32. *See id.* at 184. *See also* McCaffrey, *supra* note 3, at 10; Hardberger, *supra* note 25, at 332.

33. Office of the High Comm'r for Human Rights, *General Comment No. 6: The Right to Life (Art. 6) adopted at the 16th Session* (Apr. 30, 1982), *available at* http://www.unhchr.ch/ tbs/ doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3.

34. *See* McCaffrey, *supra* note 3, at 10–11; Hardberger, *supra* note 25, at 338; Alvarez, *supra* note 25, at 74 (reasoning that in the modern view the ICCPR right to life encompasses the right to appropriate means of subsistence and a decent standard of living, which includes sanitary drinking water).

tality, malnutrition, and epidemics further supports this inference because lack of access to clean water contributes to such problems.[35]

Two potential advantages arise from implying the human right to water under the ICCPR. First, the text of the ICCPR includes a strong statement of states' obligations to respect the rights delineated in the covenant because ICCPR protections are immediately binding under Article 2(1): "Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[36] Second, ICCPR rights are protected by an enforcement mechanism that includes a process of international adjudication under the First Optional Protocol. If a state has ratified this Optional Protocol, an individual can bring a complaint before the Human Rights Committee against that state for violation of ICCPR rights.[37]

2. ICESCR

Some commentators have inferred the right to water from economic, social, and cultural rights as an alternative to implying a right to water from the ICCPR.[38] This line of thinking understands the right to water as implicit in rights guaranteed by the ICESCR, such as the rights to life, health, food, and an adequate standard of living.[39] Consistent with this view, in 2002 the Committee on Economic, Social and Cultural Rights (ESCR Committee) recognized the right to water as a human right in General Comment 15.[40] General Comment 15 does not constitute a legally binding interpretation of the ICESCR and thus does not impose legal obligations on states. Rather, the ESCR Committee's general comments serve as nonbinding interpretations of the ICESCR that may be used to determine whether states have met their treaty obligations.[41]

---

35. *See, e.g.*, WHO, *supra* note 1, at 2–3; Alvarez, *supra* note 25, at 71 ("[W]ater shortages or contamination can lead to famine, disease, and even death."); *Guissé Final Report*, *supra* note 9, ¶ 20.

36. ICCPR, *supra* note 25, art. 2(1).

37. *Id.* art. 2.

38. *See, e.g.*, Alvarez, *supra* note 25, at 73–74 (finding that a right to water could be inferred from ICESCR Article 11(1) on the right to an adequate standard of living, Article 11(2) on the right to be free from hunger, or Article 12 on the reduction of infant mortality); Bluemel, *supra* note 9, at 969–971. *But see* Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 491–500 (2004).

39. *See* Alvarez, *supra* note 25, at 73–74. *See also* Bluemel, *supra* note 9, at 969–971.

40. *General Comment 15*, *supra* note 9.

41. Bluemel, *supra* note 9, at 972.

General Comment 15 relies on three rationales to support its finding of a human right to water.[42] First, it argues that the right could be inferred from other rights protected by the ICESCR. It links the human right to water to rights protected under Articles 11 and 12 of the ICESCR, particularly rights that "emanate from" and are "indispensable for" the realization of the right to an adequate standard of living enshrined in Article 11(1).[43] The rights specified under Article 11(1) "include[e] adequate food, clothing and housing," and the word "includ[e]" indicates this list is "not exhaustive."[44] Thus, General Comment 15 places the right to water 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."[45]

The second argument used to support the human right to water in General Comment 15 is that such a right is necessary to protect previously recognized human rights. General Comment 15 notes that the human right to water is "indispensable" to, and a "prerequisite" for, the realization of other human rights.[46] Specifically, the text ties the right to water to the right to the highest attainable standard of health (Article 12(1)) and the rights to adequate housing and food (Article 11(1)). General Comment 15 also invokes the ideals of the International Bill of Human Rights, stating that the right to water should be "seen in conjunction with" the rights to life and human dignity.[47] The underlying rationale here mirrors the logic of inferring the right as described above: without a right to water, the textually protected rights would be impossible to realize, so that absence of a right to water renders the text meaningless.

Finally, General Comment 15 refers to prior recognition of the right to water in a variety of other international legal instruments to support finding such a right under the ICESCR.[48] The pertinent text points to human rights treaties and environmental declarations, among others.[49] The inclusion of instruments of international environmental law in this section of General Comment 15 draws attention to the absence of such instruments in the two earlier lines of analysis.[50] This suggests that principles and texts

42. *See generally* SALMAN M.A. SALMAN & SIOBHÁN MCINERNEY-LANKFORD, THE HUMAN RIGHT TO WATER: LEGAL AND POLICY DIMENSIONS 56–64 (2004).

43. *General Comment 15*, *supra* note 9, ¶ 3.

44. *Id.*

45. *Id.*

46. *Id.* ¶ 1.

47. *Id.* ¶ 3.

48. *Id.* ¶ 4.

49. *Id.*

50. *See* SALMAN & MCINERNEY-LANKFORD, *supra* note 42, at 57 (noting that some scholars derive a human right to water from a human right to a clean environment, which is implied from principles of international environmental law).

of international environmental law, while perhaps not sufficient to establish a right to water independently, do offer additional support for the right.

General Comment 15, CEDAW, and CRC seem to agree that the right to water merits protection because of its connection to other rights, thereby suggesting that the right to water is instrumental because it offers a way to protect other rights. However, this suggestion leaves some ambiguity around defining the right to water itself because various connected rights may implicate different state obligations.[51] For example, less water is needed to sustain life, which requires the provision of water for drinking, than to prevent water-borne disease, which requires the provision of water for both drinking and sanitation. Thus, deriving the right to water from the right to life would lead to lesser state obligations than deriving the right to water from the right to health.

Similarly, interpreting the right to water under the ICESCR framework suggests a lower level of legal protection than interpreting it under the ICCPR framework because of the lack of an adjudicative mechanism under ICESCR.[52] This difference has led some commentators to identify an implicit hierarchy between the two covenants, with the "ICESCR guarantees [remaining] normatively and jurisprudentially underdeveloped compared to the modern-day [ICCPR rights]."[53] At least one commentator has argued that having an adjudicative process could help protect the right to water.[54] Others contend, however, that international human rights adjudication would not promote access to water and sanitation services.[55] Under this second view, even if an international human rights body were to find that a state had breached its human rights obligations by failing to provide access to an adequate supply of clean water and sanitation, the

---

51. Bluemel argues that the human right to water has not been fully defined by international law or practice, and he questions whether the right to water is an independent right or a right subordinate to other rights. Bluemel points out that if the right to water is a subordinate right, the right from which it stems from will shape states' obligations. *See* Bluemel, *supra* note 9, at 963. *See also* Alvarez, *supra* note 25, at 72.

52. For a brief discussion of these contrasts, see JOSEPH ET AL., *supra* note 31, at 7; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 538 (6th ed. 2003). *See also* McCaffrey, *supra* note 3, at 11.

53. JOSEPH ET AL., *supra* note 31, at 8.

54. *See* Ramin Pejan, *The Right to Water: The Road to Justiciability*, 36 GEO. WASH. INT'L L. REV. 1181, 1209 (2004) (arguing that states should support the right to water by adopting the Draft Optional Protocol to the ICESCR to create an individual complaint mechanism and create a new rapporteur on the right to water).

55. *See generally* Dennis & Stewart, *supra* note 38 (arguing that justiciability for economic, social, and cultural rights was not true to the intent of the ICESCR's framers and would not increase compliance). For a more general discussion of how non-adjudicatory mechanisms may influence state compliance with international law, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645–46 (1997); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999).

remedy for such a breach would be difficult to fashion and enforce.[56] Despite the normative and rhetorical force of these contentions, the practical difference of justiciability remains and continues to fuel perceptions of hierarchical differences between ICCPR and ICESCR rights.

3. An Independent Right to Water?

Some writers have argued that recognizing water as an independent human right (for instance, by treaty or customary international law) would lead to greater consistency in interpretation of the right, greater state compliance, better enforcement and protection of the right, and a clearer understanding of remedies for violations.[57] Recent commentary has discussed whether an independent human right to water exists—that is, a right that applies by its own force as opposed to a right subordinate to other existing rights or treaties.[58] The truth of these assertions will ultimately depend on the nature and provisions of the independent right. Currently, only a few countries have recognized an independent right to water.[59] Further, the right does not appear to have achieved the status of customary international law, which would bind states that had not recognized the right.[60] For these reasons, it is difficult to support the assertion that an independent right to water presently exists.[61]

---

56. *Cf.* Dennis & Stewart, *supra* note 38, at 497–98 (noting that often lack of resources underlies a government's failure to provide for basic needs such as water, and arguing that in such circumstances a finding of a violation can be expected to have "little effect").

57. *See* Bluemel, *supra* note 9, at 968–972 (observing that the International Law Association encourages respect of a human right to water); Hardberger, *supra* note 25, at 360–62 (arguing that the right to water should be independently recognized and accorded customary international law status). *See also* John Scanlon, Angela Cassar & Noémi Nemes, *Water as a Human Right?* 13–25 (World Conservation Union Envtl. Policy & Law Paper No. 51, 2004).

58. *See, e.g.*, Bluemel, *supra* note 9, at 972; Harderberger, *supra* note 25, at 340.

59. Bluemel, *supra* note 9, at 977 (noting that some countries, such as South Africa, India, and Argentina, have provided a legal right to water). *See also* Pejan, *supra* note 54, at 1194–1196, 1203–1208 (discussing South Africa's implementation of its constitutional right to water).

60. *See* Hardberger, *supra* note 25, at 345 (arguing that the unclear scope of the right to water indicates that the right has not "risen to the level of customary international law"). *See also* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 15 (2001) (arguing that while there may be increasing state recognition of the right, one indication that the right to water is not yet customary international law is the very problem that makes the right so pressing: many governments fail to ensure access to all citizens, and because generalized state practice is a necessary element of customary international law, the failure of state practice impedes the development of customary international law). *But see* Peter Gleick, *The Human Right to Water*, 1 WATER POL'Y 487, 494 (1999) ("Regional and national conventions and constitutions are also increasingly making the right to basic resources a part of accepted State practice.").

61. *Cf.* Scanlon et al., *supra* note 57, at 20 (concluding that a right water exists but has not been "expressly recognised as a fundamental human right").

Despite these obstacles, some international documents advocate for an independent right to water. At best, this seems to give the independent right the current status of a normative ideal. For example, the Dublin Statement declared that it is "vital to recognize the basic right of all human beings to have access to clean water and sanitation at an affordable price."[62] In a report to the UN Commission on Human Rights, the Special Rapporteur for Water noted that, "[t]he right to drinking water and sanitation is an integral part of officially recognized human rights and may be considered a basic requirement for the implementation of several other human rights."[63] In supporting this assertion, the report refers to a number of international treaties, regional and national laws, and declarations from international conferences, as well as the fact that water is a substance essential to human life.[64] Similarly, the Office of the High Commissioner for Human Rights (OHCHR) stated that, "the right to drinking water and sanitation is both a human right in itself and a basic requirement for the implementation of other rights including food and health."[65] The OHCHR further expands the right to water by viewing it as a crucial component of reducing poverty and promoting sustainable development.[66]

This discussion suggests the right to water might come to be seen as existing on two planes: as an independent right and as a subordinate or instrumental right. As noted above, the existence and scope of the independent right to water remains contested. The scope of the instrumental right to water poses analytical difficulties because it is not clear how many underlying needs or uses of water have achieved the status of human rights.[67] For example, while a right to food seems firmly established, the right to development is still evolving.[68] In a world of

62. Int'l Conference on Water & the Env't, Jan. 26–31, 1992, *The Dublin Statement on Water and Sustainable Development*, princ. 4, U.N. Doc. A/CONF.151/PC/112 (Mar. 12, 1992) [hereinafter *Dublin Statement*].

63. ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Preliminary Report of the Special Rapporteur Mr. El Hadji Guissé, Relationship between the Enjoyment of Economic, Social, and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation*, ¶ 32, U.N. Doc. E/CN.4/Sub.2/2002/10 (June 25, 2002) [hereinafter *Guissé Preliminary Report*].

64. *See id.* ¶¶ 20–31.

65. Office of the High Comm'r for Human Rights, *Background Paper: Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water* ¶ 12 (World Summit on Sustainable Dev., Johannesburg, S. Afr., Aug. 26–Sept. 4, 2002), *available at* www.ohchr.org/english/about/publications/docs/wehab.final.doc.

66. *Id.*

67. *See* Bluemel, *supra* note 9, at 971 (arguing that some of the economic and sociocultural rights under ICESCR that support the right to water are not technically human rights, thus creating confusion about the force and extent of the right to water).

68. *See, e.g.*, SALMAN & MCINERNEY-LANKFORD, *supra* note 42, at 23. *But see* David Marcus, *Famine Crimes in International Law*, 97 AM. J. INT'L L. 245, 248–49 (2003).

limited water resources, a seemingly limitless number of valuable uses, and some elasticity in the definition of human rights, the instrumental approach threatens to expand into ever larger requirements. This has the potential to dilute the right, or create conflicts between rights to competing uses, before the most basic parameters of the right have been realized for all.[69] Careful formulation of the right to water, however, would assign priority to the most critical uses and needs. Indeed, General Comment 15 has taken this approach.[70]

B. *Potential Contours of the Right*

1. Interpretations of ICESCR

General Comment 15 gives a fairly detailed account of the contours of the right to water and offers the broadest discussion of the right by an international human rights body, in that it considers access for all people. The human right to water consists of both freedoms and entitlements under General Comment 15.[71] At the most basic level, the right to water is an entitlement to "sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses."[72] The adequacy of the water itself includes three elements at minimum: 1) availability; 2) quality; and 3) accessibility.[73]

The first dimension requires that a sufficient and continuous supply of water be available for basic personal and domestic uses, which expressly include sanitation and hygiene. General Comment 15 also recognizes that water is needed to fulfill various other rights protected by ICESCR, such as the right to food and the right to a livelihood.[74] The right to food is closely linked to water availability, since around seventy percent of all fresh water taken from rivers, lakes, and aquifers is put to agricultural use.[75] Arguably, the right to water also encompasses having

69. *See, e.g.*, Bluemel, *supra* note 9, at 975 (raising an example of a potential conflict under General Comment 15 between protection of traditional access to water and provision of water to impoverished communities when traditional water sources could be used to provide water to impoverished communities).

70. *General Comment 15*, *supra* note 9, ¶ 6 ("Priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.").

71. *Id.* ¶ 10.

72. *Id.* ¶ 2.

73. *Id.* ¶ 12.

74. *Id.* ¶¶ 6, 12.

75. KLARE, *supra* note 2, at 143.

enough water to support at least some food production,[76] as long as such use does not impinge on the ability to meet other basic needs.[77]

The second dimension, water quality, necessitates a certain level of environmental protection. This suggests a need to protect water sources from pollution and biological, radiological, and chemical threats.[78] Moreover, the method of fulfilling the right must be sustainable, meaning that it "ensur[es] that the right can be realized for present and future generations."[79] Together these provisions indicate that a level of protection of aquatic resources underlies the ability to fulfill the right to water.

The third component, accessibility, is itself composed of four dimensions: 1) physical accessibility (water must be within "safe physical reach" for everyone and available "within or in the immediate vicinity of" households and other institutions); 2) economic accessibility (water and water services must be "affordable for all"); 3) nondiscrimination (water and water services must be accessible to all segments of the population without discrimination on any prohibited grounds);[80] and 4) information accessibility (the right to access and share information about water).[81]

Under General Comment 15, the right to water also entails procedural rights, including a right to information about water issues, a right to participate in decisions about water, and a right to effective remedies for violations of the right.[82] These procedural rights have profound implications for how decisions should be made about water resources because they require transparency and participation.[83] In other words, affected individuals have a right to information about how decisions regarding water supplies and services are made and a right to participate in these decisions. However, beyond these procedural rights, General Comment 15 does not explicitly discuss the right to participate in the

76. *General Comment 15*, *supra* note 9, ¶¶ 6–7. *See also Guissé Final Report*, *supra* note 9, ¶ 10.

77. *See* WHO, *supra* note 1.

78. *General Comment 15*, *supra* note 9, ¶¶ 8, 10, 12.

79. *Id.* ¶ 11.

80. *See id.* ¶¶ 13–16.

81. *Id.* ¶ 12.

82. *Id.* ¶¶ 12, 48, 55. *See also* Sanchez-Moreno & Higgins, *supra* note 20, at 1675 (suggesting that these three procedural rights inhere in economic, social, and cultural rights more generally); Violeta Petrova, *At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water*, 31 BROOK. J. INT'L L. 577, 596 (2006).

83. These rights would imply that if a government wishes to privatize water resources, it must satisfy certain procedural obligations, including a right to public participation, comment, and information. *See* Sanchez-Moreno & Higgins, *supra* note 20, at 1781.

management of water resources, nor does it address any duties that might be borne by individuals enjoying the right.[84]

2. Interpretations of CRC and CEDAW

Another source of information about the scope of the right to water is the implementation of this right under CRC and CEDAW, two global treaties expressly recognizing a right to water for children and women, respectively. As part of implementation, both treaties require state parties to report periodically on their progress toward meeting treaty obligations to designated monitoring bodies.[85] The monitoring bodies respond to country reports with concluding observations. Although the primary purpose of the reporting process is to encourage or facilitate state compliance with treaty obligations, the reports also elucidate the content of human rights provisions.[86] In this way, the concluding observations are similar to a body of jurisprudence in that they interpret a treaty and clarify the nature of state obligations.

The CRC's treaty monitoring body, the Committee on the Rights of the Child (the CRC Committee), has frequently mentioned the right to water, framing it in both the context of health and an adequate standard of living. The treaty text refers to the state obligation to ensure "provision of adequate nutritious foods and clean drinking water."[87] However, in interpreting this right, the CRC Committee has emphasized "access" to water. For example, in recent concluding observations for Uganda, the CRC Committee noted its concern that "increasingly large numbers of children . . . do not enjoy the right to an adequate standard of living, including access to food, clean drinking water, adequate housing and latrines."[88] The CRC Committee recommended that Uganda "reinforce its efforts to provide support and material assistance, with a particular

84. SALMAN & MCINERNEY-LANKFORD, *supra* note 42, at 74–75 (noting Jan Lundqvist's argument that public participation should be allowed and supposed to ensure that fundamental human rights to water and sanitation are met); Jan Lundqvist, *Rules and Roles in Water Policy and Management—Need for Clarification of Rights and Obligations*, 25 WATER INT'L 194 (2000). A participatory approach is also endorsed in the *Dublin Statement*, *supra* note 62, princ. 2.

85. *See* CRC, *supra* note 23, art. 44; CEDAW, *supra* note 22, art. 18.

86. MICHAEL O'FLAHERTY, HUMAN RIGHTS AND THE UN: PRACTICE BEFORE THE TREATY BODIES 1–2 (2d ed. 2002). *Cf.* Jane Connors, *An Analysis and Evaluation of the System of State Reporting*, *in* THE UN HUMAN RIGHTS SYSTEM IN THE 21ST CENTURY 3, 6 (Anne F. Bayefsky ed., 2000).

87. CRC, *supra* note 23, art. 24, ¶ 2(c).

88. U.N. Convention on the Rights of the Child, Comm. on the Rights of the Child [CRC Comm.], *Concluding Observations of the Committee on the Rights of the Child: Uganda*, ¶ 57, U.N. Doc. CRC/C/UGA/CO/2 (Nov. 23, 2005).

focus on the most marginalized and disadvantaged families, and to guarantee the right of children to an adequate standard of living."[89]

Similarly, the CRC Committee's recent country report indicated that lack of access to water posed problems in attaining an adequate standard of living in Peru.[90] Concern focused particularly on the disparity of access to water between rural and urban areas, as only thirty-four percent of rural families had access to water, compared to seventy-four percent for urban areas.[91] The CRC Committee also expressed concern about "environmental health problems arising from a lack of access to safe drinking water, inadequate sanitation and contamination by extractive industries," and it recommended an increased effort by the state to provide "sanitation and safe drinking water to all the population."[92]

In contrast, the CRC Committee's concerns about unavailability of water in Ghana arose in the context of infant mortality. The recommendation was to allocate more financial resources to providing safe water, sanitation, and health services.[93] Similarly, General Comment 7 to CRC places access to water under states' obligations to ensure access to health care and nutrition in order to improve early childhood health and reduce infant mortality.[94]

Several principles emerge from the commentary by the CRC Committee. The right to water relates to a number of other rights, primarily the right to an adequate standard of living and the right to health, including health in early childhood and infancy.[95] Some recent concluding remarks also allude to the specific concept of environmental health.[96] The right to water, as understood by the CRC Committee, clearly encompasses sanitation and safe drinking water, but other water uses are not

89. *Id.* ¶ 58.

90. CRC Comm., *Concluding Observations of the Committee on the Rights of the Child: Peru*, ¶ 58, U.N. Doc. CRC/C/PER/CO/3 (Mar. 14, 2006) [hereinafter *CRC Concluding Observations Peru*].

91. *Id.*

92. *Id.* ¶¶ 50–51.

93. CRC Comm., *Concluding Observations of the Committee on the Rights of the Child: Ghana*, ¶¶ 49–50, U.N. Doc. CRC/C/GHA/CO/2 (Mar. 17, 2006) [hereinafter *CRC Concluding Observations Ghana*].

94. CRC Comm., *General Comment 7: Implementing Child Rights in Early Childhood*, ¶ 27, U.N. Doc. CRC/C/GC/7 (2005) [hereinafter *CRC General Comment 7*].

95. *See, e.g., id.*; CRC Comm., *Concluding Observations of the Committee on the Rights of the Child: Nicaragua*, ¶¶ 48–49, U.N. Doc. CRC/C/15/Add.265 (Sept. 21, 2005).

96. *See CRC Concluding Observations Peru*, *supra* note 90; *see also* CRC Comm., *Concluding Observations of the Committee on the Rights of the Child: Thailand*, ¶¶ 55–56, U.N. Doc. CRC/C/THA/CO/2 (Mar. 17, 2006) [hereinafter *CRC Concluding Observations Thailand*] (stating concern "about a range of environmental problems . . . which have serious consequences for children's health and development. While noting improvements in water and sanitation, particularly for rural families, the Committee is concerned about regional disparities as regards access to safe drinking water and sanitation.").

emphasized. Disparity of access to water deeply troubles the CRC Committee, which focuses on ensuring access to disadvantaged children, including refugee children and children in rural and remote areas.[97] In keeping with this focus, the CRC Committee has advocated universal access.[98] Finally, the CRC Committee conceives of state obligations as embracing a positive duty to act, and thus has recommended expenditure of money and material resources to ensure access to water and sanitation.[99]

One difficulty in interpreting the CRC Committee's remarks is that the key term "access" has not been clearly defined in concluding observations.[100] In part, the problem arises because the Committee's observations respond to periodic country reports that also use the term "access" without defining it.[101] For example, the CRC Committee seems to approve of Uganda's efforts to increase rural water supply as a way of improving access, but neither the Committee nor the periodic country report details what this improvement entailed.

Unlike the CRC Committee, the treaty monitoring body for CEDAW (the CEDAW Committee) has not extensively discussed the right to water in recent country reports or concluding observations. The right to water under CEDAW encompasses access to both clean water and sanitation, without defining the term "access." CEDAW also focuses consideration on rural women, a group vulnerable to deprivations of the right.[102] However, while the CRC Committee's attention to rural commu-

---

97. *See, e.g.*, *CRC Concluding Observations Peru*, *supra* note 90; *CRC Concluding Observations Thailand*, *supra* note 96. *See also* CRC Comm., *Concluding Observations of the Committee on the Rights of the Child: Belize*, ¶ 52, U.N. Doc. CRC/C/15/Add.252 (Mar. 31, 2005) [hereinafter *CRC Concluding Observations Belize*]. For remarks on access to water for refugee children, see CRC Comm., *Concluding Observations of the Committee on the Rights of the Child: Azerbaijan*, ¶¶ 55–56, 59–60, U.N. Doc. CRC/C/AZE/CO/2 (Mar. 17, 2006) [hereinafter *CRC Concluding Observations Azerbaijan*] ("[O]ver 40% of the population lack access to potable water, including the vast majority of refugees.").

98. *CRC Concluding Observations Azerbaijan*, *supra* note 97; *CRC Concluding Observations Belize*, *supra* note 97, ¶ 53; *CRC Concluding Observations Peru*, *supra* note 90, ¶ 59.

99. *See CRC General Comment 7*, *supra* note 94; *CRC Concluding Observations Ghana*, *supra* note 93, ¶¶ 49–50.

100. In this respect, it is interesting to note that the Special Rapporteur for Water proposed eliminating the term "access" in stating the right and instead using the formulation "the right to drinking water." *See Guissé Preliminary Report*, *supra* note 63, ¶ 22.

101. *See, e.g.*, CRC Comm., *Second Periodic Report of States Parties: Uganda*, ¶ 63, U.N. Doc. CRC/C.65/Add.33 (Nov. 5, 2004) [hereinafter *Uganda Second Periodic Report*].

102. *See* U.N. Convention on the Elimination of All Forms of Discrimination Against Women, Comm. on Elimination of Discrimination Against Women [CEDAW Comm.], *Concluding Comments of CEDAW: Eritrea*, ¶¶ 26–27, U.N. Doc. CEDAW/C/ERI/CO/3 (Feb. 3, 2006) [hereinafter *CEDAW Concluding Comments on Eritrea*]. Nearly identical language appeared in the concluding comments for Mali. *See* CEDAW Comm., *Concluding Comments of CEDAW: Mali*, ¶¶ 35–36, U.N. Doc. CEDAW/C/MLI/5 (Feb. 3, 2006) [hereinafter *CEDAW Concluding Comments on Mali*].

nities relates to concern with disparities in access and the impact of those disparities on the overarching goal of universal access,[103] the CEDAW Committee does not frame access as a universal right. Instead, CEDAW's focus on rural women arises from the treaty text rather than the Committee's independent concern with disparities in access.[104]

The CEDAW Committee apparently has not addressed state responsibilities on the right to water with the same force as the CRC Committee. In a recent comment, the CEDAW Committee "urged" the state to "pay special attention" to ensuring access to clean water.[105] In a concluding comment for Burkina Faso, the CEDAW Committee recommended that "the access of women to primary health services and drinking water be facilitated."[106] These statements seem less imperative more lax than the CRC Committee's firm statements that the state has an affirmative obligation to ensure access to water and sanitation.

In sum, although some similarities are apparent between the CRC and CEDAW treaty regimes with regard to interpretations of the right to water, notable differences can also be discerned. Some variance makes sense because the textual language supporting the right to water in these treaties differs. As with General Comment 15, access forms a crucial factor in determining whether the right to water has been realized under these treaties, and thus a clearer delineation of the types of access that satisfy the right to water under CRC and CEDAW is desirable.

III. WHAT OBLIGATIONS DOES A HUMAN RIGHT TO WATER CREATE?

The traditional view of human rights is that they generate binding obligations on governments—particularly for states that are parties to the relevant treaties—and in some circumstances, individuals.[107] For the human right to water, state obligations may arise under a number of human rights instruments, including CEDAW, CRC, and ICESCR. More recently, the view that human rights law might also bind private

103. *See CRC General Comment 7*, *supra* note 94; *CRC Concluding Observations Ghana*, *supra* note 93, ¶¶ 49–50.

104. *See* CEDAW, *supra* note 22.

105. *See CEDAW Concluding Comments on Eritrea*, *supra* note 102; *CEDAW Concluding Comments on Mali*, *supra* note 102.

106. *See* CEDAW Comm., *Concluding Comments of CEDAW: Burkina Faso*, ¶ 276, U.N. Doc. A/55/38 (Aug. 17, 2000).

107. *Cf.* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 449 (2001).

corporations has emerged.[108] This Section discusses the extent of state obligations and potential corporate obligations.

A. *State Obligations*

States have the obligation to realize economic, social and cultural rights progressively under the ICESCR.[109] However, the ESCR Committee identified nine core obligations in General Comment 15 that have "immediate effect."[110] These include ensuring access to a minimum amount of water for personal and domestic uses, ensuring nondiscrimination in access to water, adopting water programs designed to protect vulnerable and marginalized groups, and addressing water-borne diseases, particularly through sanitation programs.[111] No limitations are placed on how states must meet these immediate obligations.

More generally, states have three kinds of human rights obligations: the negative obligation to respect the right (not to violate it), the positive obligation to protect the right (to prevent third-party violations), and the obligation to fulfill the right (to ensure the individual's ability to enjoy it).[112] Any of these obligations could be implicated in water privatization arrangements.[113] For example, if a privatization contract reassigns water rights traditionally enjoyed by individuals to a private company, this contract might constitute a prohibited interference in access to water, thereby violating the duty to respect the right to water.[114] Privatization arrangements also affect the state duty to protect the right to water, since that duty covers states' obligations to protect rights from violations by third parties, such as private corporations.[115] The fundamental meaning of the obligation to protect is that states retain some human rights obligations regardless of privatization arrangements.[116] General Comment 15 explicitly addresses states' obligations under such circumstances:

---

108. *Id.*

109. ICESCR, *supra* note 25, art. 2(1); *General Comment 15*, *supra* note 9, ¶¶ 17–18.

110. *General Comment 15*, *supra* note 9, ¶ 37.

111. For a full list of core obligations, *see id.*

112. *See id.* ¶¶ 20–29; Sanchez-Moreno & Higgins, *supra* note 20, at 1674–75.

113. I provide a more detailed description of what is meant by "privatization arrangement" in Part IV.

114. *See General Comment 15*, *supra* note 9, ¶ 21 (discussing the need to respect the right to water).

115. *Id.* ¶ 23.

116. *Id.* ¶ 24. *Cf.* ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Report of the High Commissioner: Liberalization of Trade in Services and Human Rights*, ¶ 50, U.N. Doc. E/CN.4/Sub.2/2002/9 (June 25, 2002) [hereinafter *UNHCHR Liberalization of Trade in Services and Human Rights*] ("In human rights terms the need to regulate . . . is in fact a duty to regulate; the obligation on States to 'fulfill' human rights requires States to take appropriate legislative, administrative, budgetary, judicial, and other measures towards the full realization of such rights.").

> Where water services . . . are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, genuine public participation, and imposition of penalties for non-compliance.[117]

The significance of this paragraph is twofold. First, the human rights regime itself contemplates and accounts for the eventuality that water services may be provided by private companies or other third parties.[118] Thus, it is difficult to contend that privatization of water systems and supplies in itself violates human rights.[119] Second, since state parties retain certain obligations to protect the right to water even under privatization arrangements, a human rights perspective clarifies states' responsibilities, elucidates how privatization could potentially violate rights, and suggests possible steps states should take to mitigate such impact on human rights.[120]

In addition to state obligations, duties to protect human rights also apply more broadly. General Comment 15 refers to international obligations to protect the right to water, some of which are particularly relevant to privatization of water resources and systems in the context of globalization.[121] For example, not only should states avoid infringing on the enjoyment of the right to water in other states, but they should also prevent their own citizens and domestic companies from taking such actions.[122] Conceivably, then, if a company based in one country violates the right to water in another country, the government of the first country has a legal duty to intervene to prevent future abuses. Further, if resources are available, states should take actions to "facilitate" the right to water in other countries (for instance by providing water resources, or technical or financial aid).[123] The ESCR Committee sees these obligations as extending to trade

---

117. *General Comment 15*, *supra* note 9, ¶ 24.

118. Similarly, WHO concludes that the state may privatize water services and user fees may be charged, provided that everyone can afford essential water. WHO, *supra* note 1.

119. *Cf.* Sanchez-Moreno & Higgins, *supra* note 20, at 1775 (concluding that the privatization of Cochamba's water system alone was not a human rights violation).

120. *Cf. UNHCHR Liberalization of Trade in Services and Human Rights*, *supra* note 116, ¶ 50.

121. *General Comment 15*, *supra* note 9, ¶¶ 30–36.

122. *Id.* ¶ 33.

123. *Id.* ¶ 34.

matters and state activities as members of international financial institutions such as the World Bank.[124]

In summary, under a human rights perspective, the right to water is understood as a fundamental individual right that should be secured by overlapping layers of state responsibility, which govern state actions both internally and internationally. In the context of the potential privatization of water supplies and services in a globalized economy, the significance of such an understanding of the right is that a number of state and international actors have a duty to respect, protect, and fulfill the right. Where the right applies, however, responsibility does not fall solely on the state.

B. *Corporate Obligations*

Although still in its infancy relative to human rights obligations that bind states, human rights norms that apply directly to corporations have received growing interest.[125] If corporations were found to have a duty to uphold the human right to water, these duties would provide a second line of protection for the right to water in the context of privatization.[126] Some examples of this trend are voluntary, such as corporate codes with principles by which corporations agree to abide.[127] The UN's Global Compact provides an example of such norms.[128] While none of the ten core principles of the Global Compact explicitly protects water supplies or uses, the Global Compact does state that companies should comply with international human rights norms, which encompass a right to water, as argued above.[129] At least one large water company refers to the Global Compact in its corporate code of conduct, suggesting some awareness of the Compact in such businesses.[130] But since these obliga-

124. General Comment 15 notes that states should respect the right to water when entering into international agreements, and it specifically states that trade liberalization agreements "should not curtail or inhibit" a country's capacity to ensure realization of the right to water. *Id.* ¶ 35. It also requests that state parties take measures to ensure that the right to water is "taken into account" by the international financial institutions of which those states are members, including the lending policies and credit agreements of the International Monetary Fund and the World Bank. *Id.* ¶ 36.

125. *See generally* Ratner, *supra* note 107.

126. *See* Petrova, *supra* note 82, at 612–613 (arguing that a human rights approach ameliorates the problems associated with privatization).

127. *See id.* at 603–606.

128. *See generally* U.N. Global Compact, *available at* http://www.unglobalcompact.org/docs/about_the_gc/2.0.2.pdf.

129. *See id.*

130. RWE AG, RWE CORPORATE CODE OF CONDUCT 7–8 (n.d.), http://www.rwe.com/generator.aspx/property=Data/id=266710/en-download.pdf. RWE is also listed as participant in the Global Compact, http://www.unglobalcompact.org/ParticipantsAndStakeholders/

tions are voluntary, lack an oversight mechanism, and do not specifically address the right to water, it seems unlikely that the Global Compact will play a large role in realizing the human right to water.[131]

The Norms on the Responsibilities of Transnational Corporations and Other Business Entities with Regard to Human Rights, approved by the UN's Subcommission on the Promotion and Protection of Human Rights in 2003 (the UN Draft Norms), offer a revolutionary approach and at first glance seem to provide greater potential for realizing the human right to water.[132] The UN Draft Norms purport to create binding, obligatory human rights obligations for transnational corporations and other business enterprises, stating that "[w]ithin their respective spheres of activity and influence, transnational corporations and their business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law."[133] The UN Draft Norms strive to remedy the fact that international human rights law addresses the obligations and duties of states and international organizations, but often fails to address transnational corporations.[134] The basic rationale for the UN Draft Norms is that the power transnational corporations enjoy entails responsibility. International human rights law therefore must "focus adequately on these extremely potent non-state actors."[135]

Given this rationale, the UN Draft Norms could be particularly germane to protecting the right to water under privatization scenarios. The UN Draft Norms specifically mandate that transnational corporations and other business entities "contribute to [the] realization," and "refrain from actions which obstruct or impede the realization," of certain rights, including the right to adequate food and drinking water, as well as the right to the highest attainable standard of health.[136] This suggests that

---

search_participant.html (enter "RWE" in "Participant Search," then follow "RWE AG" hyperlink).

131. See Petrova, *supra* note 82, at 604–605 (summarizing criticisms of the Global Compact).

132. *See generally* ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *UN Draft Norms*]. *See also* ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003); David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

133. *See UN Draft Norms*, *supra* note 132, art. A, ¶ 1.

134. *See* Weissbrodt & Kruger, *supra* note 132, at 901. *See also* Ratner, *supra* note 107, at 461–62.

135. *See* Weissbrodt & Kruger, *supra* note 132, at 901.

136. *Id.*

corporations that entered into privatization agreements to provide water or water services would be required to meet both positive and negative human rights obligations.[137] At a minimum, they should be required to ensure that the water was safe enough to protect health and that provision of water met basic needs for adequate food and water, at least for some segment of the population.[138] Further, the UN Draft Norms emphasize that the obligations of companies augment and do not diminish or replace state responsibilities.[139] Thus, the UN Draft Norms could create a separate obligation for relevant business entities involved in privatization of water systems to protect and respect the human right to water, complementing and reinforcing state obligations.[140]

Still, the application of the UN Draft Norms to businesses is limited in a number of respects. First, the history of the UN Draft Norms subsequent to their adoption by the Subcommission on the Promotion and Protection of Human Rights places their status as law in question. The Commission on Human Rights, after adoption by the Subcommission, essentially nullified the Draft Norms by recommending that the Economic and Social Council affirm that the Draft Norms "ha[d] no legal standing."[141] The recommendation appears to relegate the Draft Norms to voluntary goals or aspirational standards.[142] Retreat from the Draft Norms was not absolute: the Commission recommended that the Economic and Social Council "confirm the importance and priority it accords" to the human rights responsibilities of transnational corporations and requested a Report from the OHCHR on the "scope and legal

137. Surya Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?*, 10 ILSA J. INT'L & COMP. L. 493, 499 (2004).

138. *See UN Draft Norms*, *supra* note 132, art. B, ¶ 2.

139. *Id.*; *id.* art. H, ¶ 19.

140. *Cf.* Petrova, *supra* note 82, at 608 (concluding that the UN Draft Norms could help ensure that privatization contributes to the realization of the right to water).

141. *See* ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/2004/116 (Apr. 22, 2004). ECOSOC adopted this recommendation. *See* ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, ¶ (c), U.N. Doc. E/DEC/2004/279 (July 22, 2004).

142. *See* Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 331 (2006) (discussing the history of the UN Draft Norms and arguing that by Spring 2005 it had become clear that the UN Draft Norms would be abandoned in their current form). *But see* Weissbrodt & Kruger, *supra* note 132 (arguing that the UN Draft Norms started as soft law, but would continue to develop a binding nature as they were adopted and promulgated by other UN bodies; subsequent recognition of the UN Draft Norms would increase in international practice).

status of existing initiatives and standards" on the subject.[143] Further, it noted that the Draft Norms "contain useful elements and ideas for consideration by the Commission."[144]

In April 2005, the Commission requested appointment of a Special Representative with a five-part mandate that included "identify[ing] and clarify[ing] standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights," and "elaborat[ing] on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation."[145] John Ruggie was appointed to this position,[146] and an Interim Report was issued in February 2006 that heavily criticized the UN Draft Norms and concluded that "the flaws of the Norms make that effort a distraction from rather than a basis for moving the Special Representative's mandate forward."[147] Still, the UN Draft Norms deserve consideration because they mark a significant, if controversial change in approach to corporate responsibility.[148] Ideally, the UN Draft Norms offer the promise of holding private companies responsible for human rights violations, which could lessen reliance on states as the primary implementers and enforcers of human rights.

---

143. *See* sources cited *supra* note 141.

144. *Id.*

145. *See* ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 1(a), U.N. Doc. E/CN.4/2005/L.87 (Apr. 15, 2005). *See also* ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises*, 68, ¶ 1(a), U.N. Doc. E/CN.4/2005/L.11/Add.7 (Apr. 20, 2005).

146. Thorsten Benner, Opinion, *The UN Can Help Business Help Itself: Corporate Responsibility*, INT'L HERALD TRIB., Aug. 18, 2005, at 6.

147. ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Interim Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, ¶ 69, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006).

148. Backer, *supra* note 142, at 288 (contending that the UN Draft Norms retain importance as indicators of significant changes in thought about corporations and the sources of corporate regulations, and as evidence of transnational law "coming into its own as a separate field of power").

IV. REALIZATION OF THE HUMAN RIGHT TO WATER AND PRIVATIZATION OF WATER SUPPLIES AND SERVICES

A. *Theoretical Perspectives*

Provision of water services is often seen as a function of governments.[149] Justifications for public provision of water include economic, social, and human rights, along with environmental considerations.[150] Since the 1970s, alternatives have been sought because of problems with public water systems, including low service quality and coverage, inefficiency, corruption, low rates of cost recovery, low productivity, and high debt burden.[151] As a starting point in comparing public and private sector systems of water services, it is worth noting that public-sector provision has failed to ensure universal access to water for the world's population.[152] The 1.1 billion people without access to an improved water supply can, to some extent, be seen as an unfortunate legacy of public-sector management of water supplies.

Privatization of the water supply is one alternative to public-sector supply that has been tested in both developed and developing countries, including France, Britain, Chile, and Argentina.[153] The trend has been significant enough for at least one author to refer to a "privatization movement."[154] Although real benefits may accrue from privatization in certain circumstances, water privatization arrangements have also suffered some high-profile collapses, for example in Atlanta, Georgia, and Cochabamba, Bolivia.[155] These failures have led to criticism of privatiza-

149. Isabelle Fauconnier, *The Privatization of Residential Water Supply and Sanitation Services: Social Equity Issues in California and International Contexts*, 13 BERKELEY PLANNING J. 37, 37–46 (1999); PETER H. GLEICK, GARY WOLFF, ELIZABETH L. CHALECKI & RACHEL REYES, PAC. INST. FOR STUDIES IN DEV., ENV'T, & SEC., THE NEW ECONOMY OF WATER: THE RISKS AND BENEFITS OF GLOBALIZATION AND PRIVATIZATION OF FRESHWATER 29 (2002).

150. *See* Jessica Budds & Gordon McGranahan, *Are the Debates on Water Privatization Missing the Point? Experiences from Africa, Asia, and Latin America*, 15 ENV'T & URBANIZATION 87, 92–98 (2003); Fauconnier, *supra* note 149 at 42; Jarmo J. Hukka & Tapio S. Katko, *Refuting the Paradigm of Water Services Privatisation*, 27 NAT. RESOURCES F. 142, 143 (2003). *Cf.* GLEICK ET AL., *supra* note 149, at 37–38; MAUDE BARLOW, BLUE GOLD: THE GLOBAL CRISIS AND COMMODIFICATION OF THE WORLD'S WATER SUPPLY 56–60 (rev. ed. 2001); Robert Glennon, *Water Scarcity, Marketing, and Privatization*, 83 TEX. L. REV. 1873, 1894 (2005).

151. Budds & McGranahan, *supra* note 150, at 87, 97–98; Fauconnier, *supra* note 149, at 37.

152. Fauconnier, *supra* note 149, at 37; Budds & McGranahan, *supra* note 150, at 97.

153. Fauconnier, *supra* note 149, at 38; GLEICK ET AL., *supra* note 149, at 23–24.

154. Fauconnier, *supra* note 149, at 38.

155. *See generally* Sanchez-Moreno & Higgins, *supra* note 20; Douglas Jehl, *As Cities Move to Privatize Water, Atlanta Steps Back*, N.Y. TIMES, Feb. 10, 2003, at A14.

tion of water services.[156] This Section argues that these failures suggest strong reasons to approach privatization cautiously, with the purpose of understanding 1) what contributions privatization may make to the provision of water and human rights, and 2) how human rights principles should influence privatization arrangements.

The term "privatization" refers generally to various types of relationships in which assets or operations, or both, move from the public to the private sector.[157] Privatization arrangements differ in terms of how much ownership or control is transferred to the private sector, what types of functions the private company performs, and how long the arrangement lasts.[158] One option is for the asset to remain a public asset, but for a private company to manage it for a specified amount of time or to provide only some of the services associated with running the water system.[159] The most extreme transfer of resources to the private sector is "divestiture" or "full fledged privatization," which means an "actual transfer" of the assets and operations to a private company, but other kinds of "private sector participation" exist as well.[160]

It is difficult to generalize about these various kinds of privatization arrangements, since much of the effect of a given privatization agreement will depend on the context, the specific terms of the agreement, and its implementation.[161] The variables that distinguish these types of arrangements also tend to have different practical implications for the human right to water.[162] As more assets and control shift to the private corporation, the government progressively loses the ability to provide

156. *See generally* Sanchez-Moreno & Higgins, *supra* note 20; Naegele, *supra* note 21; BARLOW, *supra* note 150. *Cf.* Petrova, *supra* note 82, at 589–93.

157. Fauconnier, *supra* note 149, at 43; Budds & McGranahan, *supra* note 150, at 88–90; GLEICK ET AL., *supra* note 149, at 26–28.

158. Budds & McGranahan, *supra* note 150, at 88–90; Hukka & Katko, *supra* note 150, at 143 (distinguishing between core and noncore functions).

159. Generally a "service or management contract" lasts two to five years, a lease lasts five to fifteen years, and a concession ten to thirty years. *See* Fauconnier, *supra* note 149, at 44; Budds & McGranahan, *supra* note 150, at 88–90. Also possible is a build, operate, and transfer arrangement, in which a private company builds and runs the facility for a period of time, allowing for cost recovery and a limited profit. *See* Fauconnier, *supra* note 149, at 44; Budds & McGranahan, *supra* note 150, at 90.

160. Budds & McGranahan, *supra* note 150, at 88–90; Fauconnier, *supra* note 149, at 43–44; Naegele, *supra* note 21, at 107; JUDITH REES, GLOBAL WATER PARTNERSHIP TECHNICAL ADVISORY COMMITTEE, REGULATION AND PRIVATE PARTICIPATION IN THE WATER AND SANITATION SECTOR 15–21 (1998). *See also* Hecht, *supra* note 7, at 330 (arguing that private ownership of water systems is quite rare but that contracts for private management of water systems is more common).

161. Glennon, *supra* note 150, at 1892. *Cf.* Fauconnier, *supra* note 149, at 45 ("[T]he outcomes of privatization may differ according to the political contexts in which they occur.").

162. Glennon, *supra* note 150, at 1892–93.

water independently,[163] and the more the government will need to rely on its regulatory function to ensure that water is provided to the population and human rights obligations are met.[164]

Similarly, longer term arrangements may give governments less flexibility (and potentially less power) to ensure that standards are met because the corporation will not be as exposed to competitive pressures to retain the contract.[165] However, longer term contracts offer a longer period of time over which to recoup costs, which should be more attractive to private companies, preserving the incentive to invest in infrastructure and theoretically reducing drastic rate hikes, since companies could recoup investments more gradually.[166] Conversely, the arguments in favor of privatization rest on the presumption that some level of transfer of control, assets, or function will lead to improvements in water services.[167] The challenge in any particular privatization arrangement will be to balance these forces.[168] Human rights challenges will arise when the privatization arrangement evolves in a way that fails (either in theory or in practice) to provide adequate safeguards for human rights.[169]

The potential benefits from privatization include: 1) improving efficiency of the water system (for instance, reducing input costs while adjusting prices to reflect real costs), 2) reducing the financial burden on

163. *See* Hukka & Katko, *supra* note 150, at 144 fig.1. *Cf.* Glennon, *supra* note 150, at 1893; Budds & McGranahan, *supra* note 150, at 88–90.

164. *See* REES, *supra* note 160, at 6–7. *Cf.* Glennon, *supra* note 150, at 1892–93; GLEICK ET AL., *supra* note 149, at 29, 35–37; Hukka & Katko, *supra* note 150, at 144, 153. *Cf.* Fauconnier, *supra* note 149, at 68 (emphasizing the role of regulation in ensuring equity and protecting consumer interests); Naegele, *supra* note 21, at 107.

165. *See* Fauconnier, *supra* note 149, at 43, 60; REES, *supra* note 160, at 18 (noting that "[b]y its nature the concession explicitly creates an absolute monopoly and protects the concessionaire from most forms of competition," and questioning the practical ability of competition during the initial bidding process for concession contracts to inject efficiency into the system, given the dominance of a small number of companies in the international concessions market).

166. *See* GLEICK ET AL., *supra* note 149, at 28; Glennon, *supra* note 150, at 1893. *Cf.* REES, *supra* note 160, at 21 (arguing that the shorter-term contracts are not designed to help remedy investment backlogs). *But see* Fauconnier, *supra* note 149, at 60–67 (discussing the countervailing need for private bodies to recoup costs and offering detailed treatment of pricing issues).

167. *See, e.g.*, Petrova, *supra* note 82, at 587–88; Glennon, *supra* note 150, at 1892. *See generally* Thomas M. Kerr, *Supplying Water Infrastructure to Developing Countries via Private Sector Project Financing*, 8 GEO. INT'L ENVTL. L. REV. 91 (1995).

168. *Cf.* Hukka & Katko, *supra* note 150, at 153 (concluding that public-private partnerships should be implemented in ways that fully utilize the strengths of all stakeholders).

169. *Cf.* Budds & McGranahan, *supra* note 150, at 88 ("Much depends on the way privatization is developed and the local context."); GLEICK ET AL., *supra* note 149, at 29–40 (detailing the risks of privatization, several of which threaten the human right to water, such as the risks that underserved communities will be bypassed, that water quality will decrease, and that public participation will be precluded).

the state, 3) allowing the state to focus limited resources on services that are not as amenable to privatization, 4) developing a market economy, and 5) attracting capital and international investment.[170] Raising capital plays a key role in increasing access to safe water for unserved and underserved communities, since it requires significant capital to develop the infrastructure to treat and deliver water.[171] In 2000, a widely cited report by the World Water Council and the Global Water Partnership estimated that $180 billion per year would need to be invested in water in poor countries by 2025 to meet most water needs (a dramatic increase from the then current investment of seventy-five to eighty billion dollars per year).[172]

Additionally, advocates of privatization argue that it may encourage conservation of water because privatization usually requires incorporation of the full costs of providing water into the price of water, whereas governments often provide water free or below cost.[173] Some argue that quality of service improves under privatization, in part because private companies may be more willing or able to invest in necessary technological and infrastructure updates.[174] Supporters of privatization also point out that states often have failed to ensure provision of basic services.[175] Thus, ideally, privatization could plausibly support and enhance the human right to water.[176]

No formal contradiction between the human right to water and privatization exists, since human rights documents do not specify the mechanisms for water delivery.[177] Indeed, General Comment 15 and the

---

170. Fauconnier, *supra* note 149, at 44. *See also* Petrova, *supra* note 82, at 586–88; Kerr, *supra* note 167, at 92–93; Glennon, *supra* note 150, at 1892.

171. *See, e.g.*, Budds & McGranahan, *supra* note 150, at 100; REES, *supra* note 160, at 12.

172. Hecht, *supra* note 7, at 331 (referring to WORLD WATER COUNCIL, FINANCING WATER FOR ALL: REPORT OF THE WORLD PANEL ON FINANCING WATER INFRASTRUCTURE (2003)). *But see Priceless*, ECONOMIST, July 19, 2003, at 42–43 (noting that according to WaterAid, a U.K.-based charity, an extra thirty-five billion dollars per year would be enough if lower cost measures were taken, such as providing standpipes in villages rather than piping water to each home and not bringing water used for non-drinking purposes up to drinking water quality standards).

173. *A Billion Thirsts Quenched: Water in Poor Countries*, ECONOMIST, Aug. 28, 2004, at 42. *See also* Naegele, *supra* note 21, at 107.

174. *Profit Stream*, ECONOMIST, Mar. 29, 1997, at 70 (defending the steep price increases in French water bills; at the time, seventy percent of French communes had privatized water supply systems). *See also* Kerr, *supra* note 167, at 102.

175. Hecht, *supra* note 7, at 330; REES, *supra* note 160, at 5. *See also* Petrova, *supra* note 82, at 587.

176. Sanchez-Moreno & Higgins, *supra* note 20, at 1776.

177. *See id.* at 1775–76; Budds & McGranahan, *supra* note 150, at 95. *But see* Naegele, *supra* note 21, at 114 ("Privatization of water is a violation of human rights 'unless the state retains control so as to fulfill its obligation to ensure both minimal and progressive access to needed services on a nondiscriminatory basis.' ") (internal citations omitted).

Special Rapporteur's Report on the Right to Water explicitly recognize the possibility of privatization,[178] and General Comment 15 lays out particular state obligations that must be met under privatization.[179] On a practical level, however, tensions and challenges persist because the goals of the right to water do not necessarily align with the goals of privatization.[180]

B. *Case Study: Bolivia*

1. The "Water Wars"

The collapse of a privatized water system in Cochabamba, Bolivia, is an often discussed case.[181] Before the privatization agreement, water in Cochabamba had been provided by a municipal company, SEMAPA. By 1997, SEMAPA only provided water to fifty-seven percent of the 600,000 residents of Cochabamba, and the inefficient system lost around fifty percent of the water during transport.[182] Water was rationed, and those who did not have access to the infrastructure used private wells or purchased water from private vendors at high cost.[183]

In 1998, the World Bank pressured the Bolivian government to open the water system up to the private sector as a condition for guaranteeing a loan of twenty-five million dollars to improve the system's infrastructure.[184] Only one company, Aguas del Tuarni (a transnational company whose controlling shareholder was a subsidiary of the American company, Bechtel Enterprises), bid on the call for tender.[185] The forty-year agreement gave the company control over the entire municipal water network, exclusive water rights to all the water in the district, and an annual return on investment of fifteen to seventeen percent (tied to the U.S.

178. *See Guissé Preliminary Report*, *supra* note 63, ¶ 19 ("The right to drinking water is the right of every individual to have access to the amount of water required to meet his or her basic needs. This right covers access by households to drinking water supplies and wastewater treatment services managed by public or *private* bodies.") (emphasis added).

179. *See General Comment 15*, *supra* note 9, ¶¶ 23, 24, 27 (listing state obligations when third parties, including corporations, provide water services or control water infrastructure). *Cf.* Naegele, *supra* note 21, at 114–17.

180. *Cf.* GLEICK ET AL., *supra* note 149, at 29–40 (listing challenges with privatization); Budds & McGranahan, *supra* note 150, at 111–13 (arguing that privatization has not significantly improved access to water and sanitation for the poor); REES, *supra* note 160, at 11 ("Private companies are not social services.").

181. *See generally* Sanchez-Moreno & Higgins, *supra* note 20; Naegele, *supra* note 21; Glennon, *supra* note 150.

182. Sanchez-Moreno & Higgins, *supra* note 20, at 1748.

183. *Id.*

184. Glennon, *supra* note 150, at 1890; Naegele, *supra* note 21, at 124.

185. Naegele, *supra* note 21, at 124; Sanchez-Moreno & Higgins, *supra* note 20, at 1751.

dollar).[186] The agreement structured prices based on a system of full-cost recovery through tariffs for water and services.[187] The government also required that the company assume SEMAPA's thirty-million-dollar debt.[188] The agreement required the company 1) to provide water to existing users, 2) to expand the system as directed by the Superintendent of Basic Sanitation, and 3) to be "accessible, fair, and efficient" when dealing with users.[189]

The company raised water rates by thirty-five percent, and some users reported increases as high as 200 percent.[190] This translated into bills for some workers that amounted to between twenty and twenty-five percent of their monthly income.[191] Beyond the increase in rates, the community was concerned that plans to meter wells would lead to charges for water that Aguas del Tuarni had not supplied, thus reducing alternative modes of access.[192] Peasant groups in the vicinity of Cochabamba worried that the privatization arrangement did not adequately protect their customary uses of water, mostly for agriculture.[193]

The situation led to widespread protests and civil unrest—a conflict sometimes referred to as the "Water War"—resulting in numerous arrests, some injuries, and at least one death.[194] Eventually the Bolivian government cancelled the concession.[195] Following termination, a cooperative replaced Aguas del Tuarni and Bechtel. The cooperative does not appear to have sufficient capital to repair or expand the infrastructure, and while

---

186. Naegele, *supra* note 21, at 124; Sanchez-Moreno & Higgins, *supra* note 20, at 1755–56.

187. Sanchez-Moreno & Higgins, *supra* note 20, at 1756.

188. *Id.* at 1754–55.

189. *Id.* at 1756.

190. *Id.* at 1763; Naegele, *supra* note 21, at 125.

191. SALMAN & MCINERNEY-LANKFORD, *supra* note 42, at 72 (quoting William Finnegan, *Letter from Bolivia—Leasing the Rain*, THE NEW YORKER, Apr. 8, 2002, at 47).

192. Changes in the law after the agreement was made would have permitted the company to install meters on wells in rural areas that were not built by the company. Naegele, *supra* note 21, at 125. The meters had not been installed by the time the unrest began, and the company asserts that the meters would have been installed at the wells only to charge for sewage services. However, this law and the concession agreement would arguably have allowed the company to charge for the well water or to force people to connect to the company's system because the company had "exclusive use" of water sources in the concession area. Sanchez-Moreno & Higgins, *supra* note 20, at 1766–67. *Cf.* GLEICK ET AL., *supra* note 149, at 32 (noting that water collection required permits under this agreement).

193. The specific concerns were that those within the concession area would be forced to get water from Aguas del Tuarni and that a requirement on individuals to apply for five-year licenses would impose a significant burden on those outside of the concession area. Sanchez-Moreno & Higgins, *supra* note 20, at 1768.

194. *Compare* Glennon, *supra* note 150, at 1890 (citing seven deaths and the imposition of martial law), *and* Naegele, *supra* note 21, at 125 (citing only one death, but 200 arrests and 121 wounded).

195. Naegele, *supra* note 21, at 125.

it may be increasing access slowly for the poor, inadequate service and corruption continue to plague the system.[196] Water costs remain as much as ten times higher for those not on the network or without access to a well.[197] Indeed, those without a well or water system in developing countries often must purchase water from water vendors at high prices, itself an often exploitive private business relationship for the provision of water.[198]

2. A Human Rights Analysis

The events in Cochabamba reveal a number of criticisms that can be leveled against this particular privatization arrangement, many of which highlight generalized concerns about privatization. Several aspects of the Cochabamba privatization agreement pose human rights issues: the lack of affordability of water and equity in pricing; the failure of the state to ensure that the poorest residents had water; lack of measures to ensure broad access; potential interference with traditional modes of access to water by peasants; and procedural problems regarding lack of public information and participation (the negotiations occurred in secret and over a short time period).[199] Although all of these failures are significant, the first three seem to pose the largest barriers for the progressive realization of the right to water.

Two constraints on cost apply under General Comment 15: affordability and equity. The Comment requires that "[a]ny payment for water services has to be based on the principle of equity, ensuring that these services, whether publicly or privately provided are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households."[200] Affordability is connected to the notion that the direct and indirect costs of water "must not compromise or threaten the realization of other Covenant rights."[201] Thus, equity under General Comment 15 relates to the comparative burden of a pricing structure on economic classes, while affordability relates to the price of water in relation to individuals' ability to afford the other necessities of life.[202]

---

196. Glennon, *supra* note 150, at 1891; Naegele, *supra* note 21, at 126.

197. Naegele, *supra* note 21, at 126.

198. *See* GLEICK ET AL., *supra* note 149, at 32.

199. Sanchez-Moreno & Higgins, *supra* note 20, at 1777–87 (arguing that the violation of the procedural rights to information and participation may have played a decisive role in causing the Water War).

200. *Id.* at 1777 (quoting *General Comment 15*, *supra* note 9, ¶ 27).

201. *General Comment 15*, *supra* note 9, ¶ 12(c)(ii).

202. *See* Sanchez-Moreno & Higgins, *supra* note 20, at 1777 (explaining that equity is a "comparative standard" that judges the relative burden on poor and richer households, while

The rate increases in Cochabamba that forced some residents to pay as much as twenty-five percent of their income for water seemed to violate the principle of affordability, especially since they may have reduced the ability of the poorest sectors of the population to meet other needs. The government did not take any specific measures to alleviate the burden of these price increases on the poorest members of society.[203] Instead, the agreement preferred a policy of full-cost recovery and forced the company to take on SEMAPA's debt, both of which contributed to the rate increases.[204] The government's position likely was constrained by the World Bank's requirement that the costs of infrastructure improvement be borne by consumers.[205] In terms of equity, the government and company did scale the rate increases based on income so that the increases would be progressive,[206] but at some levels of water usage, the price increases were proportionately higher for poorer residents, causing some critics to find the privatized price structure less equitable than the preceding one.[207]

Related to affordability is the requirement that the state protect the most vulnerable members of society. As General Comment 15 asserts, "States parties have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities."[208] The human rights perspective underpinning General Comment 15 does not tolerate a denial of a minimum water supply based on inability to pay. Thus, the problem with a full-cost recovery model of privatization that does not include assurances of water supply for the poorest members of society is that under such an agreement the state fails to meet its obligations to provide "necessary water and water facilities" for those without the means to procure access. This is particularly troubling when a government privatizes under pressure from an international agency,

---

affordability "suggests the right to water sets an upper limit on the cost of water in relation to people's ability to pay for it"). Compare with Fauconnier, *supra* note 149, at 41, for a policy-based, practical interpretation of equity in relation to privatization of water that emphasizes dimensions of 1) access to services that reliably provide safe drinking water across communities with different income levels; 2) cost and affordability; and 3) equity in access to decisionmaking.

203. *See* Sanchez-Moreno & Higgins, *supra* note 20, at 1778.

204. *Id.* at 1777–78.

205. Glennon, *supra* note 150, at 1890.

206. Sanchez-Moreno & Higgins, *supra* note 20, at 1777–78.

207. *Id.* at 1777.

208. *General Comment 15*, *supra* note 9, ¶ 15. Interestingly, this right appears to be linked to, but somewhat distinct from the concept of nondiscrimination under General Comment 15. The full text of paragraph 15 juxtaposes provision of water for the poorest members of society with nondiscrimination.

such as the World Bank, to accept an arrangement that entails violations of human rights obligations.[209]

In addition to these failures, the concession agreement did not on its face provide for increasing access for the half of Cochabamba's population without prior access. Rather, it maintained water services for those who already had them, and it allowed local officials to require that the company expand access in the future.[210] An agreement such as this might promote broader access over the long term, either at the instigation of the private company or the government officials charged with oversight. But making expansion of access contingent on later local, political judgments undercuts one of the primary human rights arguments supporting privatization: that private companies have the capital to invest in infrastructure expansion, while cash-strapped governments may not.[211] If privatization is to support human rights in this way, privatization agreements must be structured to ensure the investment of capital in updating infrastructure and expanding access.

Similarly, another common argument for privatization is that private companies will act more efficiently and effectively than the public sector,[212] but to guarantee a profit of fifteen to seventeen percent in the privatization agreement risks insulating the company from market forces that might help increase efficiency.[213] Furthermore, the long time period of the concession and the extensive control over water resources transferred to the private sector seemed to increase the threat that the public perceived from the concession.[214] Once conflict arose, the government could not independently provide for the population's needs, since it had ceded direct control over the resources by granting the concessionaire

209. *Cf.* Naegele, *supra* note 21, at 109. Recall that General Comment 15 exhorts international agencies to respect the right to water as well. *General Comment 15*, *supra* note 9, ¶ 36.

210. Sanchez-Moreno & Higgins, *supra* note 20, at 1756.

211. *See* Naegele, *supra* note 21, at 107 ("Only private capital, mostly from large, transnational corporations, can afford to expand water and sanitation systems to reach the underserved poor."); Glennon, *supra* note 150, at 1892.

212. Naegele, *supra* note 21, at 107; Glennon, *supra* note 150, at 1892; REES, *supra* note 160, at 5.

213. *See* REES, *supra* note 160, at 30 (noting that the presence of a monopoly may erode efficiency savings that private sector involvement should achieve, unless countermeasures are taken). *But see* Hukka & Katko, *supra* note 150, at 152 (noting that public ownership is usually not less efficient than private ownership and suggesting that the private sector must offer additional competence if it is to increase efficiency).

214. *See* Sanchez-Moreno & Higgins, *supra* note 20, at 1768. This may have been particularly striking to the population because until shortly before the privatization, people who owned land had rights to waters that crossed their land, but shortly before the privatization, the law changed to make all waters in the country the original property of the state. *Id.* at 1757–61.

the exclusive right to provide water services in the area.[215] To summarize, if privatization is to have any chance of advancing human rights, agreements must be structured and implemented in a way that promotes human rights.

C. *Further Challenges of Privatization Arrangements*

Commentators have discussed a number of challenges privatization poses.[216] Many of the challenges seem to relate to governmental responsibility in monitoring and regulating (where necessary) human rights conditions throughout the duration of privatization arrangements. One question in particular is whether governments can or will act in accordance with their duties to protect, respect, and fulfill the right to water. Critics of privatization argue that governments are often poorly positioned to exercise such regulatory capacity. Sanchez-Moreno and Higgins note that governments are often unwilling or unable to exert their power to prevent or penalize companies for human rights violations.[217] They further acknowledge that governments are often complicit in such violations.[218]

One almost axiomatic answer to the problems of privatization is that government regulation can and should guarantee that privatization is implemented in such a way as to satisfy human rights requirements. Interestingly, both supporters and detractors of privatization seem to agree on the importance of government regulation in privatization.[219] Certainly, governments have the primary duty to make sure that the right to water is protected and fulfilled.[220] General Comment 15 is quite clear that this responsibility survives the privatization relationship and that the privatization arrangement actually imposes the duty to regulate and

---

215. *Id.* at 1755. It is interesting to note that the government responded to public uproar by completely revoking the concession and reasserting control over the resources, rather than attempting to allay public concerns by imposing regulations or more stringent requirements on the company.

216. *See, e.g.*, GLEICK ET AL., *supra* note 149, at 29–39; REES, *supra* note 160, at 8–15; Petrova, *supra* note 82, at 589–93; Naegele, *supra* note 21, at 108.

217. Sanchez-Moreno & Higgins, *supra* note 20, at 1668–69.

218. *Id.*

219. Hecht, *supra* note 7, at 330 (arguing that good governance supports privatization by attracting foreign capital and that "it is in countries with strong regulatory frameworks and sound government institutions that private water companies are best able to provide efficient management"); Glennon, *supra* note 150, at 1896 ("For privatization to be successful, governments must regulate water as a social good, ensuring access to all."); REES, *supra* note 160, at 31 ("The success of privat[ization] will . . . critically depend on how well this [regulatory] task is accomplished."); Fauconnier, *supra* note 149, at 68 ("[I]t is crucial to recognize the importance of maintaining some degree of government regulation."); GLEICK ET AL., *supra* note 149, at 42; Hukka & Katko, *supra* note 150, at 153.

220. *See General Comment 15*, *supra* note 9, ¶ 24; Naegele, *supra* note 21, at 101.

oversee water provision on the government involved.[221] A number of measures can be used to discharge this responsibility. For example, the government may subsidize water for the poorest and most vulnerable consumers, or it may require a tariff structure that makes the amount of water needed to meet basic needs available free of charge or at very low cost.[222]

There may be good reason to react with skepticism to broad-brush assertions of governments' ability to regulate and protect citizens against violations of their rights caused by privatization. But if a government is not in a position to protect the right to water through regulation of private industry, it seems unlikely that the government would be in a position to meet the right itself. Although government oversight and public provision of services are different competencies, government oversight should be less resource intensive and no more subject to problems of poor governance or lack of resources than provision of public services.[223] This suggests that if a government fails to fulfill the right to water via the public sector, there is little reason to believe privatization will be better from a human rights perspective, since privatization relies on governmental oversight to ensure the protection of rights.[224] In short, the dilemma is that governments that may be most tempted by privatization may also be those with poorly functioning regulatory systems, which strongly suggests that privatization will not be a universal solution for problems in implementing the human right to water.[225]

Another practical problem with privatization is that if the right to water takes on the broad form suggested in General Comment 15, it is

---

221. *General Comment 15*, *supra* note 9, ¶ 24.

222. Durban, South Africa, for example, provides six kiloliters of water per month free of charge and only charges for water use above that amount. Chile issues vouchers that can be used to pay water bills to those below the poverty line. *See* SALMAN & MCINERNEY-LANKFORD, *supra* note 42, at 71–72. *See also* Budds & McGranahan, *supra* note 150, at 109 (discussing subsidies).

223. *See* Fauconnier, *supra* note 149, at 44. One caveat is that corruption may be more pronounced under privatization since more money may be available for corrupt purposes. *See* Budds & McGranahan, *supra* note 150, at 112 (suggesting privatization may create new forms of corruption).

224. An alternate argument suggests that at least some users, such as the wealthy or the middle class, may actually have better service and better protections under a privatized arrangement than under a poorly run public-sector system, because they can pay for better service (giving companies an incentive to provide it to them). But this does not answer the more pressing human rights question of how to ensure service to those who cannot pay.

225. Naegele asserts that governments "facing the most severe privatization crises are struggling with internal corruption, limited resources and poor management—and are not performing satisfactory regulation." Naegele, *supra* note 21, at 102. Glennon argues that "[i]n the Third World, privatization makes the most sense in those places where the government has failed to provide basic human needs for their people. But in those countries with weak, ineffective, or corrupt governments, privatization presents a problem because governments may not adequately regulate the private sector." Glennon, *supra* note 150, at 1893.

very unlikely that establishing a private supply of water will completely fulfill the right, because the right extends beyond the scope of privatization.[226] Privatization of water services usually aims at the provision of water and perhaps sanitation services to communities. According to some formulations of the right to water, such services may suffice.[227] However, under the broad formulation in General Comment 15, fulfilling the right to water may include potentially complicated and contentious tasks such as guarding water supplies against pollution or dividing scarce water supplies among competing uses. Such tasks, even for a company with significant control over the water resources and an adequate commitment to human rights, may be daunting and likely exceed the scope of the private company's power.

A final problem with privatization is that it seems unlikely that privatization arrangements can reach those in the most urgent need of water supplies: the rural poor in isolated areas.[228] Since rural projects are less likely to show a profit, they have never been attractive to large, transnational private water providers.[229] If, indeed, eighty percent of those without access to water are rural dwellers, large-scale privatization is unlikely to make significant progress in ensuring access to all.[230] In some contexts, then, the basic motivations behind privatization are at odds with a human rights perspective.[231] At bottom, privatization arrangements have the purpose of providing profit to the private enterprise involved.[232] The major transnational corporations involved in privatized water supply in poor countries have recently been retreating from these commitments because of the risks involved (currency devaluation, high levels of debt, bad publicity) and because the expected profits have not materialized or justified the risks.[233] However, experiments with small scale privatization projects under local control may offer viable models for provision of water services.[234] Methods to treat or purify water at the point of use also

---

226. *See* REES, *supra* note 160, at 14.

227. Recall that CEDAW seems to require only a water supply.

228. Budds & McGranahan, *supra* note 150, at 88, 109.

229. *How Not to Help Those in Need: Third-World Water and the Private Sector*, ECONOMIST, Aug. 28, 2004, at 11.

230. *See* WHO, *supra* note 1, at 1. *See supra* text accompanying note 4.

231. Budds & McGranahan, *supra* note 150, at 109 (noting the lack of profit to support extension of private sector water infrastructure into poor areas).

232. REES, *supra* note 160, at 11.

233. *The Flood Dries Up: International Water Companies*, ECONOMIST, Aug. 28, 2004, at 57.

234. *A Billion Thirsts Quenched*, *supra* note 173 (noting the example of Mabuia, Angola, where poor residents pay a small amount for water and a communal shower, and wealthy residents pay more and get a tap in their home; the fees pay for a local engineer in the village). *See also* Budds & McGranahan, *supra* note 150, at 109–110 (considering ways to make privatization "pro-poor").

hold promise, although many issues remain to be addressed.[235] In sum, creative private-sector initiatives may play a role in realizing the right to water in the future.

V. CONCLUSION: WHAT ROLE FOR HUMAN RIGHTS?

Some commentators seem to suggest that human rights questions are secondary to the issues of water supply and provision.[236] This raises the question of what role human rights discourse should play in the ongoing debate about how best to meet the water needs of a growing and thirsty global population.

While the right to water is a human rights problem that cannot be solved through human rights law and human rights activism alone, human rights play an important role. On one hand, a human rights perspective emphasizes the normative and moral urgency of the task. Using the rhetoric of human rights emphasizes the importance of the final goal of providing safe water to all. On the other hand, human rights discourse should define the goals and legal requirements of the right and the responsibilities of relevant stakeholders. In defining the goals and requirements of the right, human rights discourse should illuminate what measures are necessary in what time frame, how to prioritize between competing water uses and competing uses of public resources, and how the right to water relates to other rights.

Significant work to articulate the human right to water has already been completed, for example through General Comment 15, but many questions and practical matters remain unresolved. The status, scope, and content of the right to water have not been fully detailed. Clarifying and further developing the theoretical understanding of the right to water can help stakeholders assess options for progressively realizing the right.

---

235. Hecht notes the results of a UNESCO Report finding that providing a means of disinfecting water at the point of use was the most cost-effective approach to reducing waterborne disease. Hecht, *supra* note 7, at 325–26. *See* Eric Mintz et al., *Not Just a Drop in the Bucket: Expanding Access to Point-of-Use Water Treatment Systems*, 91 AM. J. PUB. HEALTH 1565, 1566–67 (2001) (reviewing various point-of-use disinfection methods); John A. Crump et al., *Household Based Treatment of Drinking Water with Flocculant-Disinfectant for Preventing Diarrhoea in Areas with Turbid Source Water in Rural Western Kenya: Cluster Randomised Controlled Trial*, 331 BRIT. MED. J. 478, 478 (2005). My point is not to endorse any of these as the ultimate solution to the problem of lack of access to safe water around the world. Rather, my purpose is to recognize the scope of potential options to improve water safety available in the private sector.

236. Hecht, *supra* note 7, at 329–331. *See also* Glennon, *supra* note 150, at 1896 (addressing privatization in the U.S. domestic context: "recognizing a human right to water does not resolve the issue of privatization; indeed it begs the question . . . . The real issue confronting the United States is not whether to recognize a human right to water, it is how to allocate the remaining 99% that we use each day.").

Further explication of the right to water with regard to privatization could help ensure that privatization arrangements take necessary precautions to protect the right to water and help decisionmakers use human rights to contain the risks of privatization.