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# AT THE FRONTIERS OF THE RUSH FOR BLUE GOLD: WATER PRIVATIZATION AND THE HUMAN RIGHT TO WATER

## I. INTRODUCTION

Water has been called the last frontier of privatization around the world.<sup>1</sup> Public bodies still supply over 90 percent of the world's water<sup>2</sup> and finance around 90 percent of the developing world's<sup>3</sup> investment in water and sewage systems.<sup>4</sup> Yet, by the end of 2000, municipalities in at least ninety-three countries underwent partial privatization of water or wastewater services, including communist countries such as China and Cuba.<sup>5</sup> Municipalities in still other countries are in the process of privatizing or evaluating the prospects of private sector involvement.<sup>6</sup> Furthermore, international financial institutions such as the World Bank

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1. Elizabeth Brubaker, Editorial, *A Thirst for Privatization: With More than 1.1 Billion People Worldwide Lacking Access to Safe Drinking Water, Governments Are Increasingly Turning to the Private Sector for Help*, NAT'L POST (Can.), Jan. 9, 2003 (attributing the remark to a journalist of the *Financial Times*).

2. *Private Passions*, ECONOMIST, July 19, 2003, at 6.

3. The terms "developing world" and "developing countries" refer to recipients, rather than donors, of international aid and assistance. This usage is adopted out of convenience, although it is important to note that the customary distinction between "developed" and "developing" countries is problematic in view of recent rethinking of the term "development," such as in the work of the Nobel prize-winning economist, Amartya Sen. Sen's approach to development as "a process of expanding the real freedoms that people enjoy" and, conversely, of "poverty as a deprivation of basic capabilities rather than merely as lowness of incomes" blurs the customary distinction between "developed" and "developing countries." See AMARTYA SEN, DEVELOPMENT AS FREEDOM 1, 87 (2000). For instance, Sen points out that although in terms of income African-Americans are many times richer compared to populations of developing countries, their "capability" to live long lives is comparatively lower than that of populations in some developing countries. *Id.* at 96. I am thankful to Professor Samuel Murumba for pointing me to the work of Amartya Sen.

4. *How Not to Help Those in Need: Third-World Water and the Private Sector*, ECONOMIST, Aug. 28, 2004, at 11, available at 2004 WLNR 10885720.

5. Brubaker, *supra* note 1 (observing that some form of water privatization took place in the three countries of North America, twenty-three countries in Latin America and the Caribbean, twenty countries in Europe, thirty countries in Africa and the Middle East, and seventeen countries in Asia and the Far East).

6. See, e.g., Gifty Korantemaa, *Ghana to Derive Negative Benefits from Water Privatization—Coalition Against Water Privatization*, GHANIAN CHRON., Jan. 6, 2006, available at 2006 WLNR 361576 (discussing water privatization in Ghana); Stephen David, *Whose Water is it Anyway?*, INDIA TODAY, Dec. 19, 2005, available at 2005 WLNR 19996247 (discussing water privatization in Bangalore, India).

have consistently supported privatization, especially in developing countries, often making privatization of utilities a precondition for loans, debt reprogramming, or loan forgiveness.<sup>7</sup>

Accompanying the global trend of water privatization, water services have been consolidated within the hands of a few powerful multinational companies.<sup>8</sup> Each of the two largest water multinationals provides water services to about 110 million people.<sup>9</sup> The combined revenue potential of multinational water companies measures close to \$3 trillion.<sup>10</sup>

Despite this clear global pattern, privatization of water services has not gone unopposed. Large protests have attended governments' attempts to privatize water in many countries.<sup>11</sup> Most famously, community protests

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7. A study of World Bank loans between 1996 and November 2002 by the International Consortium of Investigative Journalists reported that the World Bank conditioned loans on the privatization of water services in about one third of its projects. Center for Public Integrity, *Promoting Privatization*, Feb. 3, 2003, <http://www.publicintegrity.org/water/report.aspx?sID=ch&rID=44&aID=45>. The study considered 276 long-term investment loans and short-term structural adjustment loans that the Bank had labeled "water supply," and did not include combined loans. *Id.* Furthermore, the study also found that the number of loans conditioned on privatization had tripled in the period after 1996 compared to the period before 1996. *Id.* The International Monetary Fund (IMF) has supported similar policies. *See, e.g.*, Varsha Gupta D'Souza, *Development: IMF's Chief New Economist Could Signal Policy Shift*, INTER PRESS SERV., July 14, 2003 (remarking that an IMF loan to Nicaragua required the privatization of water, despite contrary domestic legislation).

8. *See* Marty Logan, *Finance: Corporations Said to Eye Water Privatization in U.S.*, INTER PRESS SERV., Feb. 4, 2003 (noting that while Europe-based multinational companies operated in a mere dozen countries in 1990, they were present in fifty-six countries and two territories by 2003).

9. The Center for Public Integrity has documented the international presence of the major multinational water companies, including their former and present subsidiaries. *See generally* Center for Public Integrity, *The Water Barons*, <http://www.icij.org/water/db.aspx?sID=db> (last visited Feb. 4, 2006) (noting that Vivendi Environment (now Veolia Environment) operates in over one hundred countries and provides water services to 110 million people, Suez operates in forty-one countries and provides water to 115 million people, while the third largest provider of water services, RWE AG, serves more than 70 million people worldwide).

10. Logan, *supra* note 8 (noting also that Vivendi Universal's revenues from water-related services increased from \$5 billion in 1990 to \$12 billion in 2002). *See also* Bill Marsden, *Cholera and the Age of the Water Barons*, Feb. 3, 2003, <http://www.icij.org/water/report.aspx?sID=ch&rID=44&aID=44> (observing that RWE's revenues from water grew "a whopping 9,786 percent," from \$25 million in 1990 to \$2.5 billion in 2002).

11. *See, e.g.*, *Provinces Protest Proposed Water Law*, BUS. NEWS AMERICAS, July 27, 2004 (reporting that farmers and indigenous groups protested privatization proposals by Ecuador's government fearing that privatization would endanger local community practices). In Paraguay, protests forced the government to postpone the reinstatement of a privatization bill, including provisions for the sale of the national water authority, which

in Cochabamba, Bolivia in 2000 resulted in the “water war,” forcing the Bolivian government to repeal the water law allowing for privatization, and to revoke the concession contract with a multinational consortium.<sup>12</sup> Furthermore, some governments have rejected water privatization despite pressure by international financial institutions.<sup>13</sup> In another remarkable development, a 2004 referendum in Uruguay approved a constitutional reform defining water as a public good and a human right, and ensuring

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had been previously repealed in 2002 due to public unrest. Kate Joynes, *Paraguayan Government Concedes to Anti-Privatisation Protesters*, WMRC DAILY ANALYSIS, Aug. 20, 2004. In Thailand, a series of protests at a local and international level stalled the privatization of water in 2004. See, e.g., *Labor Unions Launch Nationwide Anti-Privatization Roadshow*, FNWEB DAILY NEWS, June 17, 2004, available at 2004 WLNR 7272488 (describing Thailand’s labor unions’ strategy of garnering popular support against the privatization of state water and electricity utilities); *Protest at Thai Embassy in Brussels over Privatisation; ICEM’s Executive Interrupts Session for Protest*, M2 PRESSWIRE, May 27, 2004, available at Westlaw: 5/27/04 M2PW (reporting a demonstration against the Thai government’s privatization plans by 120 trade union leaders from forty countries in front of the Embassy of Thailand in Belgium); Pravit Rojanaphruk, *10,000 Rally Against Plan to Privatise Utilities*, NATION (Thail.), Mar. 28, 2004 (reporting an anti-privatization rally organized by 135 non-governmental and grass-roots organizations, which drew about 10,000 people). Public protests had also accompanied earlier instances of privatization in Indonesia, Pakistan, India, South Africa, Poland, and Hungary. See William Finnegan, *Leasing the Rain*, NEW YORKER, Apr. 8, 2002, at 43, 53.

12. For a comprehensive background on the Cochabamba water war, see generally Finnegan, *supra* note 11; JEFFREY ROTHFEDER, EVERY DROP FOR SALE 99–114 (2001). In the aftermath of the water war, the Bolivian government passed new legislation guaranteeing traditional communal practices and public participation in determining rates, and prioritizing social needs. Finnegan, *supra* note 11, at 51. Cochabamba’s water utility was transferred back into public hands. *Id.* For a legal discussion of the situation in Cochabamba from a human rights perspective, see Maria McFarland Sánchez-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, 1747–89 (2004). For a legal analysis from the perspective of risk management, see Erik J. Woodhouse, Note, *The “Guerra Del Agua” and the Cochabamba Concession: Social Risk and Foreign Direct Investment in Public Infrastructure*, 39 STAN. J. INT’L L. 295 (2003).

13. See, e.g., María Teresa Ronderos, *A Tale of Two Cities*, Feb. 11, 2003, <http://www.publicintegrity.org/water/report.aspx?aid=53> (recounting how the city of Bogotá, Colombia, refused to privatize its utility despite repeated pressure by the World Bank). The Water and Sewerage Company of Bogotá, Colombia has become “one of the most efficient, profitable and equitable water utilities in Colombia.” Sarah Garland, *Keeping it Public in Bogota*, 38 NACLA REP. ON THE AMERICAS, July 1, 2004, available at 2004 WLNR 11659096. In 2002, the company came out first in ratings by Colombia’s National Planning Commission, ahead of the privatized water utilities, while in 2004, it received the second highest international credit rating for the second year in a row. *Id.*

that its management would remain in public hands.<sup>14</sup> Commentators have said the reform sets a strong political precedent globally for the use of referenda to protect against privatization.<sup>15</sup>

The controversy surrounding water privatization reflects different responses to what the international community has recognized as a world water crisis.<sup>16</sup> Over one billion people lack access to safe drinking water,<sup>17</sup> while over two billion lack access to adequate sanitation.<sup>18</sup> Illnesses caused by lack of safe water, such as diarrheal diseases, kill over two million people each year.<sup>19</sup> Water conditions have been tied to 60 percent of the world's illness.<sup>20</sup> Africa, Asia, Latin America and the Caribbean comprise the most severely affected regions.<sup>21</sup>

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14. Raúl Pierri, *Uruguay: Referendum Gives Resounding 'No' to the Privatisation of Water*, INTER PRESS SERV., Nov. 1, 2004. The referendum took place on October 31, 2004, coinciding with the national election. *Id.*

15. *See id.* (quoting from a letter by the environmental group Friends of the Earth, signed by 127 organizations from 36 countries, which stated that the referendum "sets a key precedent for the protection of water worldwide, by enshrining these principles into the national constitution of one country by direct democracy"). Activists in Thailand have similarly called on the government to organize a referendum to decide the issue of privatization. *Labor Unions Launch Nationwide Anti-Privatization Roadshow*, *supra* note 11; Rojanaphruk, *supra* note 11.

16. A multi-agency United Nations report referring to the "world water crisis" provides a comprehensive overview of the crisis, its causes and proposed solutions, as well as a history of international water policies. *See generally* WORLD WATER ASSESSMENT PROGRAMME, UNESCO, THE UN WORLD WATER DEVELOPMENT REPORT: WATER FOR PEOPLE, WATER FOR LIFE (2003), available at [http://www.unesco.org/water/wwap/wwdr/table\\_contents.shtml](http://www.unesco.org/water/wwap/wwdr/table_contents.shtml) [hereinafter WATER DEVELOPMENT REPORT] (asserting that lifestyle changes, population increases, urbanization, and globalization are contributing factors to the world water crisis). *See also* MAUDE BARLOW & TONY CLARKE, BLUE GOLD 3-76 (2002).

17. WORLD HEALTH ORG., THE RIGHT TO WATER 3 (2003), available at [http://www.who.int/water\\_sanitation\\_health/rtwrev.pdf](http://www.who.int/water_sanitation_health/rtwrev.pdf) [hereinafter THE RIGHT TO WATER].

18. WATER DEVELOPMENT REPORT, *supra* note 16, at 10.

19. THE RIGHT TO WATER, *supra* note 17, at 6. According to quoted data, more children have died from diarrhea in the ten years preceding 2000 than from armed conflict since the Second World War. *Id.* at 7.

20. *Priceless*, ECONOMIST, July 19, 2003, at 4.

21. The situation is particularly acute in Africa, where up to 40 percent of the population remains with inadequate access to water and sanitation, while only 3 percent of the continent's renewable water is put to use, 6 percent of its land is irrigated, and less than 5 percent of its hydropower potential is used. JAMES WINPENNY, WORLD PANEL ON FINANCING WATER INFRASTRUCTURE, FINANCING WATER FOR ALL 5 (2003) [hereinafter CAMDESSUS REPORT, after Michel Camdessus, former managing director of the IMF, who chaired the panel]. In Asia, 19 percent of the population remains without water, and 52 percent without sanitation, while in Latin America and the Caribbean the respective figures are 15 percent and 22 percent. *Id.*

The international community has determined to combat the water crisis at the global level. In the United Nations Millennium Declaration, the General Assembly vowed “to halve the proportion of people who are unable to reach or to afford safe drinking water” by 2015.<sup>22</sup> At the Johannesburg World Summit in 2002, the world community further agreed to reduce by half the proportion of people without access to basic sanitation.<sup>23</sup> Progress toward achieving the Millennium Development Goals has varied.<sup>24</sup> In part, this is due to the increase of the world’s population, which offsets the increasing number of people who have obtained access to water.<sup>25</sup> According to some estimates, reaching the Millennium Goals by the target date would require increasing investments from the current \$30 billion to \$75 billion to cover the costs of providing universal access to water.<sup>26</sup> The United Nation estimated in 2002 that Asia, Latin America, and Africa should not expect universal access to safe drinking water before 2025, 2040, and 2050 respectively, at then-current rates of investment.<sup>27</sup>

Against this backdrop, proponents of privatization look to private sector involvement as a way to improve water access and sanitation, espe-

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22. United Nations Millennium Declaration, G.A. Res. 55/2, para. 19, U.N. GAOR, 55th Sess., 8th plen. mtg., U.N. Doc. A/RES/55/2 (Sept. 18, 2000). In addition, the Millennium Declaration resolved to “stop the unsustainable exploitation of water resources by developing water management strategies at the regional, national and local levels, which promote both equitable access and adequate supplies.” *Id.* para. 23.

23. World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26–Sept. 4, 2002, *Plan of Implementation of the World Summit on Sustainable Development*, para. 8, Annex, U.N. Doc. A/CONF.199/20.

24. See UN MILLENNIUM PROJECT, INVESTING IN DEVELOPMENT: A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS 3 (2005), available at [http://www.unmillenniumproject.org/reports/index\\_overview.htm](http://www.unmillenniumproject.org/reports/index_overview.htm). For example, the target of halving the proportion of people without clean drinking water in urban areas has been met in most regions, except for Eastern Asia. On the other hand, with respect to rural areas, the progress toward achieving the target is lagging in Sub-Saharan Africa, Eastern, South-Eastern and Western Asia, as well as in Latin America and the Caribbean. *Id.*

25. See CAMDESSUS REPORT, *supra* note 21, at 5 (observing that, because of population growth, coverage for urban water has decreased despite the fact that, during the 1990s, 800 million people obtained access to water and 750 million to sanitation).

26. Brubaker, *supra* note 1 (noting that although estimates tend to vary, they usually surpass current or planned public spending). A report completed in 2000 under the auspices of the World Water Council and the Global Water Partnership estimated that in poor countries, about \$75–80 billion were invested in water annually, an amount that would have to be raised to \$180 billion to reach the Millennium Goals. *Priceless*, *supra* note 20.

27. *A Few Green Shoots—The World Summit in Johannesburg*, ECONOMIST, Aug. 31, 2002, at 65.

cially in cash-strapped less developed countries.<sup>28</sup> Opponents contend that water governance should not be left to market forces.<sup>29</sup> They argue that water is a human right and should remain under the control of public bodies taking into account social fairness and environmental sustainability.<sup>30</sup>

Taking account of this debate, this Note examines the nascent developments of human rights law regarding corporate accountability for human rights and the human right to water. While the Note starts from the premise that water is a human right, it also proceeds from the descriptive proposition that water privatization is, for better or worse, a global reality.<sup>31</sup> The Note proposes that corporate accountability for the human right

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28. See WORLD BANK, WATER—A PRIORITY FOR RESPONSIBLE GROWTH AND POVERTY REDUCTION: AN AGENDA FOR INVESTMENT AND POLICY CHANGE 2 (2003), available at [http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/04/25/000094946\\_03041604014623/Rendered/PDF/multi0page.pdf](http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/04/25/000094946_03041604014623/Rendered/PDF/multi0page.pdf). Delivered at the Third World Water Forum in Kyoto, the working paper notes, among other things, the importance of “exploring public-private partnership options to attract the required increase in financial resources devoted to water investments,” under the rubric “the need for a new global deal on water.” *Id.* See also Marwaan Macan-Markar, *World Bank Backs Privatizing Water, Critics Dismayed*, INTER PRESS SERV., Mar. 17, 2003. The European Commission has also urged “partnerships between public, private and civil society actors.” See Commission of the European Communities, *Communication on the Future Development of the EU Water Initiative and the Modalities for the Establishment of a Water Facility for ACP Countries*, at 7, COM(2004) 43 final (Jan. 26, 2004), available at [http://europa.eu.int/eur-lex/pri/en/dpi/cnc/doc/2004/com2004\\_0043en01.doc](http://europa.eu.int/eur-lex/pri/en/dpi/cnc/doc/2004/com2004_0043en01.doc) [hereinafter European Commission Communication]. The communication states that such promotion must ensure “that those partnerships remain equitable and transparent, allow free and reversible choices on water services management, safeguard consumers’ and investors’ interests, and maintain high standards of environmental protection.” *Id.* In addition, the communication specifically affirms that the European Community “is taking a neutral stance on the ownership of public utilities.” *Id.* A subsequent portion of the communication, however, speaks of the need for “better mechanisms to use development aid to leverage other resources (private, development banks, financial institutions, users’ contributions, remittances, etc).” *Id.* at 11. According to activists, such use of aid subsidizes the privatization of water management. See Stefania Bianchi, *Development-EU: Civil Groups Fear More Water Privatization*, INTER PRESS SERV., Mar. 17, 2004, available at Westlaw: 3/17/04 INTERPS.

29. Mario Osava, *South Could Become Scenario of Water Wars*, INTER PRESS SERV., Mar. 21, 2003 (setting forth the positions of the organizers of the World Social Forum, an alternative gathering designed to compete with the World Water Forum, which some activists see as forwarding a corporate agenda).

30. *Id.* It is important to note, however, that although opponents of water privatization invariably cite that water is a human right, not all human rights proponents oppose water privatization. See *infra* Part V.A and notes 204–05.

31. This Note does not examine other corollaries of the global trend of water privatization and commodification of water, such as the impact of the international trade regime

to water may assuage the problems raised by water privatization, without dispensing with privatization *per se*. This challenge is twofold to the extent that both corporate liability for human rights violations and the human right to water are relatively recent and still contested notions. Taking up these developments, the Note contends that, especially where host governments may be weak, corrupt, or otherwise unable to regulate private water providers, it is of utmost importance that multinational water companies are bound by a duty to the local populations they serve.

Part II describes the global trend to privatize water, theories underpinning this trend, and critiques. Part III expounds the legal basis and the scope of the human right to water. Part IV sets forth the current developments in theories of corporate accountability for international human rights violations. Part V analyzes in greater detail the scope of the human rights liability of private water providers for the human right to water and defends its desirability, while also setting forth objections and potential difficulties in enforcement.

## II. WATER PRIVATIZATION: HISTORY, JUSTIFICATIONS, AND CRITIQUES

### *A. Water Privatization in a Historical Context*

During the 1970s and 1980s, the principal source of funding water infrastructure in the developing world came in the form of aid by international development agencies, international financial institutions such as the World Bank, and government agencies such as the U.S. Agency for International Development.<sup>32</sup> Privatized water systems in the 1980s were the rare exception rather than the rule, and international funding was directed entirely at public entities until 1990.<sup>33</sup> In 1989, the sale of water utilities in Great Britain by the government of Margaret Thatcher<sup>34</sup> set off the global trend of privatization of water utilities.<sup>35</sup>

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and the World Trade Organization. For an extended discussion of potential developments in this direction, see Rona Nardone, Note, *Like Oil and Water: The WTO and the World's Water Resources*, 19 CONN. J. INT'L L. 183 (2003).

32. Thomas M. Kerr, *Supplying Water Infrastructure to Developing Countries via Private Sector Project Financing*, 8 GEO. INT'L ENVTL. L. REV. 91, 91 (1995).

33. According to the *Camdessus Report*, private water systems operated only in France, parts of Francophone Africa, areas in Great Britain, a few cities in Spain, and some distribution schemes in the United States. CAMDESSUS REPORT, *supra* note 21, at 7.

34. The government of Margaret Thatcher listed all ten English and Welsh water utilities on the market. See *Private Passions*, *supra* note 2. The total transfer of assets to private entities has become known as the "British model" of water privatization. *Id.* For a commentary on the British lessons of water privatization, see *Stagnant—Britain's Stagnant Water Industry*, ECONOMIST, Aug. 2, 2003, at 54. See also Nardone, *supra* note 31, at 192 (noting that the primary advantage of assets sale is that it increases the availability



Few other countries, however, have followed the British model,<sup>36</sup> adopting instead a variety of public-private combinations.<sup>37</sup> The so-called French model<sup>38</sup> consists of various concession arrangements under which different portions of the water system, such as operation and management, are granted to private entities on a long-term basis.<sup>39</sup> Public water corporations with private and public shareholders (with the latter usually being the majority) exemplify a third model of privatization, which some have extolled as successfully combining private shareholders' efficiency goals with public shareholders' goals of equitable access and affordability.<sup>40</sup> Finally, under a fourth model, the government contracts out operation and management to private bidders in a competitive bidding process.<sup>41</sup>

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of capital that can be put to alternative uses, but that regulation and public protection may be lacking).

35. CAMDESSUS REPORT, *supra* note 21, at 7.

36. *Id.*

37. See, e.g., Patricia Grogg, *Cuba: Havana Improves Water Supply with Spanish Investment*, INTER PRESS SERV., Feb. 26, 2003. Cuba has retained ownership of assets in public hands. *Id.* The Cuban-Spanish company Aquas de la Habana started upgrading Havana's water system in 2000, and now runs the piped water, drainage, and sewer services in multiple districts of Havana. *Id.*

38. This model known as "affermage" originated in the nineteenth century, with the establishment of Generale des Eaux, now owned by Veolia, by Napoleon III in 1852, and the establishment of Lyonnaise des Eaux, now owned by Suez, in 1880. See *Savoir Faire*, ECONOMIST, July 19, 2003, at 7.

39. See Nardone, *supra* note 31, at 191. For instance, the Build-Operate-Transfer model (BOT), as its name suggests, allows a private company to build and operate a particular project for a certain time period, after which it will transfer ownership to the host country. See generally Kerr, *supra* note 32 (arguing in support of the BOT model for funding water infrastructure in developing countries). The prime advantage of this model is that cash-strapped governments in developing countries do not have to tap into their scarce budgets for funding or taking out loans. *Id.* at 92-93. This model envisions an important role for international financial institutions, ranging from risk insurance to debt or equity assistance. *Id.* at 95-96. Indeed, the heads of Suez and Veolia have favored the public-private partnership of the French model. *Savoir Faire*, *supra* note 38. However, the United Nations Special Rapporteur on Adequate Housing, Miloon Kothari, has pointed out that a French official audit report discredited this model in 1997. Miloon Kothari, *Privatizing Human Rights—The Impact of Globalisation on Access to Adequate Housing, Water and Sanitation*, n.10 (2003), <http://socialwatch.org/en/informesTematicos/66.html>. The model's major shortcomings were corruption, lack of transparency, lack of competition, and the concentration of immense power within the hands of conglomerates at the expense of elected public officials. *Id.*

40. Nardone, *supra* note 31, at 191.

41. See *id.* See also Robert Glennon, *Water Scarcity, Marketing, and Privatization*, 83 TEX. L. REV. 1873, 1892 (2005) (noting that this is the least controversial form of privatization). Glennon also mentions a fifth possibility of giving private companies ownership

In the mid-1990s, the domestic public sector accounted for up to 70 percent of investment in water and sanitation.<sup>42</sup> Participation by the domestic private sector comprised a mere 5 percent, while international private companies and international donations accounted for between 10 and 15 percent each.<sup>43</sup> In a parallel development, by the late-1990s, international aid for water and sanitation had fallen slightly compared to aid in the mid-1990s, while aid for irrigation, drainage, and hydropower had declined substantially.<sup>44</sup> The World Panel on Financing Water Infrastructure has described the peaks and drops of private investment and bank lending in water and sanitation as part of the general decline in financial currents since the mid-1990s.<sup>45</sup> However, the remaining factors accounting for the decline in water investment stem from risks specific to the water sector.<sup>46</sup>

Following the economic crises in Argentina and other countries, the trend to private operation had “come to a virtual stand-still.”<sup>47</sup> The newest trend is to combine the expertise and management skills of private companies with other bodies, with the private company having a small equity stake.<sup>48</sup> Recent reports warn that companies increasingly divest from developing countries and look to the American market instead because of high investment risks and significant losses that some multinational water companies suffered during the economic collapses in developing countries.<sup>49</sup>

In view of these developments, international financial institutions have increased their calls for privatization. A 2003 World Bank paper called for more private sector involvement in water.<sup>50</sup> A declaration by minis-

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of water itself and observes that this form of privatization raises a number of problems, ranging from the danger of unequal distribution between rich and poor, to lack of transparency and public participation. *Id.* at 1893.

42. CAMDESSUS REPORT, *supra* note 21, at 6.

43. *Id.*

44. *Id.* at 7 (noting that in 1996–1998 international aid for water and sanitation amounted to \$3.5 billion, while in 1999–2001, the figure declined to \$3.1 billion).

45. *Id.*

46. According to experts, investment in water infrastructure is more capital intensive than any other infrastructure project, and in particular twice as high as investments in natural gas, and 70 percent higher than investments in electricity and telecommunications. *Id.* at 10. In addition, the water sector yields the lowest financial rates of return than any other sector. *Id.* at 11.

47. *Id.* at 7.

48. *Private Passions*, *supra* note 2.

49. Logan, *supra* note 8. A January 2003 report by Public Services International stated that Suez was planning to divest a third of its water services in developing countries following the Asian currency collapse in the 1990s. *Id.*

50. WORLD BANK, *supra* note 28, at 2.

ters adopted at the Third World Water Forum in Kyoto in March 2003 also focused on the concept of “public-private partnership” to ensure safe water and provide revenue for better water sanitation, environmental protections, and irrigation systems.<sup>51</sup> In January 2004, a proposal by the European Commission to allocate \$1.2 billion to improve water access and sanitation of a block of countries in Africa, the Caribbean, and the Pacific, called for the adoption of innovative solutions, including expansion of private sector involvement.<sup>52</sup>

### *B. The Case for Water Privatization*

The global trend of water privatization has been explained in part as a result of “sheer, desperate need” of developing countries for investment in water.<sup>53</sup> Another contributing factor is the global support of international financial institutions and political bodies.<sup>54</sup> To understand its appeal, however, it is necessary to delve into the failures of prior models of international aid to public entities prevalent until the early-1990s.

The funding needs of the water sector have consistently outstripped available aid, constituting a major setback of the international aid model prevalent before the 1990s.<sup>55</sup> In addition, multilateral aid programs have suffered from inattention to local input by affected residents, have financed projects that have been both environmentally and economically unsustainable, and have failed to help the world’s poorest countries.<sup>56</sup> Bilateral aid programs have been critiqued for adversely affecting competition, and hence quality of services, by tying aid to specific goods and services from designated countries.<sup>57</sup>

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51. See Third World Water Forum, Mar. 22–23, 2003, Kyoto, Japan, *Ministerial Declaration—Message from the Lake Biwa and Yodo River Basin*, para. 6 (Mar. 23, 2003), [http://www.world.water-forum3.com/jp/mc/md\\_final.pdf](http://www.world.water-forum3.com/jp/mc/md_final.pdf) [hereinafter *Ministerial Declaration*].

52. European Commission Communication, *supra* note 28, at 11. The proposal explicitly incorporates the findings of the *Camdessus Report*. See *id.* Critics have expressed fears that the proposal is more about protecting corporate welfare than the people of the world’s poorest nations. See Julio Godoy, Analysis, *Politics—G8: Activists Fear Summit Agenda Could be Hijacked*, INTER PRESS SERV., May 28, 2003.

53. Brubaker, *supra* note 1 (noting also that developed countries are attracted to the private sector as well, despite the fact that they have more resources available, because reliance on the private sector frees up funds for alternative uses, moves risks away, and reduces costs due to the private sector’s greater efficiency).

54. See *supra* notes 7 and 28 and accompanying text.

55. See Kerr, *supra* note 32, at 94.

56. *Id.*

57. *Id.* at 95.

Furthermore, defenders of privatization point out that public utilities have largely failed to provide water access to those who most need it, namely the poor.<sup>58</sup> This failure has been tied to a host of factors ranging from corruption, inefficiency, and lack of investments, to frequent leakages of old infrastructures.<sup>59</sup> Public management of water has also been criticized for grossly underpricing water, with most of the *de facto* subsidies in developing countries accruing to the middle classes who have access to piped water,<sup>60</sup> leaving poor residents at the mercy of private vendors who charge as much as ten times higher.<sup>61</sup> The opportunity cost on time spent to obtain water comprises an additional burden on the poor.<sup>62</sup>

Proponents of privatization argue from a market perspective that private sector involvement increases efficiency, attracts more finance, and thus helps build new and much needed infrastructure, especially in developing countries.<sup>63</sup> Perhaps most importantly, privatization depoliticizes the regulation of water and allows for a better reflection of costs in prices, since governments can shift the responsibility for pricing onto the private sector.<sup>64</sup> Proper pricing is critical because it encourages sustainable use of water.<sup>65</sup> According to a World Bank senior executive, “water pricing is an essential instrument to enhance the sustainability of the resource.”<sup>66</sup> A further advantage of private sector involvement and the proper pricing that comes with it is that lenders are more willing to fi-

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58. See *Bogged Down—The Private Sector’s Role in Water Supply*, ECONOMIST, Mar. 22, 2003, at 15.

59. *Id.*

60. See Sheila M. Olmstead, *What’s Price Got to Do with It?*, ENV’T, Dec. 1, 2003, at 22 (noting that in many instances subsidies end up being misdirected both because they benefit wealthier residents already connected to the water network, but also because subsidies supported by taxes impose a heavier burden on low-income households).

61. *Bogged Down—The Private Sector’s Role in Water Supply*, *supra* note 58. See also *To Market, to Market*, ECONOMIST, July 19, 2003, at 16.

62. Olmstead, *supra* note 60.

63. Brubaker, *supra* note 1 (contending that the private sector “enjoys greater latitude to pursue efficiencies” because of market discipline, better expertise, economies of scale, and its freedom from social goals such as creation of jobs, which in the author’s view hinder productivity); Kerr, *supra* note 32, at 92–93. See also CAMDESSUS REPORT, *supra* note 21, at 32.

64. Brubaker, *supra* note 1.

65. See CAMDESSUS REPORT, *supra* note 21, at 18 (arguing that “full cost recovery from users is the ideal long-term aim”). See also *Priceless*, *supra* note 20 (noting that water has been “colossally underpriced,” which leads to its overuse and misuse, and contending that these problems would be best corrected by sensible pricing, which should reflect costs, including environmental ones).

66. Macan-Markar, *supra* note 28.

nance water projects without requiring large equity at the outset by focusing instead on expected revenue for repayment.<sup>67</sup>

Despite the fact that proponents of privatization highlight cost recovery, many concede that water is more than a mere commodity.<sup>68</sup> Because water is so essential, proponents of private-sector involvement acknowledge that pricing has to take into account such social factors as the inability of poor residents to pay.<sup>69</sup> The World Panel on Financing Water Infrastructure has coined the concept of “sustainable cost recovery” which embraces the goal of full cost recovery in the long term, while supporting targeted “pro-poor” subsidies in the meantime.<sup>70</sup> Finally, even in the case of full privatization of assets, commentators have pointed out that privatization is in fact a misnomer, considering the heavy governmental regulation ranging from tariffs to limitations on the use of assets such as sewers and public stations.<sup>71</sup> As one commentator has put it, “the choice is really between regulated public monopolies and regulated private monopolies, not between upstanding private service institutions and profiteering capitalists.”<sup>72</sup>

### *C. The Case Against Water Privatization*

Opponents of privatization frequently cite the mixed, and in some cases dismal record of private companies in developing countries.<sup>73</sup> One

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67. Kerr, *supra* note 32, at 92–93.

68. See, e.g., CAMDESSUS REPORT, *supra* note 21, at vii (“[A]ccess to water is a right and a basic need.”). A Suez official had even said that “water is too essential to life to be a commodity,” and that “it is absolutely irresponsible to privatise in developing countries,” prompting comments that he “sounds like an anti-market activist.” *A Few Green Shoots*, *supra* note 27. See also Marwaan Macan-Markar, *Cambodia: At last, Tap Water, Tap Water Everywhere*, INTER PRESS SERV., Feb. 18, 2003 (quoting the chief financial officer of Manila Water, one of the two private companies supplying water to Manila, as saying that “governments must not give up holding the right to water” and that companies “are only leasing it”).

69. See *To Market, to Market*, *supra* note 61 (pointing to the Chilean government’s policy of charging full prices for water, but giving stamps to poor residents to pay their bills, and to the South African policy of providing a minimum supply of water for free). See also Olmstead, *supra* note 60 (arguing that uniform tariffs with rebates for low-income households are best suited to meet distributional goals).

70. CAMDESSUS REPORT, *supra* note 21, at 18–19.

71. *Private Passions*, *supra* note 2.

72. Olmstead, *supra* note 60 (adding that the key issue is regulation).

73. The Center for Public Integrity has published a series of reports discussing developing countries’ experiences with water privatization. See, e.g., Andreas Harsono, *Water and Politics in the Fall of Suharto*, Feb. 10, 2003, <http://www.publicintegrity.org/water/report.aspx?aid=52> (discussing at length the process of privatization in Jakarta, Indonesia under the Suharto dictatorship, backed by the World Bank, and noting that the

study based on a year-long investigation in various countries concluded that multinational companies in the water business constantly push for higher prices, frequently fail to meet their commitments, and will abandon the project if returns are too low.<sup>74</sup> Privatizing water is likely to reduce access to clean water because of rate increases.<sup>75</sup> Making people pay the full cost of water has in one instance directly caused a cholera epidemic infecting more than 250,000 people and killing nearly 300.<sup>76</sup> In the Philippines, for instance, five years after the privatization of Manila's water system in 1997,<sup>77</sup> residents still complained that the price of water kept going up even under the supposedly more efficient system.<sup>78</sup> Aside from rate increases, observers also cite the concessionaires' failures to meet their contractually-set service targets.<sup>79</sup> According to commenta-

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companies' record of providing water access to the poor and improving finances was mixed); Daniel Santoro, *The 'Agua's' Tango: Cashing in on Buenos Aires' Privatization*, Feb. 6, 2003, <http://www.publicintegrity.org/water/report.aspx?aid=50#>.

74. Logan, *supra* note 8.

75. See Grogg, *supra* note 37. *But cf.* CAMDESSUS REPORT, *supra* note 21, at 7 (observing that it is public authorities, and not private multinationals, that supply the underserved regions comprising the 1.1 billion people who still lack access to water, and the 2.4 billion who lack sanitation).

76. See, e.g., Jacques Pauw, *Metered to Death: How a Water Experiment Caused Riots and a Cholera Epidemic*, Feb. 5, 2003, <http://www.publicintegrity.org/water/report.aspx?aid=49>. The total cost recovery principle adopted in South Africa has led to ten million South Africans having their access to water cut off for various periods between 1994 and 2002, while two million had been evicted from their homes because of not being able to pay their utility bills. *Id.* According to South Africa's Human Sciences Research Council, the cutoffs forced poor people to obtain water from polluted streams and rivers, directly causing an outbreak of cholera. *Id.* See also Logan, *supra* note 8. *Cf.* *Soweto Residents Protest Against Water Meters*, S. AFR. PRESS ASS'N, Sept. 15, 2004 (recounting reports of people refraining from flushing their toilets until they had been used several times, and storing dirty water for flushing, because the government's free allocation of the first 6000 liters was insufficient).

77. The Philippine government privatized the publicly owned Metropolitan Waterworks and Sewerage System in 1997, at the advice of the World Bank. Marites Sison, *Philippines: Awash in Water Bills After Privatization*, INTER PRESS SERV., Jan. 22, 2003. Manila Water, a partnership between the International Water Consortium and a Philippine oligarch family was awarded the concession for the East Zone area, while Maynilad Water Services, a partnership between Lyonnaise des Eaux and another Philippine family runs the West Zone area. *Id.*

78. Macan-Markar, *supra* note 68. Manila residents served by Maynilad were paying 30 cents per cubic meter of water in 2002, which constitutes a 76 percent increase from the pre-privatization price four years earlier. Sison, *supra* note 77.

79. In 2002, Maynilad terminated its 25-year concession after the government failed to approve further rate increases. Diana Mendoza, *Politics: Water Woes of Poor a Key Issue in Pilipino Election*, INTER PRESS SERV., Mar. 26, 2004, available at Westlaw: 3/26/04 INTERPS. In 2004, the Philippine government agreed to cancel \$142 million of

tors, the Philippine experience with water privatization shows that privatization does not automatically improve efficiency, and disregards the economic and social costs to citizens in favor of generating profits and cost-recovery for multinational water companies.<sup>80</sup>

Critics also highlight the power disparity between developing countries and powerful multinational companies.<sup>81</sup> Multinational companies are protected by multilateral trade agreements from termination of their contracts and may seek compensation.<sup>82</sup> The costs of compensation would be prohibitively expensive for governments seeking to terminate contracts detrimental to the needs of their citizenry.<sup>83</sup> On the other hand, companies may often coerce governments into renegotiating contracts because contract cancellation adversely affects countries' abilities to attract foreign investment.<sup>84</sup> The power disparity between multinational water companies and the governments of developing countries often results in closed-door negotiations with little input by citizens, which has been seen as contributing to a climate of corruption and bribery.<sup>85</sup> In some

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unpaid concession fees and to convert them into government-held shares, which prompted opponents in the presidential campaign to call the government action a "bail-out" and a "scandalous deal." *Id.*

80. Sison, *supra* note 77.

81. See Kothari, *supra* note 39.

82. See *id.* For example, Aguas del Tunari, the concessionaire in Cochabamba, Bolivia brought a proceeding against Bolivia before the International Centre for Settlement of Investment Disputes (ICSID), and invoked a bilateral investment treaty between the Netherlands and Bolivia as the basis for jurisdiction. *Aguas del Tunari v. Republic of Bol.*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, para. 4 (Oct. 21, 2005), [http://www.worldbank.org/icsid/cases/AdT\\_Decision-en.pdf](http://www.worldbank.org/icsid/cases/AdT_Decision-en.pdf). The arbitration tribunal rejected Bolivia's objections to jurisdiction, with one dissent. *Id.* paras. 334–37. No decision on the merits had been reached before the publication of this Note.

83. Kothari, *supra* note 39.

84. For example, the two multinational concessionaires providing water in Manila asked the Philippine government in 2001 to amend their contracts to allow them to set rates without going through the state regulatory agency, and to lower or postpone their performance targets. Sison, *supra* note 77. According to one NGO spokesman commenting on the situation in the Philippines, "street-smart companies [may be] making unrealistic and unsustainable bids just to win the tender, and gambling on the possibility that the rules of the game could change later in their favor, given the weakness of regulation in the country . . ." *Id.*

85. Kothari, *supra* note 39 (noting that negotiations behind closed doors have encouraged bribery and pointing to the convictions of Suez and Vivendi in France for paying bribes to obtain water concessions). See also Sylvestre Tetchiada, *Development—Cameroon: Water Projects Plagued by Corruption*, May 18, 2004, available at Westlaw: 5/18/04 INTERPS (recounting accusations against Cameroonian officials for demanding

instances, multinational companies have also cooperated with authoritarian regimes.<sup>86</sup>

In light of the problems plaguing privatization, opponents have called on the international community to put its resources into reforming the public sector of developing countries. Activists argue that international assistance confers *de facto* subsidies to private companies,<sup>87</sup> and point out that in many cases water companies invest very little of their own capital,<sup>88</sup> relying instead on loans from the World Bank and other financial institutions.<sup>89</sup> For instance, transnational civil society groups commenting on the EU proposal for improving water access and sanitation in underdeveloped countries critiqued the proposal for assuming, without evidence, “that the role of the private water industry needs to be expanded.”<sup>90</sup>

Instead, these groups have called on the European Union to use its funds to strengthen management skills in the public sector in poor countries, and to help upgrade publicly-run water.<sup>91</sup> Under this view, public management fosters local and community-based participatory decision-making. Community participation is better suited to respond to local needs than big privatization agendas, which force-feed the same policies on developing nations.<sup>92</sup> Some have also pointed to the successes of water delivery run by public bodies.<sup>93</sup> The public water system in Phnom Penh, Cambodia has increased tap-water delivery from 25 percent of

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payoffs in connection with a project to supply water to the Cameroonian capital, Yaounde).

86. See, e.g., Harsono, *supra* note 73 (discussing the relationships between the Suharto regime in Indonesia and the global multinationals Thames and Suez, which obtained concessions without public bidding). See also John Burton, *Malaysia to Spend Dollars 13bn on Overhaul of Water, Sewage Services*, FIN. TIMES, Aug. 19, 2004, available at 2004 WLNR 9779449 (reporting on possible renegotiations of concessions granted to multinational companies under the regime of Mahatir Mohamad behind closed doors and without competitive bidding).

87. See Bianchi, *supra* note 28.

88. Logan, *supra* note 8.

89. See, e.g., Santoro, *supra* note 73 (observing that Aguas Argentinas obtained at least 75 percent of its investment in Buenos Aires’s water system from the World Bank and similar international financial institutions).

90. Bianchi, *supra* note 28.

91. *Id.*

92. See Marwaan Macan-Markar, *Declaration on Water Lacks Clear Programme of Action*, INTER PRESS SERV., Mar. 23, 2003.

93. See Kothari, *supra* note 39 (asserting that public enterprises operate “some of the best practices found in water and sanitation provision”).



homes in 1993, to 80 percent by the end of 2002.<sup>94</sup> Similarly, Bogotá's publicly managed Water and Sewage Company has risen out of practical bankruptcy in 1993 and transformed itself into the most respected utility in Colombia.<sup>95</sup>

Critics also contend that market-based arguments about efficiency and pricing according to the laws of supply and demand are misplaced, in light of the fact that water is a public good,<sup>96</sup> as well as a natural monopoly.<sup>97</sup> The concept of markets for water belies the fact that water consumers cannot choose the best or lowest-priced provider amongst many.<sup>98</sup> Pricing of water is principally an administrative decision.<sup>99</sup>

Finally, from a human rights perspective, the acceleration of privatization has been seen to constitute essentially a privatization of human rights, including the human right to water.<sup>100</sup> Privatization of rights results in their erosion and, in particular, leads to violations of the rights of

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94. Macan-Markar, *supra* note 68 (noting, however, that the city's poor still paid only a fraction less than what they used to pay to private vendors). *See also* Kothari, *supra* note 39 (pointing to the successes of public enterprises in São Paulo, Brazil; Debrecen, Hungary; Lilongwe, Malawi; and Tegucigalpa, Honduras).

95. Ronderos, *supra* note 13. Bogotá has refused to privatize its utility despite repeated pressure by the World Bank. *Id.* In eight years, the company reduced by half the number of households without sanitation, and by 75 percent the number of households without water. *Id.*

96. *See generally* Joseph W. Dellapenna, *The Importance of Getting Names Right: The Myth of Markets for Water*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 317 (2000). A "public good" is characterized by "indivisibility," which means that it cannot be divided up so that some consumers would buy more of it, while others would be excluded, and "publicness," which means that "it is impossible to keep others from accessing and enjoying the good so long as it is accessible and enjoyable by anyone." *Id.* at 330. While Dellapenna concedes that water is not physically indivisible and public in a strict sense, he argues that it should be treated as such considering its economic and social characteristics. *Id.* at 331-36.

97. The concept "natural monopoly" has been traced to a 1670 treatise, *De Portibus Maris*, in which England's Lord Chief Justice defended governmental regulation of seaports on the principle that they were "affected with a public interest." *See* Joseph P. Tomain, *The Persistence of Natural Monopoly*, 16 NAT. RESOURCES & ENV'T 242, 243 (2002). Tomain defines "natural monopoly" as the idea that a single supplier will provide services at a lower cost by realizing economies of scale. *Id.* at 242. The usual solution to natural monopolies, however, has been not public ownership, but rather the so-called "regulatory compact" between the state and a private utility, under which "a monopoly on service in a particular geographical area . . . is granted to the utility in exchange for a regime of intensive regulation, including price regulation, quite alien to the free market . . ." *Id.* at 243 (quoting *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1189 (D.C. Cir. 1987)).

98. Dellapenna, *supra* note 96, at 321-23.

99. *Id.* at 323.

100. Kothari, *supra* note 39.

the poor.<sup>101</sup> As argued below, holding private water companies liable for the human right to water may present one avenue for preempting such violations.

### III. WATER AS A HUMAN RIGHT

#### *A. Historical Development of the Human Right to Water*

The human right to water has been inferred recently and has since then been relatively contested. The Universal Declaration of Human Rights does not expressly mention a human right to water.<sup>102</sup> The two fundamental human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), also do not explicitly refer to a right to water.<sup>103</sup> The only express references to a right to water in human rights treaties are in the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>104</sup> and the Convention on the Rights of the Child.<sup>105</sup> International humanitarian law<sup>106</sup> also contains specific pro-

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101. *Id.* (contending that “corporate globalisation, and its clear expression of privatisation of services, is one of the greatest threats to universal access to clean drinking water and sanitation” because it reduces accountability to the public and undermines services to the poor by emphasized profits and cost recovery). *But see infra* notes 204–05 and accompanying text.

102. *See* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (1948) [hereinafter Universal Declaration]. Neither was the issue discussed during the Universal Declaration’s drafting. ROTHFEDER, *supra* note 12, at 79.

103. *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967) (entered into force Jan. 3, 1976) [hereinafter ICESCR].

104. *See* Convention on the Elimination of All Forms of Discrimination Against Women art. 14(2), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) (“States Parties shall take all appropriate measures to . . . ensure to [women in rural areas] the right . . . (h) To enjoy adequate living conditions, particularly in relation to . . . water supply . . .”).

105. Convention on the Rights of the Child art. 24(2)(c), Nov. 20, 1989, 1577 U.N.T.S. 44, 30 I.L.M. 1448 (1989) (requiring state parties “to combat disease and malnutrition . . . through the provision of adequate nutritious foods and clean-drinking water . . .”).

106. International humanitarian law refers to the body of law applicable in armed conflict. *See generally* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12 1949, 75 U.N.T.S. 135 [hereinafter Geneva Conven-

visions about the right to water.<sup>107</sup> In addition, the human right to water has been enshrined in several national constitutions.<sup>108</sup>

In 2002, the Committee on Economic, Social, and Cultural Rights (ESCR Committee) issued Comment 15 addressing specifically the human right to water.<sup>109</sup> In the aftermath of Comment 15, references to the human right to water appeared in multiple reports of the United Nations and other entities,<sup>110</sup> and in the official remarks of world leaders.<sup>111</sup> However, a declaration of government ministers adopted at the Third World Water Forum in Kyoto in 2003 notably lacked language recognizing the right to water as a human right,<sup>112</sup> indicating a lack of international consensus on the issue.<sup>113</sup>

tion III]; Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

107. See, e.g., Geneva Convention III, *supra* note 106, arts. 20, 26 (providing that the detaining power shall provide sufficient drinking water to prisoners of war).

108. For example, the Constitution of South Africa explicitly recognizes a right to water:

(1) Everyone has the right to have access to

....

(b) sufficient food and water;

....

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

S. AFR. CONST. 1996 art. 27. The passing of a constitutional amendment recognizing water as a human right in Uruguay in 2004 provides another example. See *supra* note 14 and accompanying text.

109. See generally General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Comm. on Econ., Soc. & Cultural Rts., 29th Sess., U.N. Doc. E/C.12/2002/11 (2002) [hereinafter Comment 15].

110. See, e.g., THE RIGHT TO WATER, *supra* note 17.

111. For example, at the Third World Water Forum in 2003, French President Jacques Chirac stated in a video presentation that “water should be recognized as a human right.” Marwaan Macan-Markar, *Egypt Urges Programs Not Promises in Blue Revolution*, INTER PRESS SERV., Mar. 16, 2003. See also THE RIGHT TO WATER, *supra* note 17, at 6 (quoting remarks by United Nations Secretary-General Kofi Annan that “access to safe water is a fundamental human need and, therefore, a basic human right”).

112. See *Ministerial Declaration*, *supra* note 51, para. 1 (stating, instead, that “water is a driving force for sustainable development including environmental integrity, and the eradication of poverty and hunger, indispensable for human health and welfare”); Macan-Markar, *supra* note 92. The Ministerial Declaration as well the organizers of the World Water Forum have been criticized for sidestepping the United Nations, and seeking to

*B. Scope and Legal Basis of the Human Right to Water*

Although the ICESCR does not refer explicitly to a right to water, the ESCR Committee has stated that a right to water is implicit in other enumerated rights in the ICESCR. Specifically, the ESCR Committee has declared that the right to water is implicit within the right to an adequate standard of living under article 11(1) of the ICESCR because it “clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”<sup>114</sup> Furthermore, the ESCR Committee has stated that the right to water is “inextricably related” to the right to the highest attainable standard of health under article 12(1)<sup>115</sup> and the rights to adequate housing and adequate food under article 11(1) of the ICESCR.<sup>116</sup> Finally, the right to water “should be seen in conjunction with other rights enshrined in the International Bill on Human Rights, foremost among them the right to life and human dignity.”<sup>117</sup> In view of the aspirational articulation of the guarantees of the ICESCR, grounding the right to water in this covenant has distinct implications on what kind of responsibilities are conferred on state and non-state actors.<sup>118</sup>

Some scholars have pointed to customary international law as a basis for the right to water.<sup>119</sup> According to this argument, states have engaged

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bestow international legitimacy on what critics view as a privatization agenda through a ministerial meeting. See Marwaan Macan-Markar, *Critics Accuse Water Forum of Side-stepping U.N.*, INTER PRESS SERV., Mar. 20, 2003.

113. See ROTHFEDER, *supra* note 12, at 85–90 (reviewing debates at other international conferences regarding the question whether water should be viewed as a legal right or a need).

114. General Comment 15, *supra* note 109, para. 3.

115. See also THE RIGHT TO WATER, *supra* note 17, at 3 (stating that the human right to the highest attainable standard of health encompasses the “underlying determinants of health,” including safe water and adequate sanitation).

116. Comment 15, *supra* note 109, para. 3. The United Nations Special Rapporteur on Adequate Housing has stated that “without access to potable water the right to adequate housing loses its meaning.” Kothari, *supra* note 39.

117. Comment 15, *supra* note 109, para. 3.

118. Earlier commentators on the right to water writing before Comment 15 have explored the argument that the right to water should be seen as implicit within the right to life under article 6(1) of the ICCPR. See Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT’L ENVTL. L. REV. 1, 9–12 (1992).

119. Sánchez-Moreno & Higgins, *supra* note 12, at 1727–28. Cf. McCaffrey, *supra* note 118, at 8 (exploring, but ultimately rejecting an argument that a right to water could be binding as customary law if read into the right to an adequate standard of living under the Universal Declaration because it is not clear that so-called “welfare rights” under the

in a consistent practice of ensuring water provision for their citizens.<sup>120</sup> Secondly, the numerous world conferences and summits that have recognized water as a human right may be seen as indicating *opinio juris*, that is, belief by states that they have a legal obligation to ensure access to clean and affordable water.<sup>121</sup>

The right to water, as elaborated in Comment 15, encompasses both substantive and procedural components. The substantive components comprise availability, quality, and accessibility, including the principle that “water, and water facilities and services, must be affordable for all.”<sup>122</sup> The procedural components consist of the right to information concerning water issues, the right to participate, and the right to effective remedies.<sup>123</sup>

Comment 15 provides for general and specific obligations on state parties.<sup>124</sup> Notwithstanding article 2(1) of the ICESCR, which provides for a progressive achievement of rights recognized under the covenant,<sup>125</sup> the ESCR Committee has stated that state parties have some “immediate obligations” in relation to the right of water, “such as the guarantee that the right will be exercised without discrimination of any kind . . . and the obligation to take steps . . . toward the full realization of [the rights to an adequate standard of living and to the highest attainable standard of

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Declaration constitute binding customary law). The concept of “welfare” rights is discussed below. *See infra* Part III.C.

120. Sánchez-Moreno & Higgins, *supra* note 12, at 1728 n.295.

121. *Id.* The authors recognize, however, the obstacles to this argument evident in such documents as the Dublin Statement on Water and Sustainable Development, Principle No. 4, which designates that water should be recognized as an economic good. *Id.*

122. Comment 15, *supra* note 109, para. 12.

123. *Id.* para.12(c)(iv) (“[A]ccessibility includes the right to seek, receive and impart information concerning water issues.”); *id.* para. 48 (“The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water . . . held by public authorities or third parties.”); *id.* para. 55 (“Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels.”). *See also* Sánchez-Moreno & Higgins, *supra* note 12, at 1675.

124. *See* Comment 15, *supra* note 109, paras. 17–38.

125. Article 2(1) of the ICESCR provides: “Each state party . . . undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized . . . by all appropriate means, including particularly the adoption of legislative measures.” ICESCR, *supra* note 103, art. 2(1).

health].”<sup>126</sup> Furthermore, Comment 15 provides for a “constant and continuing duty” on states “to move as expeditiously and effectively as possible towards the full realization of the right to water.”<sup>127</sup> Finally, it introduces a “strong presumption that retrogressive measures taken in relation to the right to water are prohibited . . . .”<sup>128</sup>

Comment 15 divides the specific obligations of states into three categories. First, “obligations to respect” essentially impose a negative duty on states to refrain from interfering with the enjoyment of the right to water.<sup>129</sup> Second, “obligations to protect” impose affirmative duties on states to prevent third parties from interfering with the enjoyment of the right to water.<sup>130</sup> Third, “obligations to fulfill” require states to adopt a variety of measures empowering individuals and groups to exercise their right to water.<sup>131</sup> Finally, Comment 15 introduces the concept of “core obligations,” which include the obligation to “ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease.”<sup>132</sup>

With respect to non-state actors, states’ obligations to protect encompass safeguards against the actions of corporations operating water facilities.<sup>133</sup> In particular, “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.”<sup>134</sup> Furthermore, Comment 15 explicitly provides that “arbitrary or unjustified disconnection from water services or facilities,” and “discriminatory or unaffordable increases in the price of water” constitute *prima facie* violations of states’ obligation to respect the right to water.<sup>135</sup> These protections are directly relevant to potential violations that might arise from water privatization. As discussed below, however, safeguarding the human right to water from the potential violations by privatized water utilities through the mechanism of state responsibility may be in-

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126. Comment 15, *supra* note 109, para. 17. For an earlier discussion of the legal bases of a right to water and an argument that the right to water should be “an immediate obligation” of the state party encompassing a positive duty to supply safe water sufficient to sustain life, see McCaffrey, *supra* note 118, at 13.

127. Comment 15, *supra* note 109, para. 18.

128. *Id.* para. 19.

129. *Id.* paras. 21–22.

130. *Id.* paras. 23–24.

131. *Id.* paras. 25–29 (further dividing the obligations to fulfill into obligations to facilitate, promote and provide).

132. *Id.* para. 37.

133. *Id.* paras. 23–24.

134. *Id.* para. 24.

135. *Id.* para. 44(a).

adequate in light of the power differential between multinational water companies and the governments of developing countries. Governments of developing countries may be weak, corrupt, or fearful of detracting foreign investment.<sup>136</sup> It is therefore necessary to elaborate and support the legal mechanisms for holding private water providers directly liable for infringing the human right to water.

### C. *Objections to the Right to Water*

The right to water and its proper legal basis has aroused some controversy. In the view of two U.S. scholars, Michael J. Dennis and David P. Stewart, “the derivation of a separate right to water is virtually without precedent.”<sup>137</sup> They see the inference of a right to water from the provisions of the ICESCR as part of a larger revisionist program by the ESCR Committee.<sup>138</sup> In their view, the Committee has unduly rewritten provisions of the ICESCR and expanded the liability of state parties in a way neither borne out by the text of the covenant, nor by the history of its negotiation.<sup>139</sup>

In particular, Dennis and Stewart direct the brunt of their critique at the pronouncements made by the ESCR Committee concerning the affirmative duties on states to “fulfill” the rights provided for by the ICESCR, and the idea that states have immediately applicable core obligations—from which no derogation is permitted—to provide “minimum essential levels” of the rights to water, housing, food, and health.<sup>140</sup> These interpretations of the ICESCR articulate “unmistakably mandatory” obligations that, according to the authors, directly conflict with the aspirational and progressive nature of state obligations as articulated by article 2(1) of the ICESCR and evident in the treaty’s negotiating history.<sup>141</sup>

In addition, Dennis and Stewart object to some of the implementation procedures provided for by Comment 15, in particular the requirement that states adopt a national water strategy to be reviewed for compliance with the ICESCR requirements.<sup>142</sup> Subjecting the distribution and priorities of state resources to judicial determination would inappropriately result in judicial second-guessing of what are essentially legislative deci-

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136. See *supra* notes 81–86 and accompanying text.

137. 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, 494 (2004).

138. *Id.* at 491–500.

139. *Id.* at 494.

140. *Id.* at 491–92.

141. *Id.*

142. *Id.* at 497.

sions of sovereign governments.<sup>143</sup> Judicial determinations are especially inappropriate in the context of scarce resources because they would subject governments to liability for mere bad luck.<sup>144</sup>

This skepticism regarding the legal basis of, *inter alia*, the right to water and, consequently, its normative content and implementation procedures, stems from the larger jurisprudential and political debates regarding the differences between the so-called “liberty rights” under the ICCPR, and the so-called “welfare rights” under the ICESCR.<sup>145</sup> Liberty rights have been traditionally understood as negative rights, requiring the state merely to refrain from interfering with the enjoyment of such rights.<sup>146</sup> Welfare rights, on the other hand, require positive state action and significant expenditure of state resources.<sup>147</sup> This dichotomy has been challenged, however, as misplaced and reflective of the ideology of the Cold War era.<sup>148</sup> A closer examination reveals that liberty rights are not absolutely dissimilar from welfare rights in two respects. Liberty rights impose affirmative duties on state parties to organize governmental institutions—such as a legislature and a judiciary—that would ensure the rights’ realization, which requires spending resources.<sup>149</sup> Second, liberty rights have been interpreted to require affirmative steps by states to ensure the protection of rights from private infringement by third parties.<sup>150</sup> Moreover, at a conceptual level, the privileging of negative “liber-

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143. *Id.* at 498 (“Who is to say when a government has spent enough money to ensure a complaining individual’s highest attainable standard of physical or mental health?”).

144. *Id.*

145. *See id.* at 463–64 (“In light of Article 2(1) [of the ICESCR], can it cogently be argued that the ICESCR articulates real rights, or does it merely set forth hortatory goals, programmatic objectives, or utopian ideals?”).

146. McCaffrey, *supra* note 118, at 14–15 (explaining and critiquing this assumption as misplaced).

147. *Id.*

148. *See* Amnesty International, *The UN Human Rights Norms for Business: Towards Legal Accountability*, at 10, AI Index 0-86210-350-9 (2004), available at [http://web.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/IOR420022004ENGLISH/\\$File/IOR4200204.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR420022004ENGLISH/$File/IOR4200204.pdf) (observing that when the Universal Declaration of Human Rights was elaborated into treaty form, the two treaties were split as a result of the “ideological divisions of the Cold War,” and that after the Cold War, “it again became possible to view human rights obligations as interdependent”). *Cf.* Jeffrey L. Dunoff, *Does Globalization Advance Human Rights?*, 25 *BROOK. J. INT’L L.* 125, 135 (1999) (observing that during the 1980s the US rejected economic, social and cultural rights “in part as an element of larger Cold War strategies”).

149. McCaffrey, *supra* note 118, at 15; Dunoff, *supra* note 148, at 129.

150. Dunoff, *supra* note 152, at 129.



ties” over economic needs has been forcefully critiqued by Amartya Sen as rooted in an unduly narrow concept of freedom and justice.<sup>151</sup>

Concededly, even if the distinction between liberty and welfare rights is viewed as untenable, one still has to grapple with a textual difference in the ICCPR and the ICESCR. Whereas the ICCPR binds state parties to an “immediate obligation” to respect and ensure the proclaimed rights,<sup>152</sup> the ICESCR only obligates a state party to take steps “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the . . . Covenant . . . .”<sup>153</sup> This difference between the ICESCR and the ICCPR lends support to the view that the ICESCR sought to articulate “aspirational” goals rather than enforceable and justiciable state obligations. Because of their aspirational nature, the argument goes, economic, social, and cultural rights are difficult to implement through judicial mechanisms.

In response, some have pointed out that some of the rights under the ICESCR, including the right to water, are so fundamental as to require immediate, rather than progressive obligations on state parties.<sup>154</sup> Furthermore, the inference of immediately applicable core obligations to provide minimum essential levels of water may be seen as consistent with the obligation of good faith compliance with treaties.<sup>155</sup> Immediate obligations with respect to the right to water would not be unduly burdensome, insofar as they incorporate a “due diligence”<sup>156</sup> standard suffi-

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151. Sen traces the precedence of “liberty” over economic needs to John Rawls’ theory of justice, and libertarian variants of that theory, as exemplified in the work of Robert Nozick. *See* SEN, *supra* note 3, at 63–67. Instead, Sen proposes a “capability” oriented approach to justice, which emphasizes a person’s freedom to choose a life she values. *Id.* at 74. Sen defines “capability” as “the substantive freedom to achieve alternative functioning combinations,” where functioning “reflects the various things a person may value doing or being,” ranging from basic sustenance to participating in communal life. *Id.* at 75. Thus, within the capability framework, both “liberty” and economic and social needs are theoretically accorded equal importance.

152. *See* ICCPR, *supra* note 103, art. 2.

153. ICESCR, *supra* note 103, art. 2(1).

154. *See* McCaffrey, *supra* note 118, at 13. *See also* Comment 15, *supra* note 109, para. 1 (stating that the human right to water “is indispensable for leading a life in human dignity” as well as “a prerequisite for the realization of other human rights”); Amnesty International, *supra* note 148, at 10 (“Without protecting basic subsistence rights (such as food, water or shelter), it is difficult to exercise civil and political rights (such as free speech, fair trials or electoral participation).”).

155. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 79 (1969).

156. It should be noted that human rights law does not indicate what the standard of care should be with respect to the right to water. *See* Sánchez-Moreno & Higgins, *supra* note 12, at 1730. It has been argued, however, that strict liability would be undesirable

ciently elastic to take into account the capabilities of the particular state.<sup>157</sup>

With respect to the alleged difficulty of judicial determination of violations of the right to water, it should be attributed to the absence of national or international caselaw, rather than to some inherent non-justiciability of economic, social, and cultural rights.<sup>158</sup> Therefore, empowering the ESCR Committee to hear individual cases would allow it to elucidate the standard of care applicable to violations of the right to water.<sup>159</sup> Furthermore, attention should be focused on the procedural rights attendant to the right to water because violations of procedural rights lend themselves more readily to easy identification and monitoring.<sup>160</sup>

Finally, regarding the argument that judicial adjudication of the human right to water encroaches on what are essentially legislative decisions about distribution of state resources, one might argue that Dennis and Stewart are unduly formalistic. Judicial bodies have always engaged in the balancing of resources, to the extent that such balancing is implicit in protecting the minimum of rights that states and legislatures may not transgress.

#### IV. CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS

##### *A. Justification of Corporate Liability for Violations of International Human Rights*

Corporate activities have been brought into the ambit of international human rights law only recently. Historically, the human rights regime emerged to protect the rights of individuals from abuse by their governments; therefore, states have the principal duty to enforce international human rights law.<sup>161</sup> Although the development of international criminal law had focused international attention on the human rights responsibili-

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for state acts or omissions that do not give rise to liability under ordinary tort principles and that a negligence standard would be more appropriate. *Id.*

157. See McCaffrey, *supra* note 118, at 13.

158. See Sánchez-Moreno & Higgins, *supra* note 12, at 1672 n.20 (“The lack of national case law directly related to economic, social, and cultural rights has itself perpetuated the idea that those rights are not capable of judicial enforcement.” (quoting MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 10 (1995))).

159. Sánchez-Moreno & Higgins, *supra* note 12, at 1791.

160. *Id.* at 1794.

161. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L.J.* 443, 465–66 (2001).

ties of individual non-state actors, attention to the human rights violations by corporations had remained scant until recently.<sup>162</sup>

The case for corporate liability for violations of international human rights remains controversial.<sup>163</sup> The omission of private actors from the purview of international human rights law reflects the broader notion that only actions by states constitute the proper subject matter of international law, whereas violations by private actors fall within the purview of domestic laws.<sup>164</sup> Holding corporations liable for violations of international human rights departs from this traditional doctrine. The departure has been justified on the ground that the increasing economic<sup>165</sup> and political influence of corporations<sup>166</sup> in a globalized market requires that corporations comply with human rights.<sup>167</sup> Governments, especially those of undeveloped and developing countries, may be reluctant to regulate corporate activities for fear of discouraging foreign investments.<sup>168</sup> In addition,

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162. 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, 901 (2003).

163. See generally Ratner, *supra* note 161 (describing the jurisprudential debates surrounding corporate liability for human rights, and making the case that corporate liability is desirable and justified).

164. *Id.* at 466.

165. In 2000, the production output of transnational corporations amounted to one fourth of the world's total output, and 5 percent more of the output of all developing countries combined. Ann Marie Erb-Leoncavallo, *The Road From Seattle*, 37 UN CHRON., Jan. 1, 2000, at 2831. The direct investments of transnational corporations in developing countries have surpassed official aid and net lending by international banks. *Id.*

166. See Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, pmbl., U.N. Sub-Comm'n on the Promotion and Protection of Hum. Rts., 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter Norms] (noting that global trends have greatly increased the influence of transnational corporations and that these entities have both "the capacity to foster economic well-being" as well as to "cause harmful impacts on the human rights and lives of individuals"). See also Amnesty International, *Submission by Amnesty International under Decision 2004/116 on the "Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights"*, AI Index: POL 34/006/2004, Sept. 29, 2004, <http://web.amnesty.org/library/index/engpol340062004> (noting that companies exercise "tremendous influence and power" and that government regulation may be inadequate in many countries to protect individuals from adverse corporate actions).

167. Weissbrodt & Kruger, *supra* note 162, at 901 ("[W]ith power should come responsibility. . . ." (quoting Mary Robinson, U.N. High Comm'r for Hum. Rts., Second Global Ethic Lecture: Human Rights, Ethics and Globalisation, University of Tübingen, Germany (Jan. 21, 2002), <http://www.ireland.com/newspaper/special/2002/robinson>)).

168. Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 392-93 (2005); Ratner, *supra* note 161, at 462. Ratner describes the historical shifts of power between governments and companies as a

the global operations of corporations in multiple countries have made them more independent of government control<sup>169</sup> and outside the reach of any single government.<sup>170</sup>

*B. The Evolution of Corporate Responsibility: From Voluntary Codes Towards Binding Norms*

The first initiatives for corporate accountability for international human rights violations consisted of voluntary codes of conduct.<sup>171</sup> The Organization for Economic Cooperation and Development (OECD) issued Guidelines for Multinational Enterprises (OECD Guidelines) in 1976, applicable to enterprises operating in OECD member countries and eight non-members.<sup>172</sup> The OECD Guidelines provide that enterprises should “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”<sup>173</sup> Although the OECD Guidelines are not legally enforceable, but rather voluntary and aspirational,<sup>174</sup> they do, nevertheless, provide for a monitoring apparatus consisting of National Contact Points set

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“swinging pendulum.” In the colonial period, the system of “concessions” vested power in the colonial metropolises, which supported the exploitation of the colonies by the big European companies such as British East India. The period of decolonization saw expropriations of foreign investment by newly decolonized states, and the first efforts by host states to draft a multinational code of conduct for transnational corporations. The emphasis on host state rights gave way, at the end of the Cold War, to yet another shift in favor of the rights of transnational corporations, manifested in bilateral treaties between home states and host states, and free trade agreements. *Id.* at 452–60. For a discussion of the implications of bilateral investment treaties on state protections of human rights, see Ryan Suda, *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization* (2005), <http://www.nyulawglobal.org/workingpapers/documents/GLWP0105Suda.pdf> (last visited Jan. 8, 2006) (noting that expropriation provisions in bilateral investment treaties may preclude states from regulating human rights, and outlining a hypothetical human rights defense to an arbitration brought by an investor for alleged expropriation).

169. Ratner, *supra* note 161, at 463.

170. See Amnesty International, *supra* note 148, at 5.

171. One of the earliest and best known voluntary codes of conduct, the “Sullivan Principles,” was elaborated for transnational corporations operating in South Africa during apartheid. See *Sullivan Principles for U.S. Corporations Operating in South Africa*, 24 I.L.M. 1496 (1985). For an overview of the various initiatives for developing corporate codes of conduct, including a brief review of the Sullivan Principles, see Murphy, *supra* note 168, at 403–20.

172. See Organisation for Economic Co-operation & Development, *OECD Guidelines for Multinational Enterprises*, June 21, 1976, <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (revised 2000).

173. *Id.* at 19.

174. *Id.* at 17.

up by adhering states and an overseeing Investment Committee.<sup>175</sup> The main critique of the OECD Guidelines concerns their implementation. Their monitoring mechanism has been viewed as inadequate because its bodies lack investigative or remedial powers and are susceptible to abuse because state officials may refrain from actions that would alienate business from the economic interests of their government.<sup>176</sup> Secondly, it has been argued that the human rights provision in the OECD Guidelines is too general to provide meaningful guidance for companies.<sup>177</sup>

In January 1999, United Nations Secretary-General Kofi Annan articulated nine principles for corporate responsibility at the World Economic Forum.<sup>178</sup> With the addition of a tenth principle against corruption in 2004, these principles have come to be known as the Global Compact.<sup>179</sup> With respect to human rights, the Global Compact articulates two principles: (1) "Businesses should support and respect the protection of internationally proclaimed human rights;" and (2) "make sure that they are not complicit in human rights abuses."<sup>180</sup> The inclusion of a pledge to support human rights and to avoid complicity with human rights violations reflects an expansion of the role of business enterprises regarding human rights over and above that implicit in the OECD Guidelines, which provided only that business enterprises should "respect" human rights. Companies may participate in the Global Compact by sending a letter to the Secretary-General, followed by a change in corporate operations "so that the Global Compact and its principles become part of strategy, culture and day-to-day operations" of the company.<sup>181</sup> Still, the Global Compact has been criticized for being too general, for failing to encourage companies to consider best practices compliant with the prin-

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175. *Id.* at 32, 35–37.

176. See Amnesty International, *supra* note 162 (expressing concern that government officials may be too close to business interests, potentially allowing the government's economic interest to influence its consideration of corporate behavior).

177. *Id.*

178. Secretary-General Kofi Annan, Address at the World Economic Forum in Davos, Switzerland (Jan. 31, 1999), U.N. Doc. SG/SM.6448.

179. The ten principles forming the Global Compact and other initiatives under the same umbrella are available at United Nations Global Compact, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Jan. 8, 2006).

180. *Id.*

181. United Nations Global Compact, How to Participate in the Global Compact, <http://www.unglobalcompact.org/HowToParticipate/index.html> (last visited Jan. 8, 2006).

principles, and for lacking any oversight mechanisms or means to contest the participation of companies that fail to abide by its principles.<sup>182</sup>

Responding to increased international scrutiny of corporate activities, many companies have adopted voluntary internal codes of conduct.<sup>183</sup> Although around 1,000 internal company codes have been estimated to exist,<sup>184</sup> according to Amnesty International, fewer than fifty make explicit references to human rights.<sup>185</sup> The shortcomings of voluntary schemes in ensuring that corporations abide by human rights norms have led to deliberations of binding measures.

### *C. The Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises*

In 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted a landmark instrument of corporate human rights obligations, the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms).<sup>186</sup> The Norms have been written as the first

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182. Amnesty International, *supra* note 166. See Murphy, *supra* note 168, at 413. It should be also pointed out that a search of the Global Compact participant database reveals only 889 business participants worldwide. United Nations Global Compact, COP Search Results, [http://www.unglobalcompact.org/CommunicatingProgress/cop\\_search.html?reset=1](http://www.unglobalcompact.org/CommunicatingProgress/cop_search.html?reset=1) (click “Business participants only”; then click “Search”) (last visited Jan. 8, 2006).

183. For a discussion of the rise of corporate codes of conduct, see Fiona McLeay, *Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations—A Small Piece of a Large Puzzle* (2005), <http://www.nyulawglobal.org/workingpapers/documents/GLWP0105McLeay.pdf>. For a discussion of corporate responses to international scrutiny from a legal-sociological standpoint, especially in the wake of human rights claims against corporate actors under the Alien Torts Claims Act, see generally Ronen Shamir, *Between Self-Regulation and the Alien Torts Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 *LAW & SOC’Y REV.* 635 (2004). Shamir argues that companies have responded with a twofold strategy. The first part of companies’ strategy is to undermine the identity and motives of Western public interest lawyers who bring the cases, and the second part consists of the adoption of internal voluntary codes. The adoption of voluntary codes allows companies to “stabilize” the meaning of the concept “social responsibility” around voluntary, rather than binding, schemes. *Id.* at 660. As the author puts it, “corporate voluntarism has become . . . a crucial frontline in the struggle over meaning and an essential ideological locus for disseminating the neoliberal logic of altruistic social participation that is to be governed by goodwill alone.” *Id.* For an example of a voluntary code of a multinational water company, see RWE, RWE CODE OF CONDUCT, <http://www.rwe.com/generator.aspx?property=Data/id=266710/en-download.pdf>.

184. McLeay, *supra* note 183, at 7.

185. Amnesty International, *supra* note 148, at 5.

186. See generally Norms, *supra* note 166.

non-voluntary scheme for international corporate accountability for human rights abuses.<sup>187</sup> Their legal authority has been hotly contested. The Norms' principal drafter argues that "[t]he legal authority of the Norms derives principally from their sources in treaties and customary international law, as a restatement of international legal principles applicable to companies."<sup>188</sup> Critics have disputed this characterization, charging that the Norms "are presented as a set of norms or standards when in fact many of the instruments from which they are drawn are not themselves legally binding and those that are heavily qualify the rights they are supposed to address."<sup>189</sup> While the Norms have been overwhelmingly supported by international human rights organizations and civil society representatives in numerous countries,<sup>190</sup> multiple business associations

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187. Weissbrodt & Kruger, *supra* note 162, at 903. *See also* Amnesty International, *supra* note 148, at 6–7 (noting that the Norms are "self-consciously normative," and lack clauses characteristic of voluntary schemes that would highlight their non-regulatory character). In April 2004, however, the Commission on Human rights issued a decision, in which it "affirm[ed] that [the Norms] has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard." Report of the Sub-Commission on the Promotion and Protection of Human Rights, U.N. Comm'n on Hum. Rts., 60th Sess., U.N. Doc. E/CN.4/2004/L.73/Rev.1 (Apr. 16, 2004).

188. Weissbrodt & Kruger, *supra* note 162, at 913; Amnesty International, *supra* note 148, at 7 ("All of the substantive human rights provisions in the UN Norms are drawn from existing international law and standards. The novelty or the UN Norms is to apply these . . . to private enterprises, but even in doing so to draw on a wide range of international practice . . ."). *See also* Norms, *supra* note 166, pmbl. (recalling that the Universal Declaration of Human Rights is addressed to every organ of society, including transnational corporations and other business enterprises). Weissbrodt and Kruger concede that there is no consensus on the place of businesses within the international legal order as of yet that would make possible the Norms' incorporation into treaties as "hard law," but argue that the further refinement and implementation of the Norms by higher bodies in the United Nations will develop their binding nature. Weissbrodt & Kruger, *supra* note 162, at 913–15. *See also* Amnesty International, *supra* note 148, at 6 ("The process leading to the UN Norms is similar to that resulting in other 'soft law' standards, some of which are now seen as part of customary international law.").

189. Timothy E. Deal, Senior Vice President, U.S. Council for International Business, Statement to the Fund for Peace, Human Rights and Business Roundtable: Business and Human Rights; The Proposed Norms on the Responsibilities of Business Regarding Human Rights (Feb. 6, 2004), <http://www.uscib.org/index.asp?documentID=2823>.

190. *See* Amnesty International, Statement of Support for the UN Human Rights Norms for Business delivered at the 60th Session of the Commission on Human Rights 15 March–23 April 2004, Geneva, AI Index: IOR 42/005/2004, [http://web.amnesty.org/pages/ec-unnorms\\_4-eng](http://web.amnesty.org/pages/ec-unnorms_4-eng) (the statement has been signed by nearly 200 NGOs and 175 individuals including members of the European Parliament).

have criticized the Norms rigorously, principally on the ground that they shift human rights obligations from governments to private actors.<sup>191</sup>

Reflecting this tension, the future of the Norms remains uncertain.<sup>192</sup> At its session in April 2005, the United Nations Commission for Human Rights refrained from endorsing the Norms. Instead, it requested that the Secretary-General appoint a special representative for a period of two years, with a mandate to clarify further the standards of corporate accountability, and decided to continue consideration of the question at its next session.<sup>193</sup>

Under the Norms, transnational corporations have the general obligation to “promote, secure the fulfillment of, respect, ensure respect of, and protect human rights recognized in international as well as national law” within their spheres of activity and influence.<sup>194</sup> This obligation embraces a standard of “due diligence” that companies’ activities “do not contribute directly or indirectly to human abuses” or “benefit from abuses of which they were aware or ought to have been aware.”<sup>195</sup> In relevant part, the Norms obligate corporations specifically to “respect economic, social

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191. See, e.g., Deal, *supra* note 189; International Chamber of Commerce [ICC] & International Organization of Employers [IOE], Joint Views of the ICC and IOE on the Draft 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/NGO/44 (July 24, 2003). For a summary of the challenges raised in response to the Norms, see U.N. Comm’n on Hum. Rts., *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, para. 20, U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005) [hereinafter *High Commissioner Report*].

192. See Murphy, *supra* note 168, at 408 (“Initial enthusiasm for the [Norms] . . . has been muted.”).

193. Human Rights Resolution 2005/69, U.N. Comm’n on Hum. Rts., 61st Sess., U.N. Doc. E/CN.4/RES/2005/69 (2005). The Commission’s request was subsequently approved by the Economic and Social Council. Decision 2005/273, U.N. Econ. & Soc. Council, <http://www.un.org/docs/ecosoc/documents/2005/decisions/Decision%202005-273.pdf>.

194. Norms, *supra* note 166, para. 1 (noting, also, that states have the primary responsibility of protecting human rights and ensuring their observance by businesses). See also Ratner, *supra* note 161, at 508–10 (explaining the “corporate sphere” theory as a set of concentric circles, where the greatest duty runs to those with most ties to the corporation, while lesser duties run to those with less ties to the corporation).

195. Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, para. 1(b), U.N. Sub-Comm’n on the Promotion and Protection of Hum. Rts., 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003) [hereinafter *Commentary*] (stating that the “due diligence” standard also encompasses an obligation of corporations to inform themselves of the human rights impact of their activities so that they can avoid being complicit in violations).



and cultural rights . . . and contribute to their realization, in particular the rights to . . . drinking water,” as well as to “refrain from actions which obstruct or impede the realization of those rights.”<sup>196</sup>

The Norms provide for implementation by various entities, ranging from internal self-regulation by business enterprises to monitoring by other United Nations bodies, intergovernmental organizations, non-governmental organizations, investors, lenders and consumers, states, and so forth.<sup>197</sup> In particular, the Norms require businesses to adopt the provisions of the Norms in internal codes of conduct, disseminate them to stakeholders and the public, incorporate them into their business contracts, and undertake monitoring and periodic reports.<sup>198</sup> As part of their monitoring obligations, businesses are required to study the human rights impact of major projects they undertake, within the limits of their resources and capabilities, to make the results available to stakeholders, and to consider stakeholder reactions.<sup>199</sup> Moreover, the Norms require corporations to engage in periodic assessments of their compliance with the Norms and to make these assessments available to stakeholders to the same extent as their annual reports.<sup>200</sup> Where assessments show inadequate compliance, the Norms call upon businesses to develop a plan of action for reparation and redress.<sup>201</sup> In addition to actions by the companies, the Norms provide for judicial determination of damages and criminal sanctions against noncompliant companies, in accordance with national and international law.<sup>202</sup>

The Norms impose substantive obligations and detailed implementation procedures that go well beyond the general guidelines of prior voluntary models.<sup>203</sup> With respect to the right to water, the Norms could provide an invaluable tool for ensuring that water privatization will not endanger—and, indeed, that it will contribute to the realization of—the right to water.

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196. Norms, *supra* note 166, para. 12. As the Commentary explains, this provision explicitly obligates corporations to “observe standards which protect the right to water and are otherwise in accordance with [General Comment 15].” Commentary, *supra* note 195, para. 12(b).

197. For an overview of the implementation procedures envisioned by the Norms, see Weissbrodt & Kruger, *supra* note 162, at 915–21.

198. Norms, *supra* note 166, paras. 15–16; Commentary, *supra* note 195, paras. 15–16.

199. Commentary, *supra* note 195, para. 16(i).

200. *Id.* para 16(g).

201. *Id.* para 16(h).

202. Norms, *supra* note 166, para 18.

203. See Amnesty International, *supra* note 148, at 15.

## V. ANALYSIS AND CONCLUSION

*A. Analysis of the Possible Scope of Liability of Private Water Providers for Violations of the Right to Water and its Enforcement*

Reading the provisions of Comment 15 and the Norms on corporate accountability together, it is possible to examine hypothetically the scope and nature of corporate responsibility for violations of the human right to water in the context of privatized water utilities. Maria McFarland Sánchez-Moreno and Tracy Higgins have argued that privatization should not constitute a *per se* violation of the right to water.<sup>204</sup> Instead, in their view, privatization might indeed contribute to the realization of the right to water.<sup>205</sup> Nevertheless, the particular circumstances in which privatization is carried out might give rise to substantive and procedural violations of the right to water.<sup>206</sup>

Commenting on the privatization of water in Cochabamba, Bolivia, Sánchez-Moreno and Higgins have argued that the Bolivian government might have violated substantive provisions of the right to water, in particular the principles of equity and affordability,<sup>207</sup> by approving rate increases without providing for mechanisms to protect its poor residents.<sup>208</sup> Furthermore, the failure of the Bolivian government to create timely op-

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204. Sánchez-Moreno & Higgins, *supra* note 12, at 1775–76 (describing, but rejecting the view that privatization might be seen as a *per se* violation of the human right to water). Drawing on William Finnegan’s article on Cochabamba in *The New Yorker*, the authors note that the peasants in Cochabamba viewed the concessionaire as inherently interfering with their customary habit of using water for free. *Id.* at 1775. This view was captured in the expression that the concessionaire attempted to “lease the rain.” *Id.* See also Finnegan, *supra* note 11.

205. Sánchez-Moreno & Higgins, *supra* note 12, at 1776. *Cf.* Human Rights Resolution 2005/69, *supra* note 193, pmbl. (recognizing that “the responsible operation of transnational corporations and other business enterprises and effective national legislation can contribute to the promotion of respect for human rights and assist in channelling the benefits of business towards this goal . . .”). *But see* Kothari, *supra* note 39 (contending that privatization erodes the human rights to housing, water, and sanitation).

206. Sánchez-Moreno & Higgins, *supra* note 12, at 1776.

207. Comment 15, *supra* note 109, paras. 12(c)(ii), 27.

208. *Id.* para. 44(a)–(b). See Sánchez-Moreno & Higgins, *supra* note 12, at 1776–79. The authors also observe that the concession arrangements between the Bolivian government and the concessionaire might have interfered with customary uses of water by Cochabamba peasants, but note that such interference would only give rise to a violation if carried in an arbitrary manner. *Id.* at 1779. They argue that arbitrariness may be inferred from the fact that the interference “was merely a byproduct of the deal [between the government and the consortium] structured to serve other purposes.” *Id.*

portunities for citizens to participate in the passing of water laws violates the procedural rights of participation and information.<sup>209</sup>

Applying the requirements of Comment 15 and the Norms in this context would extend analogous obligations to a private water provider, qualified by the limiting standard of “due diligence,” which is expressly stated in the Norms. Thus, under the standard of “due diligence” a private water provider would be liable for violating the substantive right to affordable water by designing rate increases without mitigation mechanisms for poor households, to the extent that the company knew or should have known of the consequences of rate increases on the poorest residents that it serves.<sup>210</sup> Since the Norms also impose an affirmative duty on companies to inform themselves of the effect of their activities on human rights, a company that was unaware of the consequences of rate hikes on the poor residents that it serves would also arguably violate its duty of due diligence.<sup>211</sup>

The procedural rights of information and participation by relevant stakeholders promulgated in Comment 15 as components of the right to water are supplemented by the implementation procedures of disclosure and monitoring envisioned by the drafters of the Norms. Under the monitoring obligations of the Norms, a private water provider has an affirmative duty to conduct studies of the human rights impact of proposed privatization contracts. Such duty would compel private water providers to put their superior institutional resources into designing innovative pricing solutions, such as differential pricing and subsidies for low-income users to ensure affordability and access to minimum amounts of water for all. In addition, since Comment 15 provides for procedural rights to information and participation<sup>212</sup> of affected people, water providers would be required not only to make available the results of human rights studies to stakeholders, but to consult the local communities affected by their activities. Imposing a relationship of correlative duties and rights between multinational water providers and sub-sovereign entities, such as affected communities, could fill in regulatory gaps resulting from weak or corrupt governments and prevent cooperation with authoritarian ones. The requirements further ensure that corporations will refrain from dealing with

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209. Sánchez-Moreno & Higgins, *supra* note 12, at 1781–86.

210. See Commentary, *supra* note 195, para. 1(b). See also Sánchez-Moreno & Higgins, *supra* note 12, at 1786–87 (discussing the potential liabilities of the consortium involved in Cochabamba).

211. See Commentary, *supra* note 196, para. 1(b).

212. The right to public participation under Comment 15 extends to groups and individuals, over and above the participation by national and local officials. Sánchez-Moreno & Higgins, *supra* note 12, at 1782.

governments behind closed-doors without public input, thereby increasing the transparency of the negotiations between water companies and governments.

Enforcement of corporate responsibility of the human right to water may prove difficult. Although a discussion of enforcement strategies and possible forums is beyond the scope of this Note, it will suffice to point out two main barriers. First, the passage of time is necessary before the Norms and Comment 15 mature into “hard law.” In this respect, future support by the United Nations and the community of states is critical. Second, although the Norms envision enforcement by international tribunals and national courts,<sup>213</sup> there is presently no complaint mechanism to bring violations of economic, social and cultural rights to the attention of the ESCR Committee. Nevertheless, violations of the right to water might be brought before regional human rights forums, where the relevant treaties cover economic, social and cultural rights, provided that other jurisdictional requirements are satisfied.<sup>214</sup> Enforcement by national courts has been utilized, for example, in South Africa, although it should be borne in mind that the right to water is enshrined in the South African Constitution.<sup>215</sup> Despite the difficulties of enforcement through litigation, using the Norms and Comment 15 as a publicity tool may be a powerful means of bringing international pressure on private water providers to incorporate human rights provisions in their contracts with governments and to adopt internal self-regulation policies.

#### *B. The Desirability of a Human Rights Approach to Water Privatization*

Considering the degree to which private water operators supplant or replace public entities in the delivery of water services, especially in developing countries, the elaboration of global mechanisms to protect and ensure access to water becomes paramount. As commentators on both sides of the private-public debate have recognized, the global scope of

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213. Norms, *supra* note 166, para. 18.

214. See, e.g., Organization of African Unity, Banjul Charter on Human and Peoples' Rights art.16(1), June 27, 1981, 21 I.L.M. 58 (1982) (“Every individual shall have the right to enjoy the best attainable state of physical and mental health.”).

215. See, e.g., *Residents of Bon Vista Mansions v. S. Metro. Local Council* 2002 (6) BCLR 625 (W) (S. Afr.) (holding that plaintiffs' disconnection from water supply constituted a prima facie violation of their right to water). See also Michael Kidd, *Not a Drop to Drink: Disconnection of Water Services for Non-Payment and the Right of Access to Water*, 20 S. AFR. J. HUM. RTS. 119 (2004), available at <http://wwwserver.law.wits.ac.za/sajhr/2004/kidd.pdf>. Where the right to water is not enshrined in a national constitution, the requirement of implementing legislation before treaty obligations become enforceable, especially in dualist countries, may prevent direct enforcement through national courts.

the water crisis requires global solutions. The exploration of public-private partnerships, extolled by international financial institutions, must go hand-in-hand with developing mechanisms for holding multinational water companies responsible for the human right to water.

A human rights approach to water privatization is desirable for several reasons. First, by bringing the scrutiny of the international community to bear upon the activities of multinational water companies, the human rights approach alleviates the power inequity between transnational corporations and governments of developing countries. Moreover, a human rights approach to water privatization would ensure the participation of the local people as "stakeholders" affected by privatization. Such participation not only protects the interests of affected communities, but also reduces the political risk for private investors, possibly preempting some of the privatization fiascos, like the water war in Bolivia.

Second, a human rights approach contributes to the goal of universal access to water by clarifying that water is "a legal entitlement, rather than a commodity or service provided on a charitable basis."<sup>216</sup> Imposing a binding duty for the human right to water on private water providers is necessary to ensure that the right will not be violated where the host governments are unable or unwilling to regulate.

Nevertheless, some of the objections pertaining to corporate responsibility for human rights in general may attain heightened force in the context of a "welfare" right such as the human right to water. For example, an objection may be raised that companies should not be forced to assume responsibilities that have traditionally been accorded to states, such as providing for the welfare of the citizenry.<sup>217</sup> Countering such objections, the Norms clearly state that states remain the primary addressees of human rights law.<sup>218</sup> In addition, the Norms limit corporate accountability through the theory of the corporate sphere, ensuring that corporations are not subjected to a sweeping obligation to the general citizenry.<sup>219</sup> Thus, under the Norms, a transnational company that operates in a host

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216. THE RIGHT TO WATER, *supra* note 17, at 9 (also noting that the human rights approach empowers individuals to realize their human rights, rather than seeing them as "passive recipients of aid").

217. Indeed, it is still contested whether states have such responsibilities. *See supra* Part III.C.

218. Amnesty International, *supra* note 148, at 14.

219. *See High Commissioner Report, supra* note 191, para. 36 ("In contrast to the limits on States' human rights obligations, the boundaries of the human rights responsibilities of business are not easily defined by reference to territorial limits. . . . Defining the boundaries of business responsibility for human rights therefore requires the consideration of other factors, such as the size of the company, the relationship with its partners, the nature of its operations, and the proximity of people to its operations.").

state, but does not otherwise provide water services, does not—like its host state—have a general affirmative duty to undertake positive steps toward the realization of the right to water of the citizens of the host state. However, a transnational corporation that is engaged in the provision of water services would be bound by an affirmative duty running not to the general citizenry, but to those water consumers affected by corporate activity.<sup>220</sup>

The recent developments regarding the elaboration of a human right to water and corporate responsibility for human rights may go some way toward addressing the problems posed by the privatization of a resource essential to human life, while at the same time preserving the benefits of privatization. Whether the Norms will develop into “hard law” that would be binding and enforceable against private water providers remains to be seen.

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220. In this respect, it should be noted that corporate responsibility for the human right to water is not a panacea to all of the problems attendant to water privatization. For instance, because of the corporate sphere theory, the human rights approach may be of limited use in addressing the problem of “unbundling” of services central to many privatization schemes, which allows the separation of profitable from unprofitable regions. See *Kothari, supra* note 39. By definition, unbundled unprofitable regions which remain in the public sector would be outside the corporate sphere.

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