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Sharmila L. Murthy JD, MPA

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# The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over-Privatization

Sharmila L. Murthy, JD, MPA\*

## INTRODUCTION

The recognition by the United Nations (U.N.) General Assembly<sup>1</sup> and the U.N. Human Rights Council<sup>2</sup> in 2010 of a human right to safe drinking water and sanitation has propelled awareness of the global water and sanitation crisis to new heights, while also raising a host of challenging issues. This article surveys the evolution of this right by attempting to place it within a broader historical context and by addressing some of the controversies around privatization.

The framing of water and sanitation as a human right can be understood as an affirmation of the fundamental importance of water and sanitation for human dignity, and as a response to global water service trends that have increasingly emphasized efficiency, financial sustainability, and privatization. The concept of a human right to water and sanitation has been an important vehicle for communities around the world to raise attention to perceived inequities and injustice in access to a vital natural resource and to services that have significant public health implications. Part I of this article discusses the history of the

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\* Fellow, Harvard Kennedy School of Government: Human Rights to Water & Sanitation Program, Carr Center for Human Rights Policy, and Sustainability Science Program, Mossavar-Rahmani Center for Business & Government; Assistant Professor, Suffolk University Law School (as of July 1, 2013); JD, Harvard Law School; MPA, Harvard Kennedy School of Government. The author would like to thank Mark Williams, Anna Russell, Benjamin Mason Meier, David McDonald, Charlie Clements, Mathias Risse, and Arani Kajenthira for their helpful comments, and Maya Mahin and Philip Hamilton for their valuable research assistance. This paper also benefited from great feedback provided at a Human Rights Workshop at Yale Law School organized by the Orville H. Schell, Jr. Center for International Human Rights.

1. G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (Aug. 3, 2010); G.A. Res 64/PV.108, U.N. Doc. A/RES/64/PV.108 (July 28, 2010); Press Release, General Assembly, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, By Recorded Vote of 122 in Favour, None Against, 41 Abstentions, U.N. Press Release GA/10967 (28 July 2010).

2. Human Rights Council Res. 15/9, U.N. Doc. A/HRC/RES/15/9 (Oct. 6, 2010).

human right to water and sanitation, which was not explicitly included among the rights recognized at the founding of the human rights system. The idea of a human right to water first emerged at international environmental conferences, in response to water justice struggles around the world. However, it was not until decades later that the right to water, along with the right to sanitation, was recognized within the human rights legal framework. In the streets, the human right to water became a rallying call for political and social anti-privatization movements that sought to keep water as a public good that would be accessible to everyone. Although several countries, including the United States and Canada, had historically been opposed to recognizing the right to water, a review of the General Assembly minutes during the 2010 vote on the human right to safe drinking water and sanitation suggests that the politics around privatization may have influenced the positions of these abstaining countries. The Human Rights Council resolution several months later clarified several of these concerns, leading to a consensus decision. While the human right to safe drinking water is arguably recognized in international law, the legal status of an independent right to sanitation is less clear, which is why this article is called the human right(s) to water and sanitation. The debate over the scope of the human right to water and sanitation is not necessarily over, as the recent dialogue on the human right to water and sanitation at the Rio+20 conference, discussed *infra*, suggests.<sup>3</sup>

Part II considers the meaning of the human right to water and sanitation under international law. The human right to water and sanitation entitles “everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”<sup>4</sup> The legal obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) are discussed, with a focus on the concepts of progressive realization and nondiscrimination. The section also addresses misconceptions that often arise regarding the enforceability of these rights and the nature of positive and negative rights.

Part III turns to the topic of privatization. Although human rights are neutral with respect to the private sector’s involvement in the delivery of water and sanitation services, human rights are not irrelevant to such decisions. From a human rights perspective, the important question is not *whether* a private sector entity is involved in the delivery of services, but *how* the arrangement is structured, implemented, and monitored. While this issue has been central to the debate around the human right to water and sanitation, it is not new from the

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3. See discussion *infra* Part I.D; Rio+20 United Nations Conference on Sustainable Development, June 20-22, 2012, *The Future We Want* (Jan. 10, 2012).

4. United Nations, Econ. & Soc. Council, Comm. on Econ., Soc., & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 29th Sess., 2002, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter General Comment No. 15].

perspective of economic and social rights. Given the history of the ICESCR, it may seem surprising that the human right to water and sanitation has been perceived to be so at odds with privatization. Three themes highlighting the tensions between human rights and private sector involvement in the water and sanitation sectors are explored: financial sustainability, efficiency, and dispute resolution. In effect, human rights principles can be understood as guideposts for regulation, monitoring, and oversight, which are critical when the private sector is involved in the delivery of water and sanitation services.

## I.

### UNDERSTANDING THE HUMAN RIGHT(S) TO WATER AND SANITATION AS A SOCIO-LEGAL RESPONSE TO TRENDS IN WATER MANAGEMENT

Communities around the world have invoked the idea of a human right to water in local struggles to maintain access to traditional sources of water and to improve access to sufficient quantities of good quality and affordable water and sanitation services. Their calls for a human right to water have been grounded in notions of justice<sup>5</sup> and have reflected not only a physical dependence on water for survival, but also a cultural, religious, and spiritual relationship with this vital natural resource. For many, it is almost axiomatic to describe water as a human right because it is so vital for human existence. Yet the recognition of water, and later sanitation, as a human right has been a relatively new feature of our international legal system.

The human right to water and sanitation was not explicitly recognized at the time the founding human rights instruments were adopted by the United Nations. The field of human rights was codified in the wake of World War II, with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. As its name suggests, the UDHR was intended to be declaratory, outlining the aspirations of the international community to respond to the atrocities of the Holocaust. Since then, the international human rights system has evolved, providing a forum for articulating legally binding obligations and aspirational goals through soft law instruments. After the UDHR was adopted, the goal was to create one treaty that would cover the wide range of human rights recognized within it, with no distinction between civil and political rights and economic, social, and cultural rights.<sup>6</sup> However, for a variety of historical and ideological reasons, two covenants were created, reflecting a conceptual divide that still persists today. As this article demonstrates, many of the concerns raised about framing water and sanitation as a human right may seem new to the water and

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5. Heiner Bielefeldt, *Access to Water, Justice and Human Rights*, in *THE HUMAN RIGHT TO WATER* 49, 49-51 (Eibe Riedel & Peter Rothen eds., 2006).

6. MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* (1995).

sanitation sectors, but they reflect longstanding critiques and misconceptions about economic, social, and cultural rights.<sup>7</sup>

One of the earliest seminal human rights conventions, the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant) of 1966, failed to explicitly recognize a human right to water and sanitation. Matthew Craven, who examined the *travaux préparatoires*, indicated that water, along with other possible rights, such as transport, were considered in the drafting process of Article 11 on the “right to an adequate standard of living.”<sup>8</sup> Article 11 was intended to be broad, and the three specifically mentioned rights—to food, clothing, and housing—were meant to be illustrative. It also may be that the drafters assumed that water was so essential to life that it was redundant to recognize a right to water.<sup>9</sup> Alternatively, at the time the ICESCR was being drafted in the nineteen fifties and sixties, there were fewer concerns about water scarcity.<sup>10</sup> Given the taboos around discussing sanitation, it is perhaps more understandable why this was not expressly recognized as a right. However, soft law declarations made at a series of international conferences beginning in the nineteen seventies paved the way for the eventual recognition of the right to water and sanitation as within the scope of rights recognized by the Covenant.

The genesis of the right to water discourse, which in turn gave way to discussion of a right to sanitation, can be traced back to the 1977 Mar del Plata conference in Argentina. The conference issued an Action Plan on “Community Water Supply,” declaring that “[a]ll peoples . . . have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”<sup>11</sup> This principle was affirmed in Agenda 21, Chapter 18 of the 1992 U.N. Conference on Environment and Development in Rio de Janeiro.<sup>12</sup> The Mar del Plata conference also recognized that water and disposal of wastewater are essential

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7. See Part III.A.

8. See CRAVEN, *supra* note 6 at 25, 291–293. See also Peter Gleick, The Human Right to Water, 1 *Water Policy* 487, 490–491 (1998) (noting the article in the UDHR on a right to an adequate standard of living).

9. Gleick, *supra* note 8, at 490 (“A detailed review of international legal and institutional agreements relevant to these questions supports the conclusion that the drafters implicitly considered water to be a fundamental resource.”); Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 *GEO. INT’L ENVTL. L. REV.* 1 (1992–93).

10. INGA WINKLER, *THE HUMAN RIGHT TO WATER: SIGNIFICANCE, LEGAL STATUS AND IMPLICATIONS FOR WATER ALLOCATION* 42 (2012) (noting that at the time that the Covenant was drafted, the right to water was not included most likely because “water was not perceived to be as scarce as a resource as it is today; its availability was taken for granted—water was considered to be available as freely as is the air to breathe”).

11. United Nations Water Conference, Mar del Plata, Mar. 14–25, 1977, *Report of the United Nations Water Conference*, U.N. Doc. E/CONF.70/29 (1977); SALMAN M. A. SALMAN & SIOBHÁN MCINERNEY-LANKFORD, *THE HUMAN RIGHT TO WATER: LEGAL AND POLICY DIMENSIONS* 8–9 (2004).

12. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Agenda 21*, U.N. Doc. A/CONF.151/26 (1993).

for life and human development. It called for international cooperation so that “water is attainable and is justly and equitably distributed among the people within the respective countries.”<sup>13</sup> Moreover, the decade between 1981 and 1990 was declared to be the International Drinking Water Supply and Sanitation Decade.<sup>14</sup>

The right to access clean water and sanitation was further recognized in 1992 at the International Conference on Water and Environment in Dublin, but with an emphasis on affordable services and the economic value of water. The four key Dublin Principles were:

- (1) Fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment;
- (2) Water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels;
- (3) Women play a central part in the provision, management and safeguarding of water; and,
- (4) Water has an economic value in all its competing uses and should be recognized as an economic good.<sup>15</sup>

The fourth principle has been the most influential and controversial:

Within this principle, it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price. Past failure to recognize the economic value of water has led to wasteful and environmentally damaging uses of the resource. Managing water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources.<sup>16</sup>

The Dublin Principles recognized the basic right to clean water and sanitation, but also emphasized a link between pricing water appropriately and environmentally sustainable water usage. The basic idea was that if people had to pay for water, it would be used more carefully.<sup>17</sup>

The idea in the Dublin Principle of managing water as an economic good was controversial. For many, the treatment of water as an economic good would pave the way for greater commodification and privatization, placing control over a vital natural resource in the hands of a few who would sell it for a price.<sup>18</sup> Yet,

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13. *Report of the United Nations Water Conference, supra* note 11, at 2.

14. G.A. Res. 34/191, U.N. Doc. A/RES/34/191 (Dec. 19, 1977).

15. International Conference on Water and the Environment, Dublin, Ir., Jan. 26-31, 1992, *The Dublin Statement on Water and Sustainable Development* (June 1992) [hereinafter *Dublin Statement*]; SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 9.

16. *Dublin Statement, supra* note 15.

17. PETER ROGERS & SUSAN LEAL, *RUNNING OUT OF WATER: THE LOOMING CRISIS AND SOLUTIONS TO CONSERVE OUR MOST PRECIOUS RESOURCE* 124 (2010) (noting that historically water has been undervalued as an economic resource; as Plato had observed long ago, “only what is rare is valuable, and water which is the best of all things . . . is also the cheapest”).

18. *See, e.g., MAUDE BARLOW & TONY CLARKE, BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD’S WATER* xii (2002)

[G]overnments and international institutions are advocating a ‘Washington Consensus’ solution: the privatization and commodification of water. Price water, they

as Part III discusses in greater detail, the story of privatization is not quite so black and white because of the challenges associated with financing the expansion of services to the poor, entering into effective concession contract arrangements, and ensuring appropriate monitoring and regulation.

Although the Dublin Principles sparked controversy, they were very influential in promoting water services strategies that seek to achieve economic efficiency, environmental sustainability, and social equity.<sup>19</sup> As Part III discusses, the delivery of effective water and sanitation services is costly, yet the tariffs for these basic services historically have been kept very low, often benefitting the rich who have network access to piped infrastructure. Notably, the human right to safe drinking water and sanitation under international law recognizes that services must be affordable, not free, but that no one should be denied access for inability to pay.

#### A. *Water Management Trends Increasingly Emphasize Economic Efficiency*

The eventual recognition of the human right to safe drinking water and sanitation under the ICESCR can be understood as an attempt to keep equity and equality<sup>20</sup> the central foci of water services delivery, in the wake of an

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say in chorus; put it up for sale and let the market determine its future. . . . Water, according to the World Bank and the United Nations, is a *human need*, not a *human right*. These are not semantics; the difference in interpretation is crucial. A human need can be supplied in many ways, especially for those with money. But no one can sell a human right.

MAUDE BARLOW, BLUE COVENANT: THE GLOBAL WATER CRISIS AND THE COMING BATTLE FOR THE RIGHT TO WATER 43-44 (2007) (describing the Dublin conference as a vehicle for promoting water privatization in the global South).

19. See U.N.-Water, *Status Report on Integrated Water Resources Management and Water Efficiency Plans*, 5 (2008) (“The most widely accepted definition of [Integrated Water Resources Management] is that given by the Global Water Partnership: ‘IWRM is defined as a process that promotes the coordinated development and management of water, land and related resources, in order to maximize the resultant economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems.’”); Hugo Tremblay, *A Clash of Paradigms in the Water Sector? Tensions and Synergies Between Integrated Water Resources Management and the Human Rights-Based Approach to Development*, 7 (Working Paper, Aug. 1, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1661146](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661146) (“IWRM identifies various elements for the implementation of good water governance that span the areas of policy, legislation, institutional capacity and frameworks, financial instruments, social development and scientific research. Economic efficiency in water use, social equity and environmental and ecological sustainability are considered overriding principles that govern this approach.”).

20. While water management documents emphasize the word “equity,” see Tremblay, *supra* note 19, (noting that human rights documents underscore that the legal obligation is one of “equality”). See CATARINA DE ALBUQUERQUE, ON THE RIGHT TRACK: GOOD PRACTICES IN REALISING THE RIGHTS TO WATER AND SANITATION 145 (2012), available at [http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices\\_en.pdf](http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices_en.pdf) (emphasizing that equality and nondiscrimination, not equity, are the “most correct terms for describing the objective of ensuring access to water and sanitation for all according to the needs of each person and for gaining a better understanding of human rights”). See also General Comment No. 15, *supra* note 4, ¶

increasing emphasis on economic efficiency and environmental sustainability. Historically, water management focused on increasing supply and access to water, such as through investment in dams and other large-scale infrastructure. However, increasing population, urbanization, agricultural development, and industrial development have created greater demands on water.<sup>21</sup> At the same time, climate change, glacial melt, salinity, and pollution have all negatively impacted the availability of freshwater. Greater demands on water and concerns about scarcity have led to increasing recognition of the need to reduce waste and improve efficiency by managing the demand for water, leading to the rise of the term “demand management.”<sup>22</sup> Global managers have begun to recognize that “water is often oversupplied relative to demand, generally underpriced relative to its intrinsic and economic values, and governed by institutions geared to augment supply rather than to manage demand.”<sup>23</sup> Improved economic pricing of water has been seen as a way to manage water demand in a way that promotes greater financial sustainability.<sup>24</sup> Demand-responsiveness strategies have also focused on developing solutions and providing services that communities are willing and able to pay for, and that they will sustain into the future.<sup>25</sup>

Water consumption within the agricultural and industrial sectors has been a major source of the need for reform in water management strategies. Globally, the agricultural sector is the largest consumer of water, with estimates suggesting that the sector uses upward of seventy percent of all water, with the

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13 (“[t]he obligation of States parties to guarantee that the right to water is enjoyed without discrimination (art. 2, para. 2), and equally between men and women (art. 3), pervades all of the Covenant obligations.”); *but see id.*, ¶ 27 (“[e]quity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.”). *See also* Urooj Quezon, Kayser, Georgia Lyn Kayser, and Benjamin Mason Meier, *Workshop Synthesis Report - Human Rights-Based Indicators Regarding Non-Discrimination and Equity in the Access to Water and Sanitation Organized by the U.N. Office of the High Commissioner for Human Rights & the Water Institute*, University of North Carolina at Chapel Hill (Oct. 15, 2011), available at SSRN: <http://ssrn.com/abstract=2160095> or <http://dx.doi.org/10.2139/ssrn.2160095> (“In contrast to equality, the definition of equity usually refers to economic barriers, in which monitoring helps us to understand who is left behind, focusing on the most disadvantaged members of society.”).

21. United Nations Dev. Program, *Human Development Report 2006: Beyond Scarcity: Power, Poverty and the Global Water Crisis*, at iv, 14 (2006), available at <http://hdr.undp.org/hdr2006/pdfs/report/HDR06-complete.pdf>.

22. David B. Brooks, *An Operational Definition of Water Management*, 22 INT’L J. WATER RESOURCES DEV. 521, 524 (2006).

23. *Id.* at 522 (quoting Stiles, G., *Demand-side management, conservation, and efficiency in the use of Africa’s water resources*, in WATER MANAGEMENT IN AFRICA AND THE MIDDLE EAST: CHALLENGES AND OPPORTUNITIES (E. Rached, E. Rathgeber & D. Brooks eds., 1996).

24. *Id.* at 525 (“[I]n most countries, and particularly in developing countries, water demand management is pursued for other goals as well as for saving water. The most important goal is usually saving money (typically, reducing deficits) at the water utility, with getting rid of wastewater a common secondary goal.”).

25. *Human Development Report*, *supra* note 21, at 102 (“Governments and donors now stress a demand-responsive approach. At a basic level this simply means that approaches to provision should focus on what users want, on the technologies that they are willing and able to pay for and on what they are able to sustain.”).



remainder used by the industrial and then domestic (*i.e.*, personal use) sectors.<sup>26</sup> In many parts of the world, agricultural and industrial users are not charged for the water that they consume, and they may even receive indirect benefits in the form of subsidized electricity. Even if water does not have an economic value at the time of consumption, it is converted into a commodity when used for agriculture or industrial products. Indeed, the concept of “virtual water” was coined to reflect this phenomenon in the agricultural sector.<sup>27</sup> Part of the goal of water demand management strategies has been to develop a way for the user to value water more and factor water usage into economic decisions about which products to produce.<sup>28</sup>

With respect to municipal water systems, the new paradigm of demand management began to manifest in a drive to improve the efficiency and financial sustainability of operations by increasing water tariffs and reducing subsidies. In most parts of the world, the government has traditionally subsidized water delivery systems.<sup>29</sup> Prices were set to recover operational costs, but they were almost never sufficient to cover long-run maintenance costs and the future costs of obtaining water (which could require building infrastructure, such as dams and aqueducts, to convey water from other areas). Consistent with the water demand management trends discussed above, such as improved economic pricing and developing community-responsive solutions and services, there has been a large push to make water utilities more financially sustainable by increasing tariffs to reflect true costs.<sup>30</sup> Private sector participation has been perceived as a way to improve financial sustainability, often by relieving the government of the politically challenging task of raising water tariffs.

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26. 2030 Water Res. Grp., *Charting Our Water Future: Economic Frameworks to Inform Decision-Making* 12 (2009), available at [http://www.mckinsey.com/App\\_Media/Reports/Water/Charting\\_Our\\_Water\\_Future\\_Exec%20Summary\\_001.pdf](http://www.mckinsey.com/App_Media/Reports/Water/Charting_Our_Water_Future_Exec%20Summary_001.pdf); INTELLIGENCE COMM., *GLOBAL WATER SECURITY IV* (2012) (noting that agriculture uses approximately seventy percent of the global fresh water supply); ROGERS & LEAL, *supra* note 17, at 47 (“Agriculture consumes 70 percent of all the fresh water that is available on earth.”).

27. See A.Y. Hoekstra & P.Q. Hung, *Globalisation of Water Resources: International Virtual Water Flows in Relation to Crop Trade*, 15 *GLOBAL ENVTL. CHANGE* 45 (2005).

28. DAVID ZETLAND, *THE END OF ABUNDANCE: ECONOMIC SOLUTIONS TO WATER SCARCITY* 207 (2011) (“In most parts of the world, water’s price reflects the cost of delivery (wells, pipes, treatment, and so on), not water’s value in use. This partial-cost pricing leads to shortage and misallocation.”).

29. George R. G. Clarke, Katrina Kosec & Scott Wallsten, *Has Private Participation in Water and Sewerage Improved Coverage? Empirical Evidence from Latin America*, 21 *J. INT’L DEV.* 327, 335 (2009) (noting that prices often rise after private sector participation because “public utilities often set prices far below long-run marginal costs and rely on subsidies for investment and, often, operating costs”).

30. See discussion of affordability *infra* Part III.B.

B. *Struggles for “Water Justice” Build Momentum for the Human Right to Water*

Overt private sector participation failures in the water and sanitation sectors around the world, combined with frustration at perceived inaction by governments, have given rise to a political movement demanding recognition of a human right to water and sanitation. In many instances, individuals experienced rate hikes and poor service, but faced institutions that lacked sufficient accountability mechanisms and did not communicate effectively. Social protest was a natural outgrowth of the frustration that people felt. The most well-known protest, *la Guerra del Agua* in Cochabamba, led Bolivia’s third-largest city to cancel its private water concession contract in 2000.<sup>31</sup> The local community rose up after the municipality entered into a private concession contract with a consortium known as Aguas del Tunari, headed by the American company Bechtel, which resulted in skyrocketing water rates and degraded services provision.<sup>32</sup> The local communities in the surrounding neighborhoods were outraged when Aguas del Tunari placed meters on their own private wells.<sup>33</sup> The human right to water was a rallying cry to action in the streets, and the protests ultimately led the municipality to cancel its contract. Several years later, street protests also led the Bolivian twin cities of La Paz and El Alto to cancel their private concession contracts.<sup>34</sup>

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31. See, e.g., KAREN BAKKER, *PRIVATIZING WATER: GOVERNANCE FAILURE AND THE WORLD’S URBAN WATER CRISIS* 165-169 (2010) (summarizing key facts of Cochabamba’s privatization experiment and noting that “Cochabamba’s *Guerra del Agua*, or ‘water war,’ has become emblematic of the potential power of social movements” even if “a closer examination . . . suggests that there exist significant limits on the power of communities to improve water-supply access for the urban poor”); Rocio Bustamante, Carlos Crespo, & Anna Maria Walnycki, *Seeing Through the Concept of Water as a Human Right in Bolivia*, in *THE RIGHT TO WATER: POLITICS, GOVERNANCE AND SOCIAL STRUGGLES* 223, 231-232 (Farhana Sultana & Alex Loftus eds., 2012) (noting the “well-documented Water Wars of Cochabamba became the poster child and impetus for the international Anti-Privatization and Right to Water Movement throughout the 2000s”); PUB. CITIZEN, *WATER PRIVATIZATION FIASCOS: BROKEN PROMISES AND SOCIAL TURMOIL* 5 (2003) (“In April 2000, after seven days of civil disobedience and angry protest in the streets, the president of Bolivia was forced to terminate the water privatization contract granted to Aguas del Tunari, subsidiary of the giant Bechtel corporation.”); Verónica Perera, *From Cochabamba to Colombia: Travelling Repertoires in Latin American Water Struggles*, in *THE RIGHT TO WATER: POLITICS, GOVERNANCE AND SOCIAL STRUGGLES* 241, 243 (Farhana Sultana & Alex Loftus eds., 2012) (highlighting global influence by noting that “Colombians were inspired by the iconic 2000 Cochabamba water war, when the multitude . . . cancelled a privatization contract and evicted a United States-led transnational corporation.”).

32. See William Finnegan, *Letter from Bolivia: Leasing the Rain*, *NEW YORKER* (Apr. 8, 2002), [http://www.newyorker.com/archive/2002/04/08/020408fa\\_FACT1](http://www.newyorker.com/archive/2002/04/08/020408fa_FACT1). See also Andrew Nickson & Claudia Vargas, *The Limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia*, 21 *BULLETIN OF LATIN AMERICAN RESEARCH* 99–120 (2002).

33. BAKKER, *supra* note 31, at 166 (“The company also undertook to place water meters on private wells . . . that rural and peri-urban residents had independently built and financed.”).

34. Laurie & Crespo, *supra* note 34.

Struggles for water justice have also been seen in other parts of the world. In India, the idea of a human right to water was invoked in public interest litigation to reduce and remedy water pollution, as well as in battles with multinational bottling companies, whose extraction of water from the ground threatened the local community's ability to rely on water.<sup>35</sup> In South Africa, the human right to water has been employed in constitutional litigation. One of the more well-known cases, *Mazibuko v. City of Johannesburg and Others*, attempted (ultimately unsuccessfully) to increase the amount of water provided for free and to prohibit the use of prepaid water meters in poor communities, which has been perceived as a commodification of water.<sup>36</sup> In light of the increasing number of water justice struggles around the world, it is perhaps no surprise that water, and later sanitation, became recognized as a human right in the first decade of the twenty-first century.

The human right to water and sanitation as an anti-privatization political rallying call, however, is distinct from its meaning under international law. The human right to water has often been used in street protests as a vehicle for opposing privatization and the increasing treatment of water as an economic good. Because this political movement has played a key and vocal role in raising awareness, the human right to water (and sanitation) has been perceived in some circles to be at odds with privatization.<sup>37</sup> Self-declared "water warriors" took up the mantle of the human right to water (and to a lesser degree, the right to sanitation) as a means to stop the perceived privatization of water.<sup>38</sup> As Part III discusses in more detail, human rights law is neutral with respect to economic modes of delivery, but relevant to how such decisions are carried out. Moreover, despite the vociferous debate about privatization, empirical studies suggest that involving the private sector in the delivery of water and sanitation services has

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35. See S. Muralidhar, *The Right to Water: An Overview of the Indian Legal Regime*, in THE HUMAN RIGHT TO WATER 65 (Eibe Riedel & Peter Rothen eds., 2006); Saby Ghoshray, *Searching for Human Rights to Water Amidst Corporate Privatization in India: Hindustan Coca-Cola Pvt. Ltd. v. Perumatty Grama Panchayat*, 19 GEO. INT'L ENVTL. L. REV. 643 (2007); Philippe Cullet & Joyeeta Gupta, *India: Evolution of Water Law and Policy*, in THE EVOLUTION OF THE LAW AND POLITICS OF WATER 157-173, 165 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2009), (noting that in *Subhash Kumar v. State of Bihar*, (1991) S.C. 420, the Supreme Court of India held that "the right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life").

36. See Jackie Dugard, *Civic Action and the Legal Mobilisation: The Phiri Water Meters Case*, in MOBILISING SOCIAL JUSTICE IN SOUTH AFRICA: PERSPECTIVES FROM RESEARCHERS AND PRACTITIONERS 71 (Jeff Handmaker & Remko Berkhout eds., 2010); Malcolm Langford & Anna Russell, *'Global Precedent' or 'Reasonable No More?': The Mazibuko Case*, 19 J. WATER L. 73 (2008); Patrick Bond, *The Right to the City and the Eco-Social Commoning of Water: Discursive and Political Lessons from South Africa*, in THE RIGHT TO WATER: POLITICS, GOVERNANCE AND SOCIAL STRUGGLES 190 (Farhana Sultana & Alex Loftus eds., 2012).

37. Jennifer Davis, *Private-Sector Participation in the Water and Sanitation Sector*, 30 ANN. REV. ENV'T & RESOURCES 145, 153 (2005) (noting that "arguments against W&S privatization often conflate questions regarding private-sector delivery of essential services with broader globalization concerns").

38. BARLOW, BLUE COVENANT, *supra* note 18.

been neither a ringing success, nor a universal failure, as advocates of either side might suggest.<sup>39</sup> Nevertheless, from the standpoint of understanding the evolution and origins of the human right to water and sanitation, the role that several disastrous privatization experiments, such as those in Cochabamba, Bolivia, played in fueling the movement to recognize a human right to water and sanitation under the ICESCR cannot be overlooked.

The movement toward a human right to water and sanitation is a modern day parallel to the nineteenth century social reform movement in Great Britain that sought to expand universal access to water and sanitation in the wake of private sector failures. When the developed world initially sought to create water networks, it was the private sector that built them.<sup>40</sup> As unregulated natural monopolies, the private companies focused on providing access to the wealthy, who could afford the high prices.<sup>41</sup> Most companies declined to build sewerage systems, negatively impacting public health, because they were capital intensive and had low profit margins.<sup>42</sup> Social reformers began to understand the importance of water and sanitation for health and began campaigning for universal access, seeking to ensure that every house had access to clean water and an on-site toilet.<sup>43</sup> For some reformers, water supply was a material

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39. Craig Anthony Arnold, *Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 785, 803-04 (2009) ("Economic analyses of only the operating efficiencies of privately operated systems versus publicly operated systems show mixed results, with four studies finding that private utilities are more efficient, five studies finding that public utilities are more efficient, and three studies finding no differences in efficiencies between private and public water utilities. In addition, private water companies have little incentive to invest in public water systems' improvements or maintenance activities that will produce benefits beyond the end of the privatization contract's term."); ZETLAND, *supra* note 28, at 87-88 (noting that in the United States "there is not much evidence" that neither public nor privately-owned utilities "deliver better performance, prices or quality. . . . The reason we see both public and private ownership around the world is because neither is always better. On the other hand, both public and private water utilities can fail."); Davis, *supra* note 37, at 159 (noting that "a considerable literature suggests that imperfections in both competition for contracts and regulation often lead to negligible effects on efficiency under privatization within natural monopoly sectors such as water supply and sanitation").

40. Davis, *supra* note 37, at 147; BAKKER, *supra* note 31, at 83 (noting that in the nineteenth century, private corporations built and operated the first water-supply networks in cities like Boston, New York, London, Paris, Buenos Aires, and Seville); James Salzman, *Thirst: A Short History of Drinking Water*, 18 YALE J.L. & HUMAN. 94, 112 (2006).

41. See BAKKER, *supra* note 31 at 84 ("[H]igh prices charged by private companies meant that subscription to water supply networks was selective rather than universal. . . . As unregulated monopolies, companies typically charged high prices and undersupplied water to maintain the price. Moreover, sewerage systems were so capital intensive, and of such low profitability, that private water companies did not, as a rule, build them.").

42. *Id.* ("The nineteenth-century case illustrates the difficulty of combining private sector ownership and management with the control of water supply-related 'externalities.' The terrible fires and water-borne disease epidemics (notably cholera and typhoid) that regularly swept through nineteenth-century cities provided strong justification for universal provision of potable water supplies at sufficiently high pressures.").

43. *Human Development Report*, *supra* note 21, at 113.

expression of political inclusion: “Citizenship, they argued, must be conceived not only in terms of political representation but also services provision.”<sup>44</sup> Water was promoted not only because it prevented disease, but also because it was considered critical for a “minimum level of dignity to which all citizens have a right.”<sup>45</sup> In Great Britain, as well as other parts of Europe, the unequal access, distribution, and public health consequences resulting from private sector-controlled water management led, in some instances, to tighter government regulation of the private entities and, in many instances, to municipal governments taking over the distribution of water.<sup>46</sup>

Given this history, perhaps it is no surprise that water and sanitation are now recognized as a human right in a global system grounded in human dignity. Policymakers have realized that unregulated private service providers would not have the incentive to ensure access to water and sanitation for all.

### C. *Building the Legal Basis for the Human Right to Water and Sanitation*

Support has continued to build within the United Nations for a human right to safe drinking water and sanitation. In 1998, the U.N. Economic and Social Council’s Sub-Commission on Prevention of Discrimination and Protection of Minorities issued a working paper outlining the basis for “the right of access of everyone to drinking water supply and sanitation services.”<sup>47</sup> In 1999, the General Assembly issued a resolution on “The Right to Development,” which “reaffirm[ed] that, in the full realization of the right to development, the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community.”<sup>48</sup> Then, in 2002, the U.N. Committee on Economic, Social and Cultural Rights adopted General Comment 15 on the Right to Water.<sup>49</sup>

In General Comment 15, the Committee, which is responsible for interpreting and clarifying the provisions of the ICESCR,<sup>50</sup> determined that under the Covenant, the right to water is contained within the right to an adequate standard of living (Article 11.1), and “inextricably related” to the right

44. BAKKER, *supra* note 31, at 55.

45. *Id.*

46. *Id.*; Salzman, *supra* note 40, at 112 (noting that “in the Metropolis Water Act of 1852, private water suppliers became regulated entities, required to provide piping into private residences” and that “[o]nly in 1902 did municipal water become a public service”).

47. U.N. Special Rapporteur, *The Realization of Economic, Social and Cultural Rights: The Right of Access of Everyone to Drinking Water Supply and Sanitation Services, Working Paper by Mr. El Hadji Guissé, Under Sub-Commission Resolution 1997/18*, U.N. Doc. E/CN.4/Sub.2/1998/7 (June 10, 1998) [hereinafter *Working Paper by Mr. Hadji Guissé*] (by El Hadji Guissé).

48. G.A. Res. 54/175, U.N. Doc. A/RES/54/175 (Feb. 15, 2000).

49. General Comment No. 15, *supra* note 4.

50. WINKLER, *supra* note 10, at 40 (noting that the Committee “does not have the authority to create new obligations, but rather interprets and clarifies the provisions of the ICESCR”).

to the highest attainable standard of health (Article 12.1) and the rights to adequate housing and adequate food (Article 11.1).<sup>51</sup> General Comment 15 defined the right to water as every person's entitlement to "sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses."<sup>52</sup> It also stated that "the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival."<sup>53</sup> As noted in General Comment 15, support for a right to water can be found in other international instruments. For example, the Convention on the Rights of the Child (CRC) states that children have a right to clean drinking water,<sup>54</sup> while the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) declares that rural women have a right to "enjoy adequate living conditions, particularly in relation to . . . water supply" on an equal basis with men.<sup>55</sup> In addition, certain regional instruments also recognize the right.<sup>56</sup> General Comment 15, however, was not without controversy, as some felt that the Committee had gone too far in creating a "new" right, while others believed it accurately recognized an existing or implied right.<sup>57</sup> Moreover, despite recognizing concerns about water scarcity, the Committee did not attempt to link the emerging right to water to a right to the environment.<sup>58</sup>

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51. See Benjamin Mason Meier, Georgia Lyn Kayser, Urooj Quezon Amjad & Jamie Bartram, *Implementing an Evolving Human Right Through Water and Sanitation*, 15 WATER POLICY 116-133 (2013) (providing an overview of the history of the right to water and sanitation, including a more detailed discussion of General Comment 15); General Comment No. 15, *supra* note 4, ¶ 3.

52. General Comment No. 15, *supra* note 4, ¶ 2.

53. *Id.* ¶ 3. As discussed in more detail below, General Comment 15 discusses sanitation in several places but appears to treat the right to sanitation as derivative from the right to water.

54. Convention on the Rights of the Child art. 24.2(c), Nov. 20, 1989, 1577 U.N.T.S. 3 (requiring states to combat disease and malnutrition "through the provision of adequate nutritious foods and clean drinking-water").

55. Convention on the Elimination of All Forms of Discrimination Against Women art. 14.2(h), Dec. 18, 1979, 1249 U.N.T.S. 13 (requiring States to ensure that women have the right to "enjoy adequate living conditions, particularly in relation to . . . water supply").

56. H.R.C. Res. 15/9, *supra* note 2, at 2 (highlighting several regional instruments, including the "Protocol on Water and Health, adopted by the Economic Commission for Europe in 1999, the European Charter on Water Resources, adopted by the Council of Europe in 2001, the Abuja Declaration, adopted at the first Africa-South America summit in 2006, the message from Beppu, adopted at the first Asian-Pacific Water Summit in 2007, the Delhi Declaration, adopted at the third South Asian Conference on Sanitation in 2008, and the Sharm el-Sheikh Final Document, adopted at the Fifteenth Summit Conference of Heads of State and Government of the Movement of Non-Aligned Countries in 2009").

57. Anna Russell, *Incorporating Social Rights in Development: Transnational Corporations and the Right to Water*, 71 INT'L J.L. IN CONTEXT 1, 13 n.76 (2011) (citing the Tully versus Langford debate).

58. Eibe Riedel, *The Human Right to Water and General Comment No. 15 of the CESCR*, in THE HUMAN RIGHT TO WATER 19, 28 (Eibe Riedel & Peter Rothen eds., 2006) (noting that the Committee on Economic, Social and Cultural Rights "was not that bold . . . with respect to the relationship between the right to water and the environment. It felt that since there was quite some dispute on this issue of environmental protection, it should not be raised in this specific General

The U.N. High Commissioner for Human Rights issued a report in 2007 on “the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.”<sup>59</sup> This report further traces the evolution of the human right to water under international law and highlights the growing, but still uncertain, status of sanitation under international law. It also notes that the Millennium Development Goals helped to increase recognition of the need to improve access to water and sanitation, as evidenced by a 2005 status report by the U.N. Millennium Task Force on Water and Sanitation.<sup>60</sup> In November 2008, the Human Rights Council appointed an Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation to examine the status of these rights.<sup>61</sup>

Having been the site of anti-privatization water justice struggles, Bolivia<sup>62</sup> introduced a resolution on the human right to safe drinking water and sanitation to the General Assembly in July 2010.<sup>63</sup> Comments made during the General Assembly discussion, and the abstention of forty-one countries from the ultimate vote, suggest that the resolution caught many by surprise. That the United States and Canada abstained was not surprising to many because these countries had long voiced their concerns about recognizing a human right to water under international law.<sup>64</sup> However, a review of the General Assembly minutes

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Comment, particularly given the breadth of the environmental aspects of water.”).

59. U.N. High Comm’r for Human Rights, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the United Nations High Commissioner for Human Rights and the Secretary-General: Report of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation Under International Human Rights Instruments*, U.N. Doc. A/HRC/6/3 (Aug. 16, 2007) [hereinafter Annual Report].

60. U.N. MILLENNIUM PROJECT, HEALTHY, DIGNITY, AND DEVELOPMENT: WHAT WILL IT TAKE? (2005).

61. Office of the U.N. High Comm’r for Human Rights, *Seventeen Frequently Asked Questions About the United Nations Special Rapporteurs: Fact Sheet No. 27*, 1 (2001) [hereinafter Fact Sheet No. 27] (“The United Nations Commission on Human Rights has mandated experts to study particular human rights issues. These experts now constitute what are known as the United Nations human rights mechanisms or mandates, or the system of special procedures.”).

62. See Laurie & Crespo, *supra* note 34, at 841 (“In recent years Bolivia has come to play a central and emblematic role in global water debates. Home to both an iconic anti-privatisation movement based in the city of Cochabamba and one of the first large, city-wide private water concessions (La Paz–El Alto, granted in 1997) to be heralded as ‘pro-poor’ by donor organisations water issues here are hotly contested under an increasingly international gaze.”) (internal citations omitted).

63. G.A. Res. 64/PV.108, *supra* note 1.

64. Peter Gleick, *Implementing the Human Right to Water*, in *THE HUMAN RIGHT TO WATER* 143, 144 (Eibe Riedel & Peter Rothen eds., 2006) (“Some remain opposed to a formal declaration of this right [to water]. . . . Such arguments have been put forward by the British Foreign Office, the U.S. Department of State, and others.”); Matthew Craven, *Some Thoughts on the Emergent Right to Water*, in *THE HUMAN RIGHT TO WATER* 37, 39-41 (Eibe Riedel & Peter Rothen eds., 2006) (noting that Canada, a water-rich nation, had taken a stand against the U.N. Committee’s pronouncement in General Comment 15 out of concern for international obligations between states with respect to

suggests that the abstentions were driven by concerns that were partly substantive, but largely procedural, in light of the fact that the Human Rights Council in Geneva had not yet completed its legal examination of the issue, making the resolution premature.<sup>65</sup>

The U.S. and Canadian reactions to Bolivia's proposed resolution are instructive.<sup>66</sup> On the one hand, the United States indicated its support for the work of the Human Rights Council's Independent Expert on human rights obligations relating to access to safe drinking water and sanitation, stating that it hoped to join a consensus on the text of the Human Rights Council Resolution. On the other hand, the United States found the text of the General Assembly Resolution problematic because there was "no right to water and sanitation in an international legal sense as described by the resolution."<sup>67</sup> The United States also noted that the resolution had "not been drafted in a transparent, inclusive manner," circumventing the process that was already underway in Geneva.<sup>68</sup> Similarly, Canada noted that the text was "premature" and that the non-binding resolution appeared to declare a right without setting out its scope.<sup>69</sup>

Notably, although the General Assembly resolution "recalls" relevant hard and soft law instruments, such as the ICESCR and General Comment 15, the active part of the resolution simply recognizes "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights."<sup>70</sup> The abstaining states, such as the United States and Canada, may have been concerned that the right to water and sanitation was not explicitly tied to rights recognized in the ICESCR. As a result, the General Assembly resolution could be interpreted as creating "new" rights. Moreover, the General Assembly resolution was silent on the role of non-state actors and privatization. Meier *et al.* observe that:

[A]lthough commentators have discussed a wide range of substantive concerns underlying state abstentions, from issues of water commodification to international obligation, abstaining states raised only procedural concerns in their public objections, reflecting the political resonance of rights-based discourses and raising the political costs of denying the existence of a human right to water and sanitation.<sup>71</sup>

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water); Anna Russell, *International Organizations and Human Rights: Realizing, Resisting or Repackaging the Right to Water?*, 9 J. HUM. RTS. 1, 11 (2010) (noting that "the historical opposition to socioeconomic rights by the United States was cited as a major obstacle to the development of rights programs, particularly the right to water, within some of the international organizations. (In regard to the right to water specifically, Canada's concern over extraterritorial obligations was also noted, but as a significantly more minor point.)").

65. G.A. Res. 64/PV.108, *supra* note 1.

66. *Id.*

67. *Id.* at 8.

68. *Id.*

69. *Id.* at 17.

70. *Id.* at 5; G.A. Res 64/L.63/Rev.1\*, U.N. Doc. A/RES/64/L.63/Rev.1\* (July 26, 2010).

71. Meier *et al.*, *supra* note 51, WATER POLICY at 121-122.



Despite the forty-one abstentions, 122 countries voted on July 28, 2010 to adopt a resolution “that recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”<sup>72</sup> Notably, the resolution was orally amended so that the term “declare” was replaced by “recognize,”<sup>73</sup> reflecting the idea that the right was not “new,” but rather an interpretation of existing language. The resolution also called on states and international organizations to provide financial resources, capacity building, and technology transfer, especially to developing countries.

Following on the heels of the General Assembly’s vote, on September 30, 2010 the U.N. Human Rights Council adopted by consensus Resolution 15/9 on human rights and access to safe drinking water and sanitation.<sup>74</sup> In contrast to the General Assembly resolution, the Human Rights Council resolution is much more specific. It “affirm[ed] that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.”<sup>75</sup> The resolution also has several clauses that address head-on the debate around privatization, affirming that states may opt to involve non-state actors provided that they maintain primary responsibility for ensuring the realization of human rights.

In Clause 6 of the resolution, the Human Rights Council “[r]eaffirms that States have the primary responsibility to ensure the full realization of all human rights, and that the delegation of the delivery of safe drinking water and/or sanitation services to a third party does not exempt the State from its human rights obligations.”<sup>76</sup> Clause 7 “[r]ecognizes that States, in accordance with their laws, regulations and public policies, may opt to involve non-State actors in the provision of safe drinking water and sanitation services and, regardless of the form of provision, should ensure transparency, non-discrimination and accountability.” Clause 9 then spells out some key ways that states should monitor non-state actors. By grounding the human right to water and sanitation in rights recognized by the ICESCR and affirming that the right is not incompatible with private sector participation, the Human Rights Council resolution appears to have addressed the concerns of countries like the United States and Canada, which abstained during the General Assembly debate on the issue.

After the Human Rights Council resolution passed, the then-Independent Expert on human rights obligations related to access to safe drinking water and sanitation announced that “This means that for the U.N., the right to water and sanitation, is contained in existing human rights treaties and is therefore legally

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72. See G.A. Res. 64/PV.108, *supra* note 1.

73. G.A. Res. 64/L.63/Rev.1\*, *supra* note 70.

74. H.R.C. Res. 15/9, *supra* note 2.

75. *Id.* at 2.

76. *Id.* at 3, Clause 6.

binding.”<sup>77</sup> While they do not give the human right to water and sanitation the status of customary international law, taken together, Comment 15 and the General Assembly and Human Rights Council resolutions have arguably brought the right to water and sanitation within the scope of the rights recognized under the ICESCR. In 2011, the Human Rights Council re-appointed the Independent Expert as a Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, reflecting the change in international law, and extended the mandate for another three years.<sup>78</sup>

Water development practitioners have received the recognition of the right to water and sanitation within the U.N. system with mixed signals. In qualitative interviews conducted with practitioners at various international development and U.N. agencies, Anna Russell found that “it was repeatedly explained that rights are political and that the entry of rights language into the water sector may be seen to unnecessarily politicize issues.”<sup>79</sup> Although senior staff were comfortable using rights-based language, it was not clear to many technical people what, if anything, the right to water would add to their work.<sup>80</sup>

The declarations issued at the World Water Forums (WWF), which take place every three years and are organized by the World Water Council and the Global Water Partnership,<sup>81</sup> are also instructive. The forum declarations historically have avoided framing water and sanitation in rights language, focusing instead on “needs” and “access.”<sup>82</sup> For example, in 2009 the Ministerial Statement of the World Water Conference in Istanbul acknowledged “discussions within the U.N. system regarding human rights and access to safe drinking water and sanitation,” but then went on to declare that “access to safe drinking water and sanitation is a basic human need.”<sup>83</sup> As a result, the forums

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77. *Right to Water and Sanitation is Legally Binding, Affirms Key U.N. Body*, U.N. News Centre (Oct. 1, 2010), <http://www.un.org/apps/news/story.asp?NewsID=36308#UK4X3oc0WSo>.

78. Human Rights Council Res. 16/L.4, *The Human Right to Safe Drinking Water and Sanitation*, U.N. Doc. A/RES/HRC/16/L.4 (Mar. 18, 2011). *See also* Annual Report, *supra* note 59, at 6 (noting that the Commission bestows varying titles on the experts. These include special rapporteurs, independent experts, representatives of the Secretary-General or representatives of the Commission. These different titles neither reflect a hierarchy, nor are they an indication of the powers entrusted to the expert. They are simply the result of political negotiations. The most important issue is the mandate given to the expert as it is formulated in the resolutions of the Commission on Human Rights.)

79. Russell, *supra* note 64, at 11.

80. *See id.* at 11-12.

81. SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 10.

82. *See id.* for further discussion of this issue. The 1997 Marrakech Declaration recommended “action to recognize the basic human needs to have access to clean water & sanitation.” The 2000 The Hague Declaration stated “access to safe and sufficient water and sanitation are basic human needs.” The 2003 Kyoto Declaration stated “we will enhance poor people’s access to safe drinking water and sanitation.” *Id.* at 11. The 2006 Mexico Declaration reaffirmed that governments have a primary role in “promoting improved access to safe drinking water, basic sanitation.” 4th World Water Forum, Mar. 21-22, 2006, Mexico City, Mex., *Ministerial Declaration*, 2 (Mar. 22, 2006).

83. 5th World Water Forum, Mar. 16-22, 2009, Istanbul, Turk., *Istanbul Ministerial*

have been a focal point of criticism and protest by many activists dissatisfied with the increasing focus on economic efficiency, which they perceive to be at odds with the human right to water and sanitation.<sup>84</sup> The latest World Water Forum in 2012 recognized the general legal obligations associated with the rights to safe drinking water and sanitation, declaring: “We commit to accelerate the full implementation of the human rights obligations relating to access to safe and clean drinking water and sanitation by all appropriate means as part of our efforts to overcome the water crisis at all levels.”<sup>85</sup> However, the WWF was criticized by a number of NGOs and the U.N. Special Rapporteur for not expressly recognizing a human right to safe drinking water and sanitation under the ICESCR, as the U.N. General Assembly and Human Rights Council had done in their 2010 resolutions.<sup>86</sup>

In contrast to the reservations of some states, most private water service companies have whole-heartedly embraced the human right to water and sanitation.<sup>87</sup> Similarly, AquaFed, a trade organization for private companies, has also endorsed the right to water. “Typically associated with improving access to water in developing countries, the right to water [has been] seen to complement the business sector’s push for improved water governance through better articulation of the value or worth of water.”<sup>88</sup> In other words, corporations have supported the right to water because its implementation creates potential business opportunities.<sup>89</sup> The recognition of the right to water could enable corporations to expand their operations as governments provide subsidies to the poor. For example, global water services operator Veolia Water, in a submission to the U.N. Office of the High Commissioner on Human Rights, stated that “[n]o one can deny that the right to water is a basic human right,” but emphasized that the right must include identifying who pays: “[i]f the right is to become

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*Statement*, ¶ 15 (Mar. 22, 2009); *See also* Bustamante et al., *supra* note 31, at 228 (describing the People’s Water Forum, an alternative water forum held by activists in Istanbul, which led to a declaration intended to “discredit the false and business-related World Water Forum”).

84. *See* BARLOW, BLUE COVENANT, *supra* note 18; BAKKER, *supra* note 31, at 135-136 (noting that “self-proclaimed ‘water warriors’ protested both inside and outside the [World Water Forum], criticizing the forum’s co-organizers (the Global Water Partnership and the World Water Council) for their close ties to private water companies and international financial institutions”).

85. 6th World Water Forum, Marseille, Fr., Mar. 12-17, 2012, *Ministerial Declaration* (Mar. 13, 2012).

86. Claire Provost, *World Water Forum Declaration Falls Short on Human Rights, Claim Experts*, GUARDIAN (Mar. 14, 2012), <http://www.guardian.co.uk/global-development/2012/mar/14/world-water-forum-declaration-human-rights>.

87. Russell, *supra* note 57, at 13, n.77 (noting that in her interviews with transnational water corporations and a trade agency, known as AquaFed, all “indicated that a right to water exists. . . . The right was seen to based more on the concept of sustainable development, corporate social responsibility, the MDGs or World Summit on Sustainable Development (WSSD) commitments (or, in the case of the French companies, the Charter of Essential Services) than in any international human rights treaty.”).

88. *Id.* at 14.

89. *Id.*

effective, someone has to take responsibility for paying when customers cannot cover the entire cost.”<sup>90</sup>

#### D. Rio+20 Summit

The recent Rio+20 summit highlights that the debate on the articulation of water and sanitation as a human right is not entirely over. Prior to the summit, the U.N. Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation sent an open letter to states negotiating the summit’s outcome document, expressing concern that the human right to water and sanitation was at risk of being suppressed in the final text. She warned that “[s]ome States suggested alternative language that does not explicitly refer to the human right to water and sanitation; some tried to reinterpret or even dilute the content of this human right.”<sup>91</sup>

The draft Rio+20 outcome document, issued at the start of the summit on June 16, 2012, declared, “We recognize our commitments regarding the human right to safe drinking water and sanitation as inextricably related to the right to the highest attainable standard of physical and mental health as well as the right to human life and dignity. . . .”<sup>92</sup> In response, Amnesty International issued a statement criticizing the draft outcome document for failing “to acknowledge that the rights to water and sanitation are not merely linked to other human rights, such as the right to health, but they are rights that are derived from the right to an adequate standard of living.”<sup>93</sup> In addition, Amnesty criticized the Rio+20 draft outcome document for “affirming the need to focus on local and national perspectives in considering the issue and leaving aside questions of all

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90. Veolia Water, *The Right to Water: From Concept to Effective Implementation* (Apr. 13, 2007) (unpublished paper), available at <http://www2.ohchr.org/english/issues/water/contributions/PrivateSector/Veolia.pdf>.

91. Press Release, Office of the High Comm’r for Human Rights, Rio+20: U.N. Expert Urges Governments Not to Sideline the Human Right to Water and Sanitation (June 6, 2012) (emphasizing that access to safe drinking water and sanitation “already has been recognized as a human right under international law, including by the General Assembly and the Human Rights Council in 2010”).

92. Press Release, Amnesty Int’l, United Nations: Rio+20 Must Affirm Rights to Water and Sanitation Are Legally Binding—Without Arbitrary Territorial Exclusions (June 18, 2012). See also *Draft of U.N. Rio+20 Main Text*, ¶ 121, <http://www.scribd.com/doc/97339996/Draft-of-UN-Rio-20-main-text-16-June-2012-5-45-pm>. The original Rio+20 zero draft stated at paragraph 67: “We underline the importance of the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.” *The Future We Want*, *supra* note 3. The text of the draft outcome document circulated on June 16, 2012 had changed as a result of negotiations leading up to the Rio+20 summit. The text was modified through a series of negotiations leading up to the Rio+20 summit. See, e.g., *Earth Negotiations Bulletin*, INT’L INST. FOR SUSTAINABLE DEV., 9-10 (June 5, 2012) (“Debate focused on text on the human right to water, with Canada proposing an alternative paragraph on the scope and realization of the human right to water and sanitation, and the G-77/China, the EU and Switzerland preferring the original text.”).

93. Press Release, Amnesty Int’l, *supra* note 92.

transboundary water issues.”<sup>94</sup> The water section of the final Rio+20 outcome document stated:

We underline the importance of the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights. Furthermore, we highlight the critical importance of water resources for sustainable development, including poverty and hunger eradication, public health, food security, hydropower, agriculture and rural development.

We recognize the necessity of setting goals for wastewater management, including reducing water pollution from households, industrial and agricultural sources and promoting water efficiency, wastewater treatment and the use of wastewater as a resource, particularly in expanding urban areas.

We renew our commitment made in the Johannesburg Plan of Implementation (JPOI) regarding the development and implementation of integrated water resources management and water efficiency plans. We reaffirm our commitment to the 2005-2015 International Decade for Action “Water for Life”. We encourage cooperation initiatives for water resources management in particular through capacity development, exchange of experiences, best practices and lessons learned, as well as sharing appropriate environmentally sound technologies and know-how.<sup>95</sup>

The Rio+20 outcome document represents the first time that countries reaffirmed the right to safe drinking water and sanitation at a major U.N. summit meeting.<sup>96</sup> Notably, the final document did not reference transboundary issues.<sup>97</sup> Instead, it simply reaffirmed the right to water and sanitation, as well as other key global water management principles, such as integrated water resources management. In response, the U.N. Special Rapporteur stated, “While I cannot praise the document as a perfect one from a human rights perspective and even though—as you know—I had suggested stronger and clearer language, I think that the final text demonstrates all the Member States’ strong commitments to improve the current situation [and I am] really encouraged to see them.”<sup>98</sup>

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94. *Id.*

95. *The Future We Want*, *supra* note 3, at 20.

96. *See Rio+20: Outcome Document Undermined by Rights Opponents*, HUMAN RIGHTS WATCH (June 22, 2012), <http://www.hrw.org/news/2012/06/22/rio-20-outcome-document-undermined-rights-opponents>.

97. *Id.* (“It is unfortunate that some governments attempted arbitrarily to exclude transboundary water issues from the scope of the right to water,” said Savio Carvalho, Demand Dignity program director of Amnesty International. “That these attempts were unsuccessful is a win for human rights.”).

98. E-mail from Catarina de Albuquerque, U.N. Special Rapporteur on the human right to safe drinking water and sanitation, Office of the High Commissioner for Human Rights (June 20, 2012) (on file with author). *But see* Cleophas Tsokodayi, Greenpeace: Rio+20 Sustainable Development Summit a ‘Failure,’ EXAMINER.COM (June 23, 2012), <http://www.examiner.com/article/greenpeace-rio-20-sustainable-development-summit-a-failure> (criticizing the Rio+20 summit as a “failure of epic proportions” for not taking more concrete action).

## II. MEANING UNDER INTERNATIONAL LAW

With the consensus resolution by the U.N. Human Rights Council, many of the potential concerns of the abstaining states during the General Assembly vote about the scope of the legal obligations associated with the right to water and sanitation may have been addressed. The Rio+20 negotiations over the text of the outcome document highlight that there are still some open questions. Nevertheless, the nature of the existing legal obligations can be understood by considering the key provisions of the ICESCR. This next section first focuses on the concepts of progressive realization and nondiscrimination in Article 2 of the ICESCR and then examines the content of the right to water and sanitation under international law.

### A. *Legal Obligations*

State parties under ICESCR Article 2 are not obligated to realize the human right to water and sanitation overnight. Rather, states must use maximum available resources to ensure that the right to water and sanitation, along with all of the other rights recognized within the ICESCR, are realized progressively.<sup>99</sup> This concept of “progressive realization,” which is unique to the ICESCR, acknowledges the constraints due to limited available resources.<sup>100</sup> At the same time, “progressive realization” is not an excuse for inaction, nor does it mean that the obligations are not binding. However, the measurement for determining inaction is different and more difficult to measure.<sup>101</sup> Thus, while the number of

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99. International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3.

100. Indep. Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water & Sanitation, *Rep. of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, United Nations Gen. Assembly, ¶¶ 10, 18, U.N. Doc. A/65/254 (Aug. 6, 2010) (by Catarina de Albuquerque) [hereinafter *Rep. of the Independent Expert*] (“The notion of progressive realization relates not only to progressively achieving universal access to water and sanitation, but also to meeting these standards. Human rights do not settle for minimum standards, such as basic access to water and sanitation, but ultimately require achieving a higher standard that guarantees an adequate standard of living.”); United Nations, Econ. & Soc. Council, Comm. on Econ., Soc., & Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, 5th Sess., 1990, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter *General Comment No. 3*]. See also SALMAN & MCINERNEY-LANKFORD, *supra* note 11, at 30 (noting that “[t]he history and institutional apparatus of the ICESCR is inextricably linked to the concept of ‘progressive realization’ at the heart of the ICESCR’s implementation”).

101. CRAVEN, *supra* note 6, at 16 (noting that “the nature of international law is such that the question of enforceability has never been conclusive as to the existence of international rights or duties”); MARY DOWELL-JONES, *CONTEXTUALISING THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHT: ASSESSING THE ECONOMIC DEFICIT 27* (2004) (“Although the concept of a minimum core content/minimum threshold of Covenant obligations is accepted as juridical theory, the pragmatic elaboration of its content and strategies for its meaningful application to State parties to the Covenant poses a clear, ongoing challenge to the Committee.”).

people with access to safe drinking water and sanitation is critical, progressive realization emphasizes the importance of considering how governments allocate their budgets over time. In addition, the Article 2 requirement that states guarantee that rights “will be exercised without discrimination” means that it is critical to examine how those services are being provided to the population.<sup>102</sup> This concept of nondiscrimination, which is an immediate obligation under the ICESCR, seeks to ensure that *everyone* has the same ability to access economic, social, and cultural rights, including access to safe drinking water and sanitation.<sup>103</sup>

A state party’s *unwillingness* to realize the human right to water and sanitation is distinct from its *inability* to do so.<sup>104</sup> The concepts of progressive realization and nondiscrimination in ICESCR Article 2 can be used as tools to monitor governments’ expenditures over time and to assess whether the obligations to expend maximum available resources to realize rights in a non-discriminatory way are being met.<sup>105</sup> In this sense, human rights may promote accountability<sup>106</sup> and embolden civil society to monitor the government’s progress.<sup>107</sup> By empowering individuals as rights-holders to seek avenues of redress against states, the human rights framework of access to water and sanitation complements good governance and anticorruption efforts seeking to ensure that resources are being used efficiently, fairly, and transparently.<sup>108</sup>

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102. General Comment No. 3, *supra* note 99.

103. See International Covenant on Economic, Social and Cultural Rights, *supra* note 99, art. 2.

104. General Comment No. 15, *supra* note 4, ¶ 41.

105. Rep. of the Independent Expert, *supra* note 100, at 8:

It is difficult to assess in quantitative terms whether a State is expending ‘the maximum of its available resources’. However, there is an emerging body of research and practice in the field of quantitative assessments of human rights progress, going directly to the question of whether States are dedicating sufficient resources to the realization of their obligations. The human rights framework requires an examination of the fiscal and policy efforts undertaken for the realization of human rights, to assess whether these are sufficient under the given circumstances.

106. JOHN SCANLON, ANGELA CASSAR & NOEMI NEMES, WATER AS A HUMAN RIGHT? 31 (2004).

107. See Rep. of the Independent Expert, *supra* note 100, at 8, 16.

108. See Indep. Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water & Sanitation, *Rep. of the Indep. Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation: Progress Report on the Compilation of Good Practices*, United Nations Human Rights Council, ¶ 7, U.N. Doc. A/HRC/15/31/Add.1 (July 1, 2010) [hereinafter Progress Report] (by Catarina de Albuquerque) (“The significance of enshrining a right in a legal framework is to confer on people an entitlement; standards and approaches can then be defined in relevant laws and policies.”); *Corruption Risks and Integrity in Urban Water Supply*, WATER INTEGRITY NETWORK 3 (Apr. 2011), [http://www.waterintegritynetwork.net/images/stories/WIN\\_Briefs/WIN\\_Brief\\_4\\_-\\_Urban\\_Water.pdf](http://www.waterintegritynetwork.net/images/stories/WIN_Briefs/WIN_Brief_4_-_Urban_Water.pdf); Emilie Filmer-Wilson, *The Human Right to Water and the Human Rights-Based Approach to Development*, in THE HUMAN RIGHT TO WATER 53, 62 (Eibe Riedel & Peter Rothen eds., 2006) (“Participation, equality, empowerment, and attention to both the outcome and processes of programmes are already cornerstones of good programming practice. . . . “[T]he ‘added value’ of a HRBA in this respect is that it offers a coherent normative framework that reinforces and extends

However, effectively measuring state compliance with economic, social, and cultural rights under Article 2 in a meaningful way presents numerous challenges.<sup>109</sup> Human rights norms must be translated into measurable indicators.<sup>110</sup> However, even where such indicators exist, it can be difficult to obtain access to all of the relevant information, to ensure its reliability, and to analyze it properly.<sup>111</sup>

Nevertheless, the recognition of water and sanitation as a human right itself increases the global community's political, legal, and moral will to address the dire need for water and sanitation. Some argue that an emphasis on human rights in the water and sanitation sector could threaten to divert resources from other development projects, displacing the policy priorities of elected officials who must decide how to allocate precious resources across competing priorities such as water, education, health, roads, and job creation. However, the human right to water and sanitation is embedded within the ICESCR and supported by the Article 2 obligation to progressively realize *all* rights recognized within the ICESCR.

### B. *Content of the Human Right to Water and Sanitation*

The human right to water and sanitation under international law is guided by the notion that sufficient water and sanitation services must be provided to ensure human dignity, life, and health.<sup>112</sup> General Comment 15 describes the normative content of the human right to water in two related ways. In paragraph

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these good programming practices by making them non-negotiable, consistent and legitimate.”).

109. See HENRY STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS & MORALS* 277 (2007) (“The greatest challenge is to identify effective approaches to implementation – i.e., to the means by which ESCR can be given effect and governments can be held accountable to fulfil their obligations.”); Robert E. Robertson, *Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social, and Cultural Rights*, 16 *HUM. RTS. Q.* 693 (1994) (discussing possible standards that could be developed to improve compliance with the ICESCR declaration that each party must devote the “maximum of its available resources” to realizing these rights).

110. See Sakiko Fukuda-Parr, Terra Lawson-Remer & Susan Randolph, *An Index of Economic and Social Rights Fulfillment: Concept and Methodology*, 8 *J. HUM. RTS.* 195 (2009) (discussing a composite index methodology for measuring economic and social rights fulfillment); Benjamin Mason Meier, Georgia Kayser, Urooj Amjad, Jocelyn Getgen Kestenbaum & Jamie Bartram, *Drop by Drop: Examining the Practice of Developing Human Rights Indicators to Facilitate Accountability for the Human Right to Water and Sanitation*, \_\_\_ *J. HUM. RTS. PRAC.* (forthcoming 2013) (describing the process of developing human rights indicators for water and sanitation); Amjad et al., *supra* note 20 (discussing the measurement of indicators for equity and nondiscrimination).

111. DOWELL-JONES, *supra* note 101, at 185-192 (noting that there “is an evident lack of expertise among the Committee” and that “[t]oo many fundamental issues concerning the scope and practice implications of the Covenant remain unclear. . . . At its most basic, how the interrelationship of a State party’s fiscal, monetary and broad macroeconomic policy and the obligations set out in the Covenant is conceptualized by the Committee has not been systematically clarified.”).

112. General Comment No. 15, *supra* note 4, ¶ 1.



two, it states that the right to water “entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.” In paragraph twelve, it describes the content of the right as requiring: (1) availability, (2) quality, and (3) accessibility.<sup>113</sup> Accessibility is further divided into four subcategories: (a) physical accessibility, (b) economic accessibility, (c) nondiscrimination, and (d) information accessibility.<sup>114</sup> In her report on “good practices,” the U.N. Special Rapporteur built on General Comment 15 by developing two sets of criteria that could be used to evaluate whether a practice was “good” from the standpoint of realizing the human right to water and sanitation. The first set, which she described as the “normative content” of the human right to water and sanitation, consists of: (1) availability, (2) quality/safety, (3) acceptability, (4) accessibility, and (5) affordability.<sup>115</sup> The second set she described as “cross-cutting” criteria because they are applicable to all human rights: (6) nondiscrimination, (7) participation (which incorporates the concept of information accessibility described in General Comment 15), (8) accountability, (9) impact, and (10) sustainability.<sup>116</sup> The cross-cutting criteria contain both substantive and procedural rights, and they are conceptually consistent with the principles of the human rights-based approach to development.<sup>117</sup>

The approach used to define the human right to water and sanitation is in line with how other rights recognized in the ICESCR have been treated. A member of the Committee on Economic, Social and Cultural Rights has described this as the “‘ilities’-approach, meaning the availability, accessibility, and affordability and safety of water for every human person within the available resources of the state.”<sup>118</sup> General Comment 15 articulates normative standards, but does not specify actual quantities of water. Paragraph two states that “An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.”<sup>119</sup> Although the exact amounts are supposed to be determined at the national and subnational levels, both General Comment 15 and “good practices” refer to

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113. *Id.* at ¶ 12. *See also* SCANLON ET AL., *supra* note 106, at 28.

114. General Comment No. 15, *supra* note 4, ¶ 12(c).

115. Progress Report, *supra* note 108, ¶¶ 15-36.

116. *Id.* ¶¶ 37-68.

117. *See The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among U.N. Agencies*, HUMAN RIGHTS BASED APPROACHES PORTAL, <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies> [hereinafter HRBA Portal]; Filmer-Wilson, *supra* note 108; Russell, *supra* note 64, at 2-3 (discussing the introduction of human rights language into development circles).

118. Riedel, *supra* note 58, at 25 (“The strategy of the CESCR was to closely follow the general comments it had drafted on housing, forced evictions, food, education and health. Consequently, the main focus was on equal access to available water services and resources.”).

119. General Comment No. 15, *supra* note 4, ¶ 2.

guiding principles, such as the World Health Organization's minimum daily water requirements, which describe twenty liters per capita daily (lpcd) as basic access; fifty lpcd as intermediate access; and 100-200 lpcd as optimal access.<sup>120</sup> As a result, domestic incorporation of the right to water and sanitation, with specific parameters, is now one of the primary public policy challenges.<sup>121</sup>

Like other economic, social, and cultural rights, the implementation of the human right to water and sanitation imposes obligations on states to respect, protect, and fulfill these rights.<sup>122</sup> These duties apply to both positive and negative rights, which General Comment 15 describes as “freedoms” and “entitlements.”<sup>123</sup> States have an obligation to *protect* individuals' rights to access from interference by third parties, such as by ensuring that an industry does not pollute a local waterway.<sup>124</sup> They also have an obligation to *respect* these rights, such as by not arbitrarily cutting off services.<sup>125</sup> Finally, they have a right to *fulfill* these rights, by using maximum available resources to progressively ensure that everyone has access to the services.<sup>126</sup>

It is sometimes asserted that in comparison to civil and political rights, economic and social rights are primarily positive rights that require financial investment.<sup>127</sup> Nevertheless, “it would be wrong to suggest that civil and political rights themselves are entirely negative or free of cost.”<sup>128</sup> A simple

120. *Id.* ¶ 12; WORLD HEALTH ORG., THE RIGHT TO WATER 13 (2003), available at <http://www.righttowater.info/wp-content/uploads/Right-to-Water.pdf>. See also Gleick, *supra* note 8, at 496.

121. Human Development Report, *supra* note 21, at 60.

122. General Comment No. 15, *supra* note 4, at ¶ 20-; SCANLON ET AL., *supra* note 106, at 22; Fons Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, 11 HUM. RTS. L. REV. 1, 20 (2011) (noting that “the typology of state obligations ‘to respect, to protect, to fulfil (facilitate and provide)’ [is] used increasingly in the debate on [economic, social, and cultural] rights”). See also United Nations, Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd Sess., 2000, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter General Comment No. 14] (noting in paragraph 33 that “[t]he right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfill”).

123. General Comment No. 15, *supra* note 4, ¶ 10.

124. *Id.* ¶¶ 23-24, 44(b).

125. *Id.* ¶¶ 21, 44(a).

126. *Id.* ¶¶ 25-26, 44(c).

127. Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 159 (1987).

128. CRAVEN, *supra* note 6, at 15. See also Alston & Quinn, *supra* note 127, at 172 (noting that “[t]he reality is that the full realization of civil and political rights is heavily dependent both on the availability of resources and the development of the necessary societal structures. The suggestion that realization of civil and political rights requires only abstention on the part of the state and can be achieved without significant expenditure is patently at odds with reality.”).

example illustrates the point: the classic “negative” right not to be arbitrarily arrested or detained requires a significant expenditure of resources to be meaningful, including an adequately trained police force, an effective judicial system, and state-provided attorneys for the indigent.<sup>129</sup> Similarly, the human right to water and sanitation imposes positive and negative obligations. Of course, in many situations, it may be easier for a judicial body to enforce negative rights by prohibiting actions that would harm access to safe water and sanitation, such as pollution, than it is to affirmatively enforce positive rights.<sup>130</sup> However, human rights require action beyond the judicial branch. It is critical that states incorporate human rights norms into domestic legislation to ensure that they meet their obligations to progressively realize these rights.<sup>131</sup>

Although framing water and sanitation as a human right will not on its own solve the challenges of improving access to basic water and sanitation services, the articulation of substantive and procedural goals informs public policy and assists in better targeting resources. By recognizing that individuals have rights, individuals are empowered to seek recourse, which can improve accountability, transparency, and service delivery.<sup>132</sup> The influence that the discourse on the human right to water and sanitation has had on discussions regarding Millennium Development Goal (MDG) targets and monitoring is instructive. The World Health Organization and UNICEF, who together comprise the Joint Monitoring Program, are now considering how to better incorporate human rights criteria into MDG monitoring.<sup>133</sup>

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129. Alston & Quinn, *supra* note 127, at 184 (“Some civil and political rights, for example, require more state involvement than do others. An obvious example is the civil right to a fair trial which requires a fully functioning judicial system to be operational. Conversely not all economic and social rights require the expenditure of the same amount of resources as others and some will require a lesser element of state intrusiveness through supervision than others.”).

130. Arnold, *supra* note 39, at 816.

131. Malcolm Langford, *The Right to Water in National Law: A Review*, in *THE HUMAN RIGHT TO WATER* 115, 115 (Eibe Riedel & Peter Rothen eds., 2006) (“The incorporation of the right to water and other social rights in national law is strongly recommended by the Committee on Economic, Social and Cultural Rights.”).

132. *But see* Human Development Report, *supra* note 21, at 102 (“[c]ommunity participation has been used as an instrument for implementing government policies, raising finance and overcoming technological obstacles rather than as a means of empowering people or enabling them to express demand.”).

133. WORLD HEALTH ORG./UNITED NATIONS CHILDREN’S FUND JOINT MONITORING PROGRAMME FOR WATER SUPPLY AND SANITATION, JMP REPORT: PROGRESS ON DRINKING WATER AND SANITATION: 2012 UPDATE (2012), <http://www.unicef.org/media/files/JMPreport2012.pdf> [hereinafter WHO/UNICEF, 2012 Update]; WORLD HEALTH ORG./UNITED NATIONS CHILDREN’S FUND JOINT MONITORING PROGRAMME FOR WATER SUPPLY AND SANITATION, REPORT OF THE FIRST CONSULTATION ON POST-2015 MONITORING OF DRINKING-WATER AND SANITATION (2011), [http://www.who.int/water\\_sanitation\\_health/publications/2011/berlin\\_meeting.pdf](http://www.who.int/water_sanitation_health/publications/2011/berlin_meeting.pdf) [hereinafter WHO/UNICEF First Consultation Report]; CTR. FOR HOUS. RIGHTS & EVICTIONS, *THE SIGNIFICANCE OF HUMAN RIGHTS IN MDG-BASED POLICY MAKING ON WATER AND SANITATION: AN APPLICATION TO KENYA, SOUTH AFRICA, GHANA, SRI LANKA AND LAOS* (2009); Amjad et al., *supra* note 20, at 8 (discussing the measurement of indicators for equity and nondiscrimination).

### C. *Water versus Safe Drinking Water*

Although the phrase “human right to water” is often used, the 2010 U.N. General Assembly and Human Rights Council resolutions refer specifically to the right to “safe drinking water.”<sup>134</sup> The general international legal consensus, however, is that the human right to water is slightly broader and also includes water for personal and domestic uses, as elaborated in General Comment 15 and by the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation.<sup>135</sup> General Comment 15 goes one step further, by including several references to agricultural water. In paragraph six, General Comment 15 recognizes that “water is necessary to produce food (right to adequate food),” but that “priority in the allocation of water must be given to the right to water for personal and domestic uses.”<sup>136</sup> In the next paragraph, General Comment 15 expands on this idea:

The Committee notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food (see General Comment No. 12 (1999)). Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology. Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not “be deprived of its means of subsistence”, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.<sup>137</sup>

Despite the broad references in General Comment 15 to water for subsistence agriculture, the current understanding of the human right to water focuses primarily on water for drinking, for other basic household needs, and for sanitation, reflecting its origins in the right to health. Moreover, General Comment 12 on the right to adequate food notably does not mention water. As concerns about the water-food nexus rise, however, this may be an evolving area of international law.<sup>138</sup>

### D. *A Separate Human Right to Sanitation?*

From the standpoint of international law, one open legal question is the status of the right to sanitation, because it is sometimes described as a right derived from water, sometimes as a co-right with water, and at other times as an independent right. As suggested by its title, “The Right to Water,” General Comment 15 primarily focuses on the right to water and references sanitation in

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134. See G.A. Res. 64/PV.108, *supra* note 1; H.R.C. Res. 15/9, *supra* note 2.

135. General Comment No. 15, *supra* note 4, ¶ 2; Progress Report, *supra* note 108, ¶ 19.

136. General Comment No. 15, *supra* note 4, ¶ 6.

137. *Id.*

138. See WINKLER, *supra* note 10, at 158-168 (discussing links between the right to water, the right to food, and agriculture). See also ALBERTO GARRIDO & HELEN INGRAM, WATER FOR FOOD IN A CHANGING WORLD (2011).

several places primarily as a rationale for ensuring the right to water.<sup>139</sup> Yet General Comment 15 also notes the importance of access to adequate sanitation as “fundamental for human dignity and privacy,” explaining that “State parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.”<sup>140</sup> Thus, although General Comment 15 primarily treats the right to sanitation as derived from the right to water, it does give some indication that it could have greater legal status.<sup>141</sup> In the 2010 resolutions by the General Assembly and the Human Rights Council, the right to sanitation is treated as a co-right with the right to safe drinking water.<sup>142</sup>

In contrast to the formulations in General Comment 15 and the General Assembly resolution, the Special Rapporteur has urged that the right to sanitation be recognized as an independent right. Thus, there are human rights to both water and sanitation. In her first report to the Human Rights Council in 2009, the then-Independent Expert (now Special Rapporteur) discussed the “second class” nature of the right to sanitation and urged that the right be recognized as independent. In her recent book, “On the Right Track: Good Practices in Realising the Rights to Water and Sanitation,” the Special Rapporteur notes that she purposefully employs the plural phrase, the human *rights* to water and sanitation, except when referring to the U.N. resolutions. She explains:

[W]ater and sanitation should be treated as two distinct human rights, both included within the right to an adequate standard of living and with equal status. There are pragmatic reasons for this approach. All too often, when water and sanitation are mentioned together, the importance of sanitation is downgraded due to the political preference given to water. Naming both water and sanitation as separate human rights provides an opportunity for governments, civil society and other stakeholders to pay particular attention to defining specific standards for the right to sanitation and subsequently for the realisation of this right. Further separating the right to sanitation from the right to water recognizes that not all sanitation options rely on water-borne systems.<sup>143</sup>

The idea of everyone being entitled to access a safe and clean place to relieve him or herself is fundamentally about upholding human dignity, which is at the core of the human rights system. Simply put, having to defecate in the open and/or unsafe, unclean, or otherwise unacceptable place is undignified, evoking feelings of shame, disgust, and fear. In fact, in introducing the draft

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139. General Comment No. 15, *supra* note 4 (describing the right to sanitation as a reason for ensuring that there is an adequate quantity of water available, ¶ 12(a), as “one of the principal mechanisms for protecting the quality of drinking water supplies and resources,” ¶ 29, and as critical for preventing and controlling diseases linked to water, *see* ¶ 37(i). In this context, sanitation appears to be a right derived from the right to water.).

140. *Id.*

141. Riedel, *supra* note 58, at 29 (“The linkage to article 12 ensured that the issue of sanitation is kept in focus, and this is reflected in the General Comment.”).

142. H.R.C. Res. 15/9, *supra* note 2.

143. DE ALBUQUERQUE, ON THE RIGHT TRACK, *supra* note 20, at 27.

General Assembly resolution on the human right to water and sanitation, the representative from Bolivia stated that “more than any other human rights issue, sanitation raised the concept of human dignity.”<sup>144</sup> In the UDHR, the concept of “dignity” is emphasized twice in the Preamble as well as in the first sentence of Article 1. Similarly, “dignity” is repeated twice in the Preamble of the ICESCR.

Recognizing the right to water and sanitation as independent rights, as suggested by the Special Rapporteur, is compelling from the standpoint of human rights theory and public policy.

From the standpoint of developing law and public policy, the Special Rapporteur rightly notes that while every intention may be made to treat water and sanitation together, the primary focus is usually on water, to the detriment of sanitation. In addition, sanitation is not a natural resource in the same way as water. As a result, many of the debates associated with the human right to water, such as ownership of water and effective privatization of a seemingly public resource, are less applicable. Finally, the science of sanitation is changing. As the Gates Foundation goal of “reinventing the toilet” suggests, there is increasing interest in developing low-water or no-water toilets.<sup>145</sup> Urine-diversion toilets that require no water are already being used in places like South Africa and Bolivia.<sup>146</sup> To the extent that these technologies become more prevalent, it is sensible to consider water and sanitation as related but independent rights. Each separately derives from the right to an adequate standard of living and the right to health in the ICESCR.

### III.

#### THE CONTROVERSY OVER PRIVATIZATION

Having reviewed the history and content of the human right to water and sanitation, this section returns to the most controversial issue: privatization. While human rights are fundamentally about the obligations between states and individuals, state responsibility for water and sanitation services does not mean that the services must be provided by the state.<sup>147</sup> As the Special Rapporteur on

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144. G.A. Res. 64/PV.108, *supra* note 1.

145. Press Release, Bill & Melinda Gates Found., Gates Foundation Launches Effort to Reinvent the Toilet (July 19, 2011) *available at* <http://www.gatesfoundation.org/press-releases/pages/safe-affordable-sanitation-110719.aspx>.

146. *See, e.g.*, Beth Lorimer, *Flushing out the Realities of Urine Diversion Toilets in South Africa's eThekweni Municipality*, INST. FOR RESEARCH & INNOVATION IN SUSTAINABILITY (Jul. 23, 2011), <http://www.irisYorku.ca/2011/07/flushing-out-the-realities-of-urine-diversion-toilets-in-south-africa%e2%80%99s-ethekweni-municipality/>; MINISTERIO DE MEDIO AMBIENTE Y AGUA, *Guía Técnica de Diseño y Ejecución de Proyectos de Agua y Saneamiento con Tecnologías Alternativas* (2011) (Bol.).

147. Davis, *supra* note 37, at 152, n. 4 (“State responsibility for basic service provision does not, of course, require direct public provision of those services. In many countries, government ensures access to basic shelter and food supply by providing cash transfers to low-income households who avail themselves of those services in the private sector.”).

the Human Right to Safe Drinking Water and Sanitation noted in her 2009 report on non-state actors, which was also cited in the Human Rights Council resolution, “[t]he right to water (less so the right to sanitation) and opposition to private sector participation are frequently linked to each other. . . . Yet, the two issues are separate. Human rights are neutral as to economic models in general, and models of service provision more specifically.”<sup>148</sup>

A 2007 report by the U.N. Office of the High Commission on Human Rights (OHCHR) to the General Assembly further elaborated:

The approach of United Nations treaty bodies and special procedures has been to stress that the human rights framework does not dictate a particular form of service delivery and leaves it to States to determine the best ways to implement their human rights obligations. While remaining neutral as to the way in which water and sanitation services are provided, and therefore not prohibiting the private provision of water and sanitation services, human rights obligations nonetheless require States to regulate and monitor private water and sanitation providers.<sup>149</sup>

Although concerns around privatization have clearly been at the core of the debate around the human right to water and sanitation, this issue is not foreign to economic and social rights generally, as suggested by the quote above. At the time of its adoption, the ICESCR engendered debate about whether the obligations contained therein were incompatible with certain systems of political economy.<sup>150</sup> In particular, concerns were raised that the ICESCR would require a more communist-oriented system, with a “totalitarian” form of state control and forced redistribution of wealth. This was partly the result of the fact that the Soviet Union and other Eastern states championed economic, social, and cultural rights, while Western states believed in the supremacy of civil and political rights, which they considered to be central to upholding liberty and democracy in the “free world.”<sup>151</sup> However, as Philip Alston and Gerard Quinn note, “such arguments have been consistently and decisively rejected by the governments of all the Western European and market economy (i.e., mixed capitalist) Third World states that have ratified the Covenant.”<sup>152</sup> The ICESCR provides

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148. Indep. Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water & Sanitation, *Rep. of the Indep. Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, United Nations Human Rights Council, ¶ 7, U.N. Doc. A/HRC/15/31 (June 29, 2010) [hereinafter Rep. of the Indep. Expert, June 2010] (by Catarina de Albuquerque).

149. Rep. of the Independent Expert, *supra* note 100, at 22.

150. Alston & Quinn, *supra* note 127, at 181 (noting that economic, social and cultural rights are often critiqued as being “inherently incompatible with a free market economy”).

151. CRAVEN, *supra* note 6, at 8-9 (noting that civil and political rights are considered “first generation” rights because they derive from the eighteenth century Declaration on the Rights of Man. In contrast, ESCR are considered to be “second generation” rights because they arose from the growth of socialist ideals in the late nineteenth and twentieth century. These rights contrast with the more recently recognized “third generation” rights, which encompass the rights of peoples or groups.).

152. Alston & Quinn, *supra* note 127, at 182.

governments with a good deal of discretion as to how to promote the relevant rights. In addition, the *travaux préparatoires* “bluntly contradict” the idea of the ICESCR as promoting one form of political economy.<sup>153</sup> In fact, a U.S. State Department official wrote in 1949 that “it is a grievous mistake . . . to assume that . . . these rights must be secured exclusively or even primarily by direct State action.”<sup>154</sup> In other words, state responsibility for human rights does not mean state-mandated services.

In 1990, the Committee on Economic, Social and Cultural Rights affirmed the neutrality of human rights toward economic models of activity. In General Comment 3 on “The nature of States parties obligations,” the Committee examined Article 2, paragraph one of the ICESCR:

The Committee notes that the undertaking “to take steps . . . by all appropriate means including particularly the adoption of legislative measures” neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognized and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development.<sup>155</sup>

At the same time, the Committee has been concerned that the trend toward *laissez-faire* market economics and privatization of state properties could exacerbate the position of the vulnerable and disadvantaged in society. To address these concerns, it “has emphasized the need for adequate safety social nets, which should . . . ‘be formulated in terms of rights rather than charity or generosity’.”<sup>156</sup> As Craven observed, “Although the Committee has tended to look critically upon associated elements of privatization, such as reductions in the proportion of government spending set aside for health and welfare services, it has not gone so far as to declare the process as being incompatible with the obligations under the Covenant.”<sup>157</sup> In other words, the ICESCR is not incompatible with a capitalist system or with market-based approaches. The 2010 Human Rights Council Resolution was in line with this historical approach, affirming the neutrality of human rights toward private sector participation while also highlighting their relevance to such decisions.

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153. *Id.* at 182-183.

154. *Id.* at 183.

155. General Comment No. 3, *supra* note 100, ¶ 8.

156. CRAVEN, *supra* note 6, at 122 (quoting Statement to the World Conference, in U.N. Doc. E/1993/22, 82, at 84, ¶ 10).

157. *Id.* at 123.



Given the history of the ICESCR, it may seem surprising that the human right to water and sanitation has been perceived to be so at odds with privatization. Part of the answer lies in recognizing that anti-privatization political and social movements around the world have used the human right to water and sanitation as a rallying call to draw attention to disastrous privatization experiments. Moreover, some countries, like Uruguay<sup>158</sup> and Bolivia,<sup>159</sup> have recognized the human right to water and sanitation while simultaneously taking steps to ban privatization of water and sanitation services, which further conflates the two issues. Part of the answer also lies in the fact that while human rights may be neutral *vis-à-vis* economic models, they are relevant as to *how* to engage the private sector in the provision of basic services.<sup>160</sup>

The following analysis illustrates this relevance by focusing on three key themes that highlight the tensions between human rights and private sector involvement in the water and sanitation sectors: financial sustainability, efficiency, and dispute resolution. This analysis discusses several of the most well-known privatization examples in the human rights literature but does not provide in-depth case studies. The analysis bridges together human rights literature with water management and economic literature in an attempt to clarify common misconceptions about how human rights are relevant to the provision of safe drinking water and sanitation by private actors.

The international human rights system's "neutral" approach, as reflected in General Comment 15 and the Human Rights Council resolution on the right to safe drinking water and sanitation, has not been without its critics. In many ways, the current framing of the human right to safe drinking water and sanitation under international law has been a disappointment to water justice activists, for whom the "neutrality" of human rights toward questions of privatization has been interpreted as an unwillingness to speak truth to corporate

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158. Raúl Pierri, *Uruguay: Referendum Gives Resounding 'No' to the Privatisation of Water*, INTER PRESS SERVICE NEWS AGENCY, Nov. 1, 2004, available at <http://www.ipsnews.net/2004/11/uruguay-referendum-gives-resounding-no-to-the-privatisation-of-water/>; Malcolm Langford, *Tragedy of the Commons? Human Rights and the World Water Crisis* (Castan Ctr. for Human Rights Law, Human Rights 2006: The Year in Review Conference Paper, 2006), available at <http://www.law.monash.edu.au/castancentre/events/2006/conf-06-langford-paper.html>.

159. The Constitution of Bolivia states in Article 20, Clause III, that access to water and sanitation constitute human rights, that they are not to be the object of any concessions nor forms of privatization, and that they are subject to a licensing and registration regime, in accordance with the law. However, Clause II also states that the state, which has the responsibility to provide basic services, may provide those services through public, mixed, cooperative or community entities. Some social reformers in Bolivia believe that the reference to "mixed" entities leaves open the possibility that the government could engage in public-private partnerships. See REPÚBLICA DEL BOLIVIA, CONSTITUCIÓN DE 2009, available at <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html>.

160. See Harvey B. Feigenbaum & Jeffrey R. Henig, *The Political Underpinnings of Privatization: A Typology*, 46 WORLD POLITICS 185, 186 (1994) ("In shifting responsibilities from government to market, privatization potentially alters the institutional framework through which citizens normally articulate, mediate, and promote their individual and shared interests.").

power. As Farhana Sultana and Alex Loftus write, rights “are seen as inherently individualizing and, in the case of human rights, they are seen to neglect the economic injustices that permit the continued violation of people’s basic dignity, building instead on a liberal democratic framework that fails to recognize the reproduction of unequal power relations within capitalist societies.”<sup>161</sup> Matthew Craven has also suggested that “a blanket refusal to engage with the policies and politics of water distribution and management is not to make the Committee’s approach any less ‘political,’” and that “by leaving the matter to other agencies, the Committee may actually contribute to the further marginalisation of its main constituency (the poor and dispossessed).”<sup>162</sup>

Given these critiques and the contentious battles over privatization around the world, perhaps the commonly held principle of neutrality should be questioned. In other words, should the human right to water and sanitation be interpreted as incompatible with privatization? On the one hand, as suggested by water justice struggles around the world, water is a unique resource that plays a very fundamental role in our lives, both physically and spiritually. The idea of placing it under private control, commodifying it and selling it to the highest bidder, is an anathema to many, who fear that the poor and marginalized will be denied access to this life-sustaining resource. At the same time, trying to create a bright-line rule against privatization is problematic because it assumes that state delivery of services is always best, which has not borne true as an empirical matter. Moreover, as discussed in greater detail below, private sector involvement in the *formal* water sector is between five and fifteen percent of all municipal services. However, millions of people around the world who do not have access to good quality and consistent services through a municipal service infrastructure rely on private vendors, such as tanker trucks and bottled water vendors, many of whom may be small-scale entrepreneurs operating in the informal sector. The human rights system is state-centric and does not distinguish between different types of non-state actors, which can range from nongovernmental organizations, to small entrepreneurs, to transnational corporations. But even if it was possible to distinguish between different types of private actors, the question concerns where the line should be drawn. Would it be based on legal structure (*i.e.*, whether it was a corporation, a sole proprietorship, or a not-for-profit) or on size of revenues, which could easily lead to the creation of shell companies? It is easy to see the difficulty of articulating bright-line rules that would make sense in *all* situations and that would not be easily circumvented.

At the same time, real tensions do exist between the idea of respecting, protecting, and realizing the human right to water and sanitation for *all* and the

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161. THE RIGHT TO WATER: POLITICS, GOVERNANCE AND SOCIAL STRUGGLES 2 (Farhana Sultana & Alex Loftus eds., 2012).

162. Matthew Craven, *Some Thoughts on the Emergent Right to Water*, in THE HUMAN RIGHT TO WATER 37, 46-47 (Eibe Riedel & Peter Rothen eds., 2006).

goals that motivate a private company. Human rights law makes clear that states are duty-bearers and have an obligation to *protect, respect, and fulfill* recognized rights. A state cannot simply assume that by delegating its formal municipal operations to a private corporation, it has discharged all of its responsibilities. Rather, regulation and monitoring is critical to help mitigate tensions between the values that drive privatization and those of the human right to water and sanitation, a topic that will be returned to at the end of this paper. The debate, which is often framed as one of “rights” versus “commodification,” obscures the fact that the delivery of water and wastewater services is a complex process that requires a significant amount of infrastructure. In fact, in some cases, there is an inherent tension between trying to make these infrastructure improvements and providing good quality, accessible, and affordable services to *all* without discrimination.

#### A. Trends in Privatization

The global push toward formal private sector participation<sup>163</sup> in water and sanitation services began in the nineteen eighties and nineties as part of a larger trend to involve the private sector in the delivery of all public services.<sup>164</sup> In fact, the rise of the term “governance” reflects the increasing devolution of authority from the state to other actors.<sup>165</sup> This trend was driven in part by a desire to tap the expertise and financial capacity of the private sector and in part by ideology.<sup>166</sup> Both rationales were reinforced by evidence that public utilities

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163. This analysis focuses specifically on the provision of services through municipal, piped networks (*i.e.*, the “formal” water sector). As noted elsewhere, millions of people around the world do not have access to piped water, and must rely on private vendors, usually known as “informal” water sector.

164. As a result of the global economic crisis of the nineteen seventies, there was a trend away from Keynesian economics, which emphasized government intervention in markets, and towards neo-classical economics, which promoted limited government interference in markets and supported increased private sector involvement. JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 12-13 (2003); STEFAN HALPER, *THE BEIJING CONSENSUS: HOW CHINA’S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY* 51-54 (2010); DAMBISA MOYO & NIALL FERGUSON, *DEAD AID: WHY AID IS NOT WORKING AND HOW THERE IS A BETTER WAY FOR AFRICA* 19-20 (2010).

165. BAKKER, *supra* note 31, at 45 (“The term ‘governance’ has risen in prominence in recent decades as formal government authority has increasingly been supplemented or supplanted by a reliance on informal authority; roles previously allocated to governments are now (controversially) categorized as more generic social activities carried out either by political institutions or by other actors.”).

166. Davis, *supra* note 37, at 154 (“The upsurge in private-sector delivery of W&S services in both industrialized and developing countries was driven by a convergence of political and economic forces. Market-based approaches to development gained popularity in the 1980s, embodied most notably by the United Kingdom’s ambitious privatization program. . . . The privatization wave that expanded to the developing world in the following decade was promoted heavily by international development agencies such as the World Bank and its private-sector arm, the International Finance Corporation (IFC).”).

in many parts of the world were not operating efficiently.<sup>167</sup> Further, the neoliberal political philosophy and principles that became known as the Washington Consensus played a large role in the promotion of pro-market, pro-privatization international development policies.<sup>168</sup> The principles of deregulation, market liberalization, and privatization of state assets and services had a significant influence on the policies of the 1980s, particularly through the Reagan and Thatcher administrations, and through structural adjustment programs promoted by the International Monetary Fund and World Bank.<sup>169</sup> As in other sectors, privatization of the water sector was perceived as a way to improve the efficiency by transferring the financial burden onto the private sector, lowering the overall costs of services.<sup>170</sup> In some instances, international aid or loans were conditioned on involving the private sector in the delivery of services that historically had been managed publicly, such as water. In fact, between 1996 and 2002, the World Bank conditioned approximately one-third of its water-related loans on the privatization of the water utility.<sup>171</sup> This was not a phenomenon limited to the developing world; for example, changes in the tax law made it easier for companies to enter the water market in the United States.<sup>172</sup>

Although the term “privatization” of water is widely used, the actual privatization of water<sup>173</sup> (*i.e.*, the full-scale divestiture of assets) is rare.<sup>174</sup> Only

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167. *Id.* (“In developing countries, public W&S utilities often have unaccounted-for water (UFW) rates of 40% or more, are considerably overstaffed, recover only about a third of their costs of service provision, and do not provide services to a substantial proportion of households within their service area.”).

168. *See, e.g.*, John Williamson, *A Short History of the Washington Consensus*, in THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE (Narcis Serra & Joseph E. Stiglitz eds., 2008); John Williamson, *The Washington Consensus as Policy Prescription for Development*, in DEVELOPMENT CHALLENGES IN THE 1990S: LEADING POLICYMAKERS SPEAK FROM EXPERIENCE (Tim Besley & N. Roberto Zaghera eds., 2005); Douglas Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2116 (2005).

169. STIGLITZ, *supra* note 121, at 13; HALPER, *supra* note 121, at 56; MOYO AND FERGUSON, *supra* note 121, at 20; Andrew Gamble, *Privatization, Thatcherism, and the British State*, 16 J.L. & SOC’Y 1 (1988); Larry Elliott & Jill Treanor, *A Whole World Sold on Sell-Offs*, GUARDIAN (Nov. 21, 2000), <http://www.guardian.co.uk/business/2000/nov/22/thatcher.politics1>.

170. Emanuele Lobina & David Hall, *Problems with Private Water Concessions: A Review of Experience*, PUB. SERVICES INT’L RES. UNIT (Nov. 2003), <http://www.psir.org/sites/default/files/2003-06-W-over.doc> (noting that within the water and sanitation sectors, “[t]he advocates of private sector involvement, ranging from international financial institutions (IFIs), bilateral agencies, OECD countries’ governments, transnational corporations (TNCs), professional associations and scholars, have argued that PSP will improve efficiency, enable the extension of water services, raise the necessary investment finance, and relieve governments from budget deficits”); Feigenbaum & Henig, *supra* note 160, at 188-189; *see* BAKKER, *supra* note 31, at 42-44.

171. Joseph W. Dellapenna, *Climate Disruption, The Washington Consensus, and Water Law Reform*, 81 TEMP. L. REV. 383, 404 (2008).

172. Arnold, *supra* note 39, at 785, 793-96.

173. Throughout this discussion, the word “water” is often used alone, and reference is not

a few parts of the United Kingdom and Chile have employed full-scale water privatization.<sup>175</sup> Rather, private sector involvement in water provision complements public provision and includes a range of activities, such as outsourcing particular services for a publicly owned water supply and service system, or contracting with private sector companies to operate, maintain, or construct publicly owned systems.<sup>176</sup> Water service contracts with private companies vary according to asset ownership, responsibility for capital investments, assumption of risk, responsibility for operations and maintenance, and contract length.<sup>177</sup>

Another trend in water privatization is the concentration of market share among a few large companies worldwide. Due to large up-front expenditures and the challenges of promoting competition, only a few large firms dominate the private sector.<sup>178</sup> Most private water companies around the world are

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made to sanitation. This is largely because the contentious debates have focused on the private sector management of water. Wastewater services may also be included as part of concession contracts, depending on how the arrangement is made.

174. Lobina & Hall, *supra* note 170, at 4 (noting that “the French model of delegated management is the prevailing form of PSP in any region of the world, and French-based companies are also dominating the global water industry”).

175. Rep. of the Indep. Expert, June 2010, *supra* note 148, at 6, n.11; THE AGE OF COMMODITY: WATER PRIVATIZATION IN SOUTHERN AFRICA 2 (David A. McDonald & Greg Ruiters eds., 2005):

Privatization, in the strict sense of the word, refers only to the outright sale (divestiture) of state assets. Although this was the system of water privatization employed in the UK in the 1980s, there have been no major water service divestments of this kind anywhere else in the world since that time. Subsequent private sector participation in water has followed the so-called ‘French model’ which involves ‘public-private partnerships’ (PPPs) whereby the state continues to own the assets and is involved in the monitoring and decision making of the service delivery, but the actual operations and planning of water services are undertaken by the private entity.

*See also* KAREN BAKKER, AN UNCOOPERATIVE COMMODITY: PRIVATIZING WATER IN ENGLAND AND WALES (2004).

176. Arnold, *supra* note 39, at 792; Edouard Pérard, *Private Sector Participation and Regulatory Reform in Water Supply: The Southern Mediterranean Experience* 15 (OECD Dev. Ctr., Working Paper No. 265, 2008), available at <http://www.oecd-ilibrary.org/content/workingpaper/245713883474> (“The seven major types of private involvement are the service contract, the management contract, the lease contract (“Affermage”), the Build-Operate-Transfer (BOT) contract, the concession contract, the joint venture contract and the divestiture.”).

177. Rep. of the Indep. Expert, June 2010, *supra* note 148; Eshien Chong et al., *Public-Private Partnerships and Prices: Evidence from Water Distribution in France*, 29 REV. INDUS. ORG. 149, 150 (2006) (noting that “public-private partnerships (PPPs) present an alternative solution to full privatization. There are a range of organizational arrangements between fully public provision of services and complete privatization. These differ in their allocation of decision prerogatives, risks, and revenues, across the public and the private parties to a contract.”); Davis, *supra* note 37, at 148–150.

178. Clarke et al., *supra* note 29, at 347; Lobina & Hall, *supra* note 170, at 5 (“The global water industry is characterised by a marked concentration, with two TNCs (Vivendi and Suez) dominating almost 70% of world private market; joint ventures between these few dominant companies; and difficulty of entry.”).

subsidiaries of, or are owned by, only a few multinational corporations that have the necessary capital and expertise to operate water and wastewater treatment systems.<sup>179</sup> As of 2009, the three largest water corporations were Veolia Environment (formerly Vivendi), which operates in over 100 countries and provides water services to 110 million people; Suez, which operates in 130 countries and provides water services to 115 million people; and RWE AG, which provides water services to over seventy million people.<sup>180</sup> As of 2009, it was estimated that the combined revenue potential of these three corporations was close to three trillion dollars.<sup>181</sup>

Globally, the rate of private sector involvement in the formal water and sanitation sector ranges between five and fifteen percent.<sup>182</sup> In 2010, the public sector operated water services in approximately ninety percent of the 400 largest cities in the world (those with populations greater than one million).<sup>183</sup> Asia is the region with the lowest rate of private sector providers. South Asia has no such providers, and excluding China, there are only three cases of private water provision in the rest of Asia: Jakarta, Manila, and Kuala Lumpur. In the rest of the world (excluding all of Asia), the private sector is involved in approximately fourteen percent of all water service delivery systems.<sup>184</sup> These rates are comparable in the United States, where about fifteen percent of water customers (measured in volume of water handled) are serviced by a private sector provider.<sup>185</sup> A survey conducted in 2007 indicated that almost 600 cities across forty-three U.S. states had contracts with private water companies.<sup>186</sup> In many parts of the world, the rate of private sector participation may be on the decline,

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179. Davis, *supra* note 37, at 152-53 (“Because the majority of ‘deep’ PSP arrangements (*i.e.*, leases and concessions) involve just a handful of European-based multinational corporations and their subsidiaries, objections are also raised regarding these companies’ repatriation of profits that have been generated through the exploitation of a local natural resource.”).

180. Arnold, *supra* note 39, at 797. *See also* Sean Flynn & Kathryn Boudouris, *Democratising the Regulation and Governance of Water in the US*, RECLAIMING PUBLIC WATER: ACHIEVEMENTS, STRUGGLES AND VISIONS FROM AROUND THE WORLD 73, 81 (Belén Balanyá et al. eds., 2005) (“In the private sector, there has been a wave of consolidations that, according to the large water companies, increase the capacity of the companies to meet investment obligations. The largest water companies in the U.S. have, in turn, been targeted for acquisition by far larger European water companies, including RWE/Thames, Veolia (formerly Vivendi) and Suez.”).

181. Arnold, *supra* note 39, at 797. *See also* BARLOW, BLUE COVENANT, *supra* note 18, at 63 (noting that the revenue was almost sixty billion dollars for Suez, just under thirty-four billion dollars for Veolia Environment, and more than two billion dollars for Thames Water, recently divested by RWE).

182. *See* Rep. of the Indep. Expert, June 2010, *supra* note 148, at 5, n. 8 (noting that as of 2003, approximately five percent of the world’s population was being served by the formal private sector).

183. David Hall, Emanuele Lobina & Violeta Corral, *Replacing Failed Private Water Contracts*, PUB. SERVICES INT’L RES. UNIT 2 (Jan. 2010), <http://www.psiru.org/sites/default/files/2010-01-W-Jakarta.doc>.

184. *Id.*

185. Arnold, *supra* note 39, at 792.

186. *Id.* at 791.

as exemplified by water service figures in cities such as Buenos Aires, La Paz, and Paris, which are returning to the public sector. There has also been a big push to increase public-public partnerships between utilities in different locations to share experience and knowledge.<sup>187</sup> At the same time, as water production technologies such as desalination rise, the Middle East and South Asia,<sup>188</sup> which have had comparatively low rates of private sector participation, are now increasingly turning to private-public solutions.<sup>189</sup>

Privatization in the water and sanitation sector has been a contentious topic in many parts of the world. This section now examines some of those controversies by focusing on three key themes that are relevant to private sector involvement in the delivery of municipal water and sanitation services: financial sustainability, efficiency, and dispute resolution.

These three themes were selected because they highlight the conflict between markets and rights. The trend toward privatization was driven largely by a desire to improve financial sustainability and efficiency, which are the first two themes. This is not to say that these are not good goals from a public policy standpoint, but rather that these choices have trade-offs. For example, raising tariffs significantly to improve the financial viability of a utility may put the services out of reach for the poorest. Cutting municipal or utility employees to achieve efficiency goals can inadvertently decrease the quality of services delivered and responsiveness to complaints.

The third theme of dispute resolution highlights the limited ability of individual citizens, who are the rights-holders, to intervene in a concession contract dispute, even though their access to basic services is placed in jeopardy by a potentially faulty concession contract. As a result, it highlights a conflict with the human rights values of participation, transparency, and accountability.

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187. Chong et al., *supra* note 177.

188. Colin Kirkpatrick, David Parker & Yin-Fang Zhang, *An Empirical Analysis of State and Private-Sector Provision of Water Services in Africa*, 20 WORLD BANK ECON. REV. 143 (2006) (“Based on the World Bank Private Participation in Infrastructure (PPI) Database for the period 1990–2002, there were 106 such projects in Latin America and the Caribbean and 73 in East Asia and Pacific, but only seven projects in the Middle East and North Africa, and 14 in Sub-Saharan Africa.”).

189. Arani Kajenthira & Sharmila Murthy, *Urban Water Challenges in the MENA Region: Integrating Islamic Principles with Demand Management Strategies*, in WATER GOVERNANCE: AN EVALUATION OF ALTERNATE ARCHITECTURES (A. Guanwansa & L. Bhullar eds., forthcoming 2013) (“More recently, however, countries and cities within the MENA region are turning to the private sector. . . . In fact, according to the market research agency Global Water Intelligence, which maintains a global public-private partnership tracker for projects that are proposed, under bidding, or signed, as of 2010, 16 out of 21 countries in the region have solicited private sector involvement in ongoing projects.”); Swaminathan Natarajan, *Innovative Indian Water Plant Opens in Madras*, BBC NEWS (July 30, 2010), <http://www.bbc.co.uk/news/world-south-asia-10819040>.

### B. Financial Sustainability

Private sector participation in water and sanitation has been perceived to be at odds with the human right to water and sanitation because it often coincides with price increases, bringing issues of affordability to the forefront.<sup>190</sup> The outsourcing of historically public services to the private sector strikes a sensitive chord: if transactions are profitable enough to merit private sector interest, then it is often assumed that all tariff increases are going to line the company's coffers, especially when the price increases do not coincide with increases in services or availability.<sup>191</sup> However, what is often overlooked in the debate is that private sector participation often coincides with a policy decision (implicit or explicit) to move from subsidized or operational tariffs to full cost recovery.<sup>192</sup> Although many municipalities recognize that their water tariffs are not sufficient to cover full costs, they may not be able to raise rates for political reasons.<sup>193</sup> By outsourcing water services to a private company, cities are sometimes able to pass decisions to raise rates onto another entity.<sup>194</sup> Thus involving the private sector in the management of water services can provide governments with the political cover they need to raise tariffs and use the revenue for needed investments.<sup>195</sup> However, questions of reconciling affordability with financial sustainability still exist, regardless of whether the private or public sector is involved.

Under international law, the human right to water and sanitation does not prohibit pricing water to recover costs. What is crucial, however, is that persons cannot be denied access to safe drinking water or sanitation services due to their

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190. See, e.g. Chong et al., *supra* note 177, at 150 (finding in a study of 5000 local water operators in France “that consumers pay more when municipalities choose PPPs, controlling for other aspects of supply and demand in water distribution that could affect prices. To our knowledge, this is the first empirical study on a large sample with precise details of contracts signed between local authorities and private operators.”).

191. Davis, *supra* note 37, at 147 (“Public concern about transferring control over essential services to a for-profit company, incurring substantial price increases and poor service from a profit-maximizing monopolist, and ensuring environmental responsibility are at the forefront of debates regarding privatization of W&S services.”).

192. Clarke et al., *supra* note 29, at 335 (noting that “public utilities often set prices far below long-run marginal costs and rely on subsidies for investment and, often, operating costs”).

193. Davis, *supra* note 37, at 154 (“The political impediments to charging cost-recovering tariffs leave public utilities struggling just to maintain existing infrastructure, much less keep pace with a growing customer base.”).

194. Nickson & Vargas, *supra* note 33.

195. For example, in Manila, between 1997 and 2003, rates were raised as much as 400 percent in the West concession and as much as 700 percent in the East concession. One commentator observed that “[c]onsidering the purchasing power of the average citizen of the Philippines and the fact that for the same period prices in general rose 36.9 percent in the country (WDID 2008), it should not be difficult to predict that the privatization of water distribution resulted in a considerable part of Manila's population being deprived of their right to water.” Manuel Couret Branco & Pedro Damião Henriques, *The Political Economy of the Human Right to Water*, 42 REV. RADICAL POL. ECON. 142, 150 (2010).



inability to pay, and that services cannot be disconnected without adequate due process.<sup>196</sup> This has probably been the most contentious and disputed topic in the human rights discourse on water and sanitation, and it is intertwined with debates about treating water as an economic good and a commodity.<sup>197</sup> For example, the Cochabamba Declaration, which was adopted in the wake of a successful anti-privatization movement in Bolivia's third largest city and led to the cancellation of a water concession contract,<sup>198</sup> stated that "[w]ater is a fundamental human right and a public trust to be guarded by all levels of government, therefore, it should not be commodified, privatized or traded for commercial purposes."<sup>199</sup> Similarly, a well-known anti-privatization water activist has written that "[a] mighty contest has grown between those (usually powerful) forces and institutions that see water as a commodity, to be put on the open market and sold to the highest bidder, and those who see water as a public trust, a common heritage of people and nature and a fundamental human right."<sup>200</sup> Even General Comment 15 on the Right to Water and Sanitation stated that "water should be treated as a social and cultural good, and not primarily as an economic good."<sup>201</sup> However, General Comment 15 does not suggest that water should be free. Rather, it emphasizes the concept of economic accessibility: "[w]ater, and water facilities and services, must be affordable for all."<sup>202</sup> Drawing on the work of Karen Bakker, Verónica Perera offers a concise summary of the problems with conflating the right to water with commodification:

While "human right" is a legal category for individuals, entitling them with rights vis-à-vis the state, "commodity" refers to the property regime of the resource. The

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196. DE ALBUQUERQUE, ON THE RIGHT TRACK, *supra* note 20, at 61:

Laws and policies that permit service providers to disconnect water and sanitation users in response to the non-payment of bills must allow for due process. Such disconnection policies per se are not contrary to human rights principles, but authorities must ensure that the person faced with the disconnection is given opportunities for consultation and for rectifying the situation. They must also ensure that basic minimum amounts of water and access to sanitation are made available to the person (and members of his or her household) regardless of their ability to pay, to protect his or her dignity, health as well as other human rights, even where a disconnection is agreed.

*See also* General Comment No. 15, *supra* note 4, ¶¶ 21, 23 (discussing steps that should be taken to prevent interference with the right to water); Vivien Foster, Considerations for Regulating Water Services While Reinforcing Social Interests 10 (Oct. 1998) (UNDP-World Bank Water and Sanitation Program Working Paper Series), *available at* [http://www.wsp.org/sites/wsp.org/files/publications/working\\_foster.pdf](http://www.wsp.org/sites/wsp.org/files/publications/working_foster.pdf).

197. *See* ROGERS & LEAL, *supra* note 17, at 132.

198. *See* BAKKER, *supra* note 31, at 165-169.

199. Cochabamba Declaration, Dec. 8, 2000, [http://www.sierraclub.org/committees/cac/water/human\\_right/](http://www.sierraclub.org/committees/cac/water/human_right/).

200. BARLOW, BLUE COVENANT, *supra* note 18, at 102.

201. General Comment No. 15, *supra* note 4, at ¶ 11.

202. *Id.* ¶ 12(c)(ii).

right to *access* water does not automatically define the character of water as a non-commodity, and thus does not foreclose the provision of water by private corporations.<sup>203</sup>

The debate around the commodification of water through pricing often obscures the fact that water is not a true public good. Water has elements of both public and economic goods, and thus is considered an “impure” public good.<sup>204</sup> True public goods cannot be commoditized because they exhibit two key characteristics.<sup>205</sup> The first is non-rival consumption, which means that one person’s consumption does not interfere with another person’s consumption. Water consumption is often rivalrous because one person’s consumption can interfere with another’s access. Indeed, this is why water as a common property resource can be subject to the classic tragedy of the commons phenomenon.<sup>206</sup> The second characteristic of a true public good is non-excludability, which means that it is not possible to exclude others from consuming the good.<sup>207</sup> Water can often be seen as combining this public-good attribute of non-excludability and the private-good attribute of rival consumption. For example, water in a lake or an aquifer is a common-pool resource that may be accessible to all (non-excludable) but that diminishes with use (rival consumption).<sup>208</sup> Water also moves from public, to private, to common-property status almost at will, making its public-private classification all the more challenging.<sup>209</sup> Although a municipal water supply is often conceived of as a public good, people outside the piped network are excluded from this supposedly public resource. At the same time, once individuals have access to piped municipal water (legally or illegally), it is often impossible to exclude them, even if these additional connections reduce the total amount of water available for others.<sup>210</sup> Water and sanitation services provide a private benefit to the user while simultaneously promoting public and environmental health, thereby creating a public good. Thus water possesses many of the classical attributes of a public good while still retaining some characteristics of private possession and rivalry.

The discourse around the commodification of water is further complicated by the fact that providing clean water and sanitation services is expensive, requiring treatment plants, the installation and maintenance of piped

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203. Perera, *supra* note 31, at 243 (citing Karen Bakker, *The “Commons” Versus the “Commodity”*: *Alter-Globalization, Anti-Privatization and the Human Right to Water in the Global South*, 39 *ANTIPODE* 430 (2007)).

204. GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 4 (Inge Kaul, Isabelle Grunberg & Marc A. Stern eds., 1999); ROGERS & LEAL, *supra* note 17, at 124-135; BAKKER, *supra* note 31, at 30.

205. ROGERS & LEAL, *supra* note 17, at 130-132.

206. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

207. BAKKER, *supra* note 31, at 30.

208. ZETLAND, *supra* note 28, at 20.

209. ROGERS & LEAL, *supra* note 17, at 131.

210. *Id.* at 131-132.

infrastructure, metering, and other costs.<sup>211</sup> Water infrastructure investments are “lumpy” because the upfront infrastructure expenditures are estimated to account for about two-thirds of the cost of the water supply.<sup>212</sup> As a result, upfront financing is needed with payback periods of twenty years or more.<sup>213</sup> As a result, water and sewerage services tend to be natural monopolies, which can subject them to price gouging if the proper regulations are not in place.<sup>214</sup> Because a municipal water system is an inherent monopoly, concerns about fairness and predatory pricing arise when a traditionally public good is transferred to private hands. Moreover, the economics of water and sanitation are “more consistent with the longer-term planning horizon of government and not with the risk-minimization and profit-maximization priorities of private firms.”<sup>215</sup>

Maintaining affordability of water and sanitation can be challenging when expensive infrastructure needs to be built or repaired. Many municipalities have been receptive to private sector involvement in water delivery because it has presented an opportunity for capital investment to upgrade degrading infrastructure or to invest in new sources of water. It is easy to ignore degrading infrastructure, even in developed countries, because water and sewer pipes are underground. For example, over the next twenty to thirty years, it is estimated that the United States will need to invest \$140-250 billion in water infrastructure.<sup>216</sup> During Cochabamba’s brief privatization experiment, the rates rose dramatically, partly because the concession bid included the cost of the Misticuni dam project to improve water supply to the city. Although the project was determined by independent analysis, including by the World Bank, to be

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211. Human rights concerns are often raised in the context of the bottled water industry, which has been accused of commodifying public water, depleting aquifers, and polluting local waterways. As this article focuses on the role of the private sector in the provision of water and sanitation services through municipal networks, it is beyond the scope of this article to address the challenges raised by the bottling industry. For further discussion on this topic, see, e.g., Salil Tripathi & Jason Morrison, *Water and Human Rights: Exploring the Roles and Responsibilities of Business* (Mar. 2009) (CEO Water Mandate Discussion Paper), available at [http://ceowatermandate.org/files/research/Business\\_Water\\_and\\_Human\\_Rights\\_Discussion\\_Paper.pdf](http://ceowatermandate.org/files/research/Business_Water_and_Human_Rights_Discussion_Paper.pdf); Ghoshray, *supra* note 35; BARLOW, BLUE COVENANT, *supra* note 18, at 82-85.

212. Clarke et al., *supra* note 29, at 329.

213. *Human Development Report*, *supra* note 21, at 78; Davis, *supra* note 37, at 151.

214. Janice A. Beecher, *Privatization, Monopoly, and Structured Competition in the Water Industry: Is There a Role for Regulation?*, in UMWELTASPEKTE EINER PRIVATISIERUNG DER WASSERWIRTSCHAFT IN DEUTSCHLAND [ENVIRONMENTAL ASPECTS OF THE PRIVATIZATION OF WATER SUPPLY IN GERMANY] 327, 330 (Fritz Holzwarth & R. Andreas Kraemer eds., 2000); ZETLAND, *supra* note 28, at 89 (“Water utilities’ monopoly power comes from two sources. Water distribution is a ‘natural monopoly’ because it’s hard for a new company to enter the business in competition with an incumbent company that’s already installed the network of pipes for delivery water. . . . The second source of monopoly power is the legal monopoly that governments award in exchange for a promise to deliver water to all members of the public (hence ‘public utility’) in the service area.”).

215. Davis, *supra* note 37, at 151-152.

216. Arnold, *supra* note 39, at 794.

unfeasible, the mayor decided to go ahead with the project.<sup>217</sup> While a private company may provide the needed capital to upgrade infrastructure, the municipality may end up in a worse position, depending on how the debt is structured and the value of the currency in which the debt is held. As a result, residents may have to pay a higher price for services due to poorly structured arrangements.<sup>218</sup> Private sector participation can assist with water infrastructure improvements, but it can also carry economic risks for local governments and residents, in the absence of proper oversight and regulation.

In reviewing empirical studies examining private sector participation in the water and sanitation industry, Jennifer Davis concludes that “involvement of the private sector does accelerate capital investment, but capital improvements often fall short of contractual targets established between the firm and government.”<sup>219</sup> She also notes that in some countries, increased investment was the result of financing secured by international development organizations. Thus, “it could be argued that, although substantial, this investment was not a result of [private sector participation] in itself but rather the cooperation of government with a donor-supported sector reform program that entailed privatization.”<sup>220</sup>

How to finance such water and sanitation service operations, while also ensuring services to the poor, is a critical human rights question. As Phillippe Cullet observed, “the fact that pricing may not be incompatible with a human rights perspective does not indicate whether this is the best strategy for realizing [sic] it for all.”<sup>221</sup> However, some scholars have argued that increasing prices can improve equity by giving water utilities the resources they need to extend

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217. *Cochabamba: The World Bank's Cautionary Tale*, FT ENERGY NEWSLETTERS—GLOBAL WATER REPORT, (Financial Times, London, U.K.), Apr. 14, 2000; BAKKER, *supra* note 31, at 166 (“Government sources and anti-privatization campaigners publicized cases of increases as high as 200 percent (although company officials maintained that average price rises were 35 percent).”); Bustamante et al., *supra* note 31, at 233 (noting that as of 2012, “communities continue to wait for the long-promised water from the Misicuni Dam project to arrive”).

218. For example, the West Manila concession failed for numerous reasons, including that it had assumed ninety percent of the debt of the prior utility. The Asian financial crisis started just one month after the concessionaires took over. Because most of the debt was in foreign currency, the Western concessionaire found itself in virtual bankruptcy as the Filipino peso lost half of its value. Although both the public and private sector parties sought to terminate the agreement, an arbitration court had determined in 2003 that neither side had the authority to end the agreement. As a result, Manila residents have had to pay a large price for this poorly constructed arrangement. See UNITED NATIONS DEV. PROGRAM & NAT'L COUNCIL FOR PUB.-PRIVATE P'SHIPS, *Water/Wastewater Improvements, Manila, Philippines, in SHARING INNOVATIVE EXPERIENCES: EXAMPLES OF SUCCESSFUL PUBLIC-PRIVATE PARTNERSHIPS* 181–192 (2009), available at <http://tcdc2.undp.org/GSSDAcademy/SIE/Docs/Vol15/21Philippines%20States.pdf> [hereinafter *Water/Wastewater Improvements*]; Philippe Marin, *Public-Private Partnerships for Urban Water: A Review of Experiences in Developing Countries*, TRENDS & POL'Y OPTIONS, no. 8, Feb. 2009, at 56.

219. Davis, *supra* note 37, at 162.

220. *Id.* at 163.

221. Phillippe Cullet, *Right to Water in India—Plugging Conceptual and Practical Gaps*, 1 INT'L J. HUM. RTS. 1, 5 (2012).

services to those who must otherwise rely on purchasing water from private vendors.<sup>222</sup> In many parts of the world, the irony is that the poor pay substantially more for water because they are not connected to municipal networks, usually situated in wealthy parts of cities. Even where networks do exist, they may not operate at a level consistent with the human right to water and sanitation.<sup>223</sup> Due to the high number of intermediaries, the high transport costs of water, and a lack of regulation, water purchased from informal private vendors is frequently ten to twenty times more expensive than water provided by a utility.<sup>224</sup> It has been estimated that over a quarter of the urban population in Latin America and nearly half of the urban population in Africa rely on small-scale vendors to some extent.<sup>225</sup> As prices for networked services are kept low for political reasons, utilities do not have the capital they need to expand into slums and other poor neighborhoods.<sup>226</sup> In some ways, the drive toward financial sustainability can be understood as promoting a form of intergenerational equity because investments in infrastructure and sustainable water management will benefit future generations.<sup>227</sup>

Achieving affordability and having safety nets in place for the poor, while simultaneously ensuring that there are adequate finances to make needed investments and expansions in water and sanitation services, are probably the greatest challenges in implementing the human right to water and sanitation. The United Nations Development Program (UNDP) has indicated that targeting full cost recovery, without any subsidizing mechanism for ensuring affordability, would put sufficient amounts of water beyond the reach of millions of people who lack access to water.<sup>228</sup> Even in the United States, financing much needed

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222. Peter Rogers, Radhika de Silva & Ramesh Bhatia, *Water is an Economic Good: How to Use Prices to Promote Equity, Efficiency, and Sustainability*, 4 WATER POL'Y 1, 2 (2002):

We argue in this paper that the conventional wisdom is incorrect—increasing prices can improve equity. Higher water rates allow utilities to extend services to those currently not served and those currently forced to purchase water from vendors at very high prices. More surprisingly we argue that price policy can help maintain the sustainability of the resource itself. When the price of water reflects its true cost, the resource will be put to its most valuable uses.

223. BAKKER, *supra* note 31, at 22 (noting that where networks exist, they do not necessarily operate efficiently or homogeneously).

224. Rep. of the Indep. Expert, June 2010, *supra* note 148, at 13.

225. *Id.* at 11.

226. ZETLAND, *supra* note 28, at 96.

227. Tremblay, *supra* note 19, at 32–33 (questioning “is it possible that a situation where drinking water made affordable to all at present entails an inequitable financial burden for future generations given the long depreciation periods and investment cycles for water infrastructures?”); General Comment No. 15, *supra* note 4, ¶ 11 (“The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.”).

228. Human Development Report, *supra* note 21, at 97 (“Research in Latin America indicates that full cost-recovery tariffs would present affordability problems for one in five households in the region. For some countries—including Bolivia, Honduras, Nicaragua and Paraguay—reaching cost recovery would imply affordability problems for nearly half the population. Affordability is an

water and wastewater improvements through utility rate increases alone would result in doubling rates across the nation, creating economic hardship for about one-third of the population.<sup>229</sup> In many parts of the world, people in poor neighborhoods who wish to be connected to a water network are expected to pay a much higher price for that connection than those living in already-connected neighborhoods that benefitted from subsidized rates or investments spread over a long period of time. Indeed, “rich countries financed their revolution in water and sanitation more than a century ago by drawing on a wide range of new financing mechanisms, including municipal bonds that spread costs over a long period.”<sup>230</sup> At the end of the nineteenth century, water and sanitation services accounted for about a quarter of the local government debt in Great Britain.<sup>231</sup>

Regardless of the nature of the service provider, governments must consider all policy instruments available for ensuring affordability, including lifeline tariffs and cross-subsidies.<sup>232</sup> The UNDP suggested guidelines for municipalities, such as setting tariffs to cover recurrent costs, with public finance covering capital costs for network expansion.<sup>233</sup> In addition, it advised that tariffs be established so that households spend no more than three percent of their income on water and sanitation.<sup>234</sup> Rising block tariffs can also be an effective way to ensure minimal access while helping to create more financially sustainable operations. However, block tariffs can often burden poor households disproportionately. In many parts of the world, the poor do not have household water access and instead purchase their water from private vendors, who buy it in bulk from the utility at the highest rate (due to the graduated tariff) and then re-sell it at a higher price.<sup>235</sup> In other instances, many poor households have a large number of people sharing water from the same tap, which also results in a higher per capita rate for water.

Given the challenges of financing water and sanitation services while also ensuring that rates remain affordable and that no one is denied services for failure to pay, it may be worth considering how to holistically provide a suite of public services where costs can be cross-subsidized across different sectors. However, the trend has been in the opposite direction. Even within state-owned

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equally serious problem in Sub-Saharan Africa, where about 70% of households could face problems paying bills if providers were to seek full cost-recovery.”).

229. WATER INFRASTRUCTURE NETWORK, WATER INFRASTRUCTURE NOW: RECOMMENDATIONS FOR CLEAN AND SAFE WATER IN THE 21ST CENTURY 2, *available at* <http://win-water.org/reports/winow.pdf>.

230. Human Development Report, *supra* note 21, at 70.

231. *Id.* at 30.

232. *Id.* at 66.

233. *Id.*

234. *Id.*

235. *Id.* at 10, 39 (noting that in Kibera, Kenya, because “kiosks are categorized as commercial entities, they pay a block tariff twice as high as the household minimum, with costs passed on to the consumer”).

and operated municipal services, there has been increasing emphasis on “corporatization, where water services are ringfenced into stand-alone ‘business units’ owned and operated by the (local) state but run on market principles.”<sup>236</sup> In many cities, the costs of municipal services, including water and sanitation, have historically been bundled into general rates bills that cannot easily be accounted for separately or itemized out of municipal taxes.<sup>237</sup> The concept of “ringfencing” entails separating out the delivery of one service from all others so that the costs and revenues associated with one service (such as water and sanitation) can be accounted for in a more direct and transparent manner.<sup>238</sup> While the creation of separate utilities operating at arms-length from the municipality can reduce political interference and improve operational efficiency, it can also make it more difficult to provide affordable services to the poor and marginalized by preventing cross-subsidization across different sectors.<sup>239</sup> To borrow a metaphor from the recent banking industry crisis, some services—like water and wastewater treatment—may be too important to fail.<sup>240</sup>

The question of how to ensure financial viability of a water system while also guaranteeing physical and economic accessibility to the most vulnerable parts of society is probably the most difficult issue.<sup>241</sup> However, municipalities must grapple with the issue of affordability, regardless of whether a private or public actor is providing the services. Even if services are delegated to a non-state private actor, that state still maintains the legal obligation to protect, respect, and fulfill the human right to water and sanitation, which means ensuring affordability.

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236. THE AGE OF COMMODITY: WATER PRIVATIZATION IN SOUTHERN AFRICA, *supra* note 168, at 17-18.

237. See, e.g., DAVID A. McDONALD, THE BELL TOLLS FOR THREE: COST RECOVERY, CUTOFFS, AND THE AFFORDABILITY OF MUNICIPAL SERVICES IN SOUTH AFRICA, MUNICIPAL SERVICES PROJECT SPECIAL REPORT 7 (March 2002), available at [http://www.municipalservicesproject.org/sites/municipalservicesproject.org/files/uploadsfile/Archive/MCDONALD\\_The\\_Bell\\_Tolls\\_for\\_Thee\\_Cost\\_Recovery\\_Municipal\\_Services\\_in\\_South\\_Africa\\_2002.pdf](http://www.municipalservicesproject.org/sites/municipalservicesproject.org/files/uploadsfile/Archive/MCDONALD_The_Bell_Tolls_for_Thee_Cost_Recovery_Municipal_Services_in_South_Africa_2002.pdf) (noting that in South Africa, there are “high numbers of households that do not know what they pay for sewerage and refuse removal—likely because the costs of these services tend to be part of the general rates bill (as opposed to direct tariffs) and are therefore not easily separated out from municipal taxes”).

238. See THE AGE OF COMMODITY: WATER PRIVATIZATION IN SOUTHERN AFRICA, *supra* note 168, at 18.

239. See, e.g., McDONALD, *supra* note 237, at 7 (“In the City of Cape Town, for example, it has been estimated that the price of water and sanitation services could increase by 30-50% if these two services are combined into a single, ring-fenced, tariff-based “business unit” separated from other service sectors in the city.”).

240. Credit for this metaphor goes to David McDonald of Queen’s University in Canada.

241. See Branco & Henriques, *supra* note 195, at 150.

### C. Efficiency and Human Rights Norms

Privatization in the water and sanitation sectors also highlights the potential tension between human rights and the drive toward financial sustainability and efficiency. As the Special Rapporteur on the Human Right to Water and Sanitation noted in her first report on “good practices”:

Human rights law acknowledges the obligation to make progress in the constraints of limited financial resources and requires moving as expeditiously and effectively as possible towards the full realization of these rights. However, cost efficiency and ease of implementation are not dominant and overarching considerations—to the contrary, human rights may even call for solutions that involve comparatively high costs. For instance, participatory processes, which are considered fundamental from a human rights perspective, may have high costs, but are considered indispensable for the realization of human rights and for achieving a sustainable impact.<sup>242</sup>

Private service providers have an incentive to operate in a financially efficient manner, which often means cherry-picking the easiest places in which to expand coverage. This could lead to overall statistical improvements in water coverage, but the most vulnerable communities may continue to be excluded from service delivery. For example, from 1997 to 2005, the twin cities of La Paz and El Alto in Bolivia had entered into a concession contract with Aguas del Illimani. That company claimed that it had exceeded the required coverage rates stated in the contract for El Alto, reaching eighty-five percent and forty-three percent for water and sewerage coverage respectively.<sup>243</sup> However, a closer examination revealed that the improved coverage and the installation of smaller secondary pipes only occurred in areas where the main network infrastructure of deep pipes had already existed. The concessionaire had not included in the service area the less fortunate communities who had no access to networked water. This was one of the factors that led the government to cancel its contract.<sup>244</sup>

The concept of cherry-picking highlights a moral hazard: Incentives to be efficient—and generate a profit—do not necessarily result in providing good services to *all*, which is critical from a human rights perspective. Although the state may envision the private service provider as assuming all of its duty to provide water and sanitation services to its citizens, the reality is that the private service provider will only offer services where it can do so efficiently, which might mean excluding groups of individuals or types of services that will not be profitable. However, solutions that are compatible with human rights are not

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242. Progress Report, *supra* note 108, ¶ 12.

243. Laurie & Crespo, *supra* note 34, at 845.

244. *Id.* at 841. The concept of cherry picking also applies to sewage treatment, which is often not as profitable as water. As a result, private companies may be reluctant to invest in sewage services, even when contractually required. For example, the two concession holders in Manila were jointly fined P29.4 million (about US\$600,000) for failing to develop sewerage treatment plants despite this having been required by a law passed five years previously. Hall et al., *supra* note 183, at 5.



necessarily efficient. As Yamin observes, a human rights perspective “forces us to see the suffering that . . . stems from human choices about policies, priorities, and cultural norms, about how we treat each other and what we owe each other.”<sup>245</sup> This does not mean that service providers should not strive toward efficiency. Indeed, a state will be better able to progressively realize its human rights obligations with respect to water and sanitation if the solutions are cost-effective. But, at the same time, the state must ensure that certain groups are not discriminated against. The principle of nondiscrimination is an immediate obligation under the ICESCR. Human rights norms require that special attention be paid to the marginal and vulnerable communities in society, to ensure that they are not left out in the drive toward improving economic averages.

Many water projects that involve the private sector have been motivated by the idea that privatization would automatically lead to efficiency gains.<sup>246</sup> This has not always proven true.<sup>247</sup> In many instances, efficiency gains have been sought by reducing what the industry terms “non-revenue water,” water “lost” to the system either through physical losses, such as leaky pipes, or through economic losses, such as illegal or unbilled connections.<sup>248</sup> Alternatively, efficiency gains have been pursued by reducing operating costs, such as the number of employees.<sup>249</sup> However, efficiency from the standpoint of financial

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245. Alicia Ely Yamin, *Will We Take Suffering Seriously? Reflections on What Applying a Human Rights Framework to Health Means and Why We Should Care*, 10 HEALTH & HUM. RTS. 45, 47 (2008) (noting that “the evolution of human rights during the Cold War meant that, even as rights discourse increasingly came to dominate our collective imagination, suffering due to violations of ESC rights has not always been taken seriously”).

246. See, e.g., Torben Beck Jørgensen & Barry Bozeman, *Public Values Lost? Comparing Cases on Contracting out from Denmark and the United States*, 4 PUB. MGMT. REV. 63, 72 (2002) (“In November 1998, the City of Atlanta signed a contract with a private company, United Water Services (UWS), Inc., to take over operation and maintenance of the water system and to provide water services to the citizens of Atlanta. . . . In the Atlanta case, the greater efficiency of contracting out was, generally, taken as axiomatic.”).

247. Chong et al., *supra* note 177, at 166 (noting that the “efficiency of organizational choices is connected to the specific details of contracts, and these may vary even within a type of contract (e.g. lease). Within and across contract types, some contracts may provide more incentives than others, anticipate investments differently, and share risk differently.”).

248. See Francisco González-Gómez, Miguel A. García-Rubio & Jorge Guardiola, *Why Is Non-Revenue Water So High in So Many Cities?*, 27 INT’L J. WATER RESOURCES DEV. 345, 347 (2011) (“NRW can be defined as the water produced and lost without revenue and it is the sum of three components: Real losses are determined by losses in the service infrastructure, from the raw water to the point at which the water reaches the final user. Apparent losses are associated with unauthorized consumption and metering inaccuracies. The third component of NRW is unbilled but authorized consumption. The higher the levels of NRW, the more inefficient the city’s water management.”).

249. See, e.g., Lorena Alcázar, Lixin Colin Xu & Ana M. Zuluaga, *Institutions, Politics, and Contracts: The Privatization Attempt of the Water and Sanitation Utility of Lima, Peru*, in THIRSTING FOR EFFICIENCY: THE ECONOMICS AND POLITICS OF URBAN WATER SYSTEM REFORM 103 (Mary M. Shirley ed., 2002) (describing efforts to improve efficiency in water utility in Peru by reducing number of workers and outsourcing activities in order to reduce labor costs and decrease the number of workers per 1000 connections. “The reduction in labor expenses and the rise in tariffs allowed [the utility] to make a profit in 1993 for the first time in more than a decade.”).

viability does not necessarily result in a well-run water utility.<sup>250</sup> For example, in Atlanta, Georgia, the private company operating the water system, United Water, sought to cut expenses by reducing workforce and training.<sup>251</sup> However, complaints rose about billing, water metering, and water-main breaks.<sup>252</sup> The water quality suffered, resulting in inadequate pressure and causing the water to sometimes run orange to brown, described as the “color of iced tea.”<sup>253</sup>

The theory that private sector participation will lead to improved efficiency and service delivery is often belied by the high transaction costs of outsourcing.<sup>254</sup> For example, an analysis of 5,000 water contracts in France found that high transaction costs made the public-private partnerships inefficient. The study found that “the institutional environment in which such contracts take place leaves room open for inadequate ex ante competition and possible collusion between operators. Possible renegotiation and corruption are other concerns. All this may lead to higher prices when the public solution is not retained.”<sup>255</sup> Although companies often are forced to prepare proposals with imperfect information,<sup>256</sup> they may have a strategic incentive to bid low with the expectation that the terms will be renegotiated.<sup>257</sup> For example, in its bid to manage Atlanta’s water system, United Water underestimated the amount of work needed to operate, maintain, and upgrade the city’s aging water infrastructure, and overestimated the amount of savings it could generate.<sup>258</sup> When problems arose, United Water blamed the city for allegedly failing to fully disclose the condition of its infrastructure.<sup>259</sup> Water quality deteriorated so

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250. Davis, *supra* note 37, at 161-162 (noting that empirical comparisons between private and public water and sanitation agencies often do not account for the differing policy and regulatory factors that influence behavior).

251. Arnold, *supra* note 39, at 799-800.

252. Emily Thornton, *Roads to Riches*, BLOOMBERG BUSINESSWEEK MAG. (May 6, 2007), <http://www.businessweek.com/stories/2007-05-06/roads-to-riches>.

253. Arnold, *supra* note 39, at 799-800; Marianne Lavelle & Joshua Kurlantzick, *The Coming Water Crisis*, U.S. NEWS & WORLD REP. (Aug. 4, 2002), [http://www.usnews.com/usnews/biztech/articles/020812/archive\\_022254.htm](http://www.usnews.com/usnews/biztech/articles/020812/archive_022254.htm).

254. See Beecher, *supra* note 214, at 334-335 (noting that while private contracting arrangements in the waste and wastewater sector have had some achievements, they are fraught with a whole host of challenges, including “more emphasis on bidding process than long-term accountability,” “‘quiet’ (no bid) renewals and sweetheart deals,” obscuring “responsibility for investment decisions,” which “may cause under-investment in infrastructure,” etc.).

255. Chong et al., *supra* note 177, at 166; Lobina & Hall, *supra* note 170, at 5 (“A similar pattern of concentration, joint ventures and difficulty of entry is also characteristic of the water market in France, which is the home base of the dominant multinationals and of the system of privatisation by delegation which has been the core means of privatisation in this sector.”).

256. Davis, *supra* note 37, at 152.

257. BAKKER, *supra* note 31, at 95; Clarke et al., *supra* note 29, at 347.

258. PUB. CITIZEN, *supra* note 31, at 3.

259. Douglas Jehl, *As Cities Move to Privatize Water, Atlanta Steps Back*, N.Y. TIMES (Feb. 10, 2003), <http://www.nytimes.com/2003/02/10/us/as-cities-move-to-privatize-water-atlanta-steps-back.html> (“United Water, a subsidiary of the giant French company Suez, has acknowledged problems with its management of the Atlanta system. But it has also said it was stuck with trying to

badly under United Water that the company even had to issue “boil water” notices.<sup>260</sup>

Although one of the rationales behind privatization is that it has the potential to reduce the cost burden on governments, in reality many contracts are structured to guarantee a rate of return, thereby shielding the company from risk by shifting risk back to the government. For example, in the Cochabamba case, the concession contract guaranteed that the operating company would receive a fifteen percent profit.<sup>261</sup> While there may be legitimate reasons to renegotiate a contract during a contract period to reflect a change in conditions,<sup>262</sup> there is often a constant pressure to renegotiate, even in supposedly stable contracts.<sup>263</sup> The concession contract for water services in the East Manila project in the Philippines is such a case. There, the government entered into a twenty-five year contract in 1997, but barely three years later, the concession was extended for another fifteen years, without any competitive bidding.<sup>264</sup> In effect, the details of how agreements are structured matter, and it cannot be assumed that private sector participation will necessarily improve the operations of a water utility from the standpoint of either efficiency or human rights.

Most municipalities that seek to outsource water and sanitation services to the private sector are motivated to do so because they have not been effective at providing the services themselves and are facing internal or external pressure to change. Municipalities are the least likely to be able to regulate private service providers effectively or to be in a strong bargaining position. As a result, unequal bargaining power between the municipality and the private corporation can lead to contracts that are neither efficient nor geared toward a human rights-oriented solution.

#### D. Dispute Resolution

If a private operator does not provide satisfactory services, which at some level can be understood as inhibiting the state from fulfilling its obligations to

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run a system in unexpected disrepair, while losing at least \$10 million annually under a \$22 million-a-year contract that the city refused to renegotiate.”)

260. *Id.* (“Atlanta officials, along with customers . . . say almost any change seems preferable to existing service they call poor, unresponsive and fraught with breakdowns, including an epidemic of water-main breaks and occasional ‘boil only’ alerts caused by brown water pouring from city taps.”); Arnold, *supra* note 39, at 799-800.

261. BAKKER, *supra* note 31, at 166.

262. Chong et al., *supra* note 177, at 153.

263. *Id.* at 153 (noting that “if operators are selected according to price bids, then public authorities are vulnerable to ‘winner’s curse,’ since the best offer may come from the most ‘optimistic’ operator who unintentionally underestimates production costs or overestimates future revenues. Alternatively, public authorities may also be victims of aggressive bids when prospective operators strategically underestimate production costs or overestimate future revenues in order to win the deal and then provoke renegotiations with a ‘captive’ local public authority in the future.”).

264. Water/Wastewater Improvements, *supra* note 218, at 181. See Hall et al., *supra* note 183, at 5.

realize the human right to safe drinking water and sanitation, municipalities likely will seek to end the private water concession contract. If the state cancels a water-sanitation contract, the private company usually can bring a claim against the state. However, these disputes generally are resolved by examining the terms of the contract and the relevant bilateral or international investment agreements, which can at times conflict with the state's human rights obligations, including with respect to water and sanitation.<sup>265</sup>

In most instances, international private sector contract disputes are brought before the International Center for Settlement of Investment Disputes (ICSID), "the only international arbitration tribunal specifically designed to address complex disputes over foreign investment contracts where one party is a national government."<sup>266</sup> Parties claim jurisdiction on the grounds that relevant investment treaties contain provisions giving consent to ICSID arbitration in the case of investor-state disputes.<sup>267</sup> Jurisdiction under a bilateral investment treaty can be invoked even if the private actor changes its corporate citizenship *after* it entered into the contract.<sup>268</sup>

In most instances, the state actor, which may be the municipality, seeks to end a contract prematurely on the grounds that services were not provided according to the terms of the contract. Yet even where the private corporation has not provided good services, the state may still face significant liability. For example, in the case of Cochabamba, Bechtel famously claimed that it sought at least twenty-five million dollars to "recover its costs and obtain damages for loss of expected profits."<sup>269</sup> After the case drew significant public attention for its

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265. See generally Jorge E. Vinales, *Access to Water in Foreign Investment Disputes*, 21 GEO. INT'L ENVTL. L. REV. 733, 743 (2009).

266. Amanda L. Norris & Katina E. Metzidakis, *Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water War*, HARV. NEGOT. L. REV. 31, 33 (2010).

267. ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* 3 (Oct. 22, 2004) (discussion paper).

268. For example, in the short-lived Cochabamba concession, the majority shareholder in Aguas del Tunari (AdT) was Bechtel Corporation, which was headquartered in San Francisco at the time the contract was signed. However, shortly thereafter, Bechtel moved its headquarters to Amsterdam. As a result, when the city cancelled the contract, Bechtel claimed that the termination violated the terms of the Bilateral Investment Treaty between the Netherlands and the Bolivian Government. The ICSID tribunal rejected Bolivia's argument that the commission did not have jurisdiction because Bechtel was really an American corporation. See Finnegan, *supra* note 32 ("The complainant was Aguas del Tunari, but the political weight was supplied by Bechtel. The company's claim is being made under a bilateral investment treaty between Bolivia and, of all places, the Netherlands. It seems that International Water, which was originally registered in the Cayman Islands (which has no comparable investment treaty with Bolivia), moved its registration to Amsterdam soon after the Cochabamba contract was signed."); Lobina & Hall, *supra* note 170, at 41; Susan Spronk & Carlos Crespo, *Water, National Sovereignty and Social Resistance: Bilateral Investment Treaties and the Struggles Against Multinational Water Companies in Cochabamba and El Alto, Bolivia*, LAW SOC. JUST. & GLOBAL DEV. 7, Oct. 2008, [http://www2.warwick.ac.uk/fac/soc/law/elj/ldg/2008\\_1/spronk\\_crespo/spronk.pdf](http://www2.warwick.ac.uk/fac/soc/law/elj/ldg/2008_1/spronk_crespo/spronk.pdf).

269. Norris & Metzidakis, *supra* note 266, at 5.

lack of transparency, Bechtel caved to public pressure and decided to withdraw the lawsuit in March 2004.<sup>270</sup> Although initially refusing to withdraw the lawsuit, Abengoa, a Spanish firm that had the second largest share in the private consortium, also yielded to public pressure and, in January 2006, dropped the lawsuit in exchange for a symbolic sum of two bolivianos (U.S. \$0.30).<sup>271</sup> In this context, the political movement that adopted the human right to water as a rallying call no doubt played a role. However, this is a well-known example in part because the outcome was so unusual.

In a different water concession case in the Buenos Aires province of Argentina, the state was found liable for damages. Azurix brought a case against Argentina in which the ICSID tribunal ruled that Argentina had violated several aspects of its bilateral investment treaty with the United States, hindering Azurix's "use and enjoyment of its investment," awarding the company U.S. \$105,240,753, plus interest.<sup>272</sup> As this case suggests, states seeking to cancel or change water service contracts in light of human rights concerns (or even to comply with national law) may find themselves unable to do so due to a conflict with international investment law.<sup>273</sup>

The ICSID forum raises questions relating to transparency, confidentiality, and the role of community groups that may want to intervene in the proceedings. Like other international arbitrations, the ICSID proceedings are generally confidential, and only the interested parties (*i.e.*, the government and private actors) may participate.<sup>274</sup> The flexibility and lack of publicity surrounding private arbitrations make this type of forum attractive to multinational corporations and private actors.<sup>275</sup> At the same time, community groups often have an interest in witnessing and perhaps intervening in disputes over the provision of public services like water and sanitation. Increased transparency is critical, especially where the state may not be adequately representing local concerns. In the Cochabamba case, the tribunal denied the request of interested parties who had sought to intervene and who had wanted the tribunal to make documents and hearings public; it also neglected to address the grounds for transparency, which included arguments on human rights.<sup>276</sup> In contrast, in a case brought by Suez/Vivendi to challenge the Argentine government's freezing of water tariffs in January 2002, the tribunal allowed community organizations to submit amicus briefs after finding that "these systems provide basic public services to millions of people and as a result may raise a variety of complex

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270. Spronk & Crespo, *supra* note 268, at 8.

271. *Id.* at 8-9.

272. Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶¶ 9, 442 (July 14, 2006), available at <http://italaw.com/documents/AzurixAwardJuly2006.pdf>; Spronk & Crespo, *supra* note 268, at 4.

273. See generally Vinuales, *supra* note 265, at 743.

274. See Norris & Metzidakis, *supra* note 266, at 45-46.

275. *Id.* at 49-50.

276. *Id.* at 53.

public and international law questions, including human rights considerations.”<sup>277</sup> The ICSID Secretariat has even noted that “[t]here may well be cases where the process could be strengthened by submissions of third parties, not only civil society organizations but also for instance business groups or, in investment treaty arbitrations, the other States parties to the treaties concerned.”<sup>278</sup>

Private concession contract disputes draw the parties into a protracted legal battle, which can place a poor country at a disadvantage. At the same time, corporations may face significant public pressure to drop claims. The corporate desire to maintain confidentiality often runs into conflict with human rights concerns about the need for transparency and greater stakeholder participation, including by community members whose access to water and sanitation may be impacted by the tribunal’s decision. Moving forward, the extent to which key stakeholders, such as individuals and community groups, can be involved in the ICSID arbitration will no doubt remain an issue.<sup>279</sup>

In summary, this section examined the relevance of human rights to private sector involvement in the delivery of water and sanitation services. Numerous factors are critical, including the details of the contracts and treaties that inform the public-private agreement, the state’s ability to develop and enforce its own regulations and laws, the private actors’ good faith and fair dealing, and the mechanisms for resolving disputes.<sup>280</sup> The next section furthers this discussion by examining how human rights principles can be understood as guideposts for regulation.

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277. Langford, *supra* note 158; *Aguas Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, ¶ 19 (May 19, 2005), available at [http://www.escribnet.org/sites/default/files/ICSIDAmicus\\_June05\\_English\\_0.pdf](http://www.escribnet.org/sites/default/files/ICSIDAmicus_June05_English_0.pdf). As a result, five nongovernmental organizations filed an *amicus curiae* submission on April 4, 2007, according to the procedural details available on the ICSID website: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=ViewAllCases>; under “Advanced Search,” search for Case No. ARB/03/19, and then click on “Procedural Details”. On July 30, 2010, the ICSID tribunal issued a decision on liability, finding that Argentina had denied the private investments fair and equitable treatment. However, it denied the claims regarding expropriation and denial of full protection and security of those investments. See *Suez v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability (July 30, 2010), available at <http://italaw.com/documents/SuezInterAquaDecisiononLiability.pdf>.

278. ICSID Secretariat, *supra* note 267, at 9.

279. See *Vinuales*, *supra* note 265, at 743-759 (discussing different ways that the human right to water could be raised in an international arbitration proceeding).

280. See Feigenbaum & Henig, *supra* note 160, at 189 (noting that “[t]he choice of a particular form of privatization can be less significant than how privatization is actually formulated and implemented.”).

*E. Human Rights as Guideposts for Regulation*

While some social movements to recognize the human right to water and sanitation saw the failures of privatization experiments as reason to prohibit private sector involvement, the international human rights legal regime has focused on increasing private sector regulation and oversight. States still have a responsibility to *protect*, *respect*, and *fulfill* the human right to water and sanitation, even where private actors are involved.<sup>281</sup> Mapping this tripartite human rights framework onto questions of implementation clarifies that private sector participation in the water and sanitation sectors will only be successful from a human rights perspective if there is adequate regulation, monitoring, and oversight.

An inverse relationship exists between the *protect* and *fulfill* prongs: The more a state delegates its responsibilities to fulfill to a non-state actor, the greater its duty to protect. Accordingly, governments must confront the question of financial sustainability and affordability. While higher tariffs may be needed to improve water and sanitation infrastructure, long-term financing and some form of subsidy for the poor likely will be required to ensure that no one is denied access to basic services due to an inability to pay.

Within the context of private sector participation in the water and sanitation sectors, “States should not assume that businesses invariably prefer, or benefit from, State inaction. . . . The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice.”<sup>282</sup> As discussed above, in a concession contract for water delivery, the incentives for operational efficiency are supposed to derive from the increased profits that the private operator would generate through efficiency savings.<sup>283</sup> If these efficiencies translate into more reliable and affordable water delivery, then an individual’s human right to water may have been protected and respected. However, a World Bank study has concluded that “[i]f regulation is lax, the operator will have little incentive to make efficiency gains and might seek, instead, to negotiate tariff increases as the easiest means to make profits.”<sup>284</sup> Such tariff increases would be in tension with the need to make water access affordable.

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281. CRAVEN, *supra* note 6, at 123.

282. Special Representative of the Secretary-General on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters., *Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Annex I.B.3, ¶ 8, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter Ruggie, Guiding Principles].

283. Marin, *supra* note 218, at 124.

284. *Id.*

The Human Rights Council Resolution of 2010 identifies key ways that states should monitor the role of private actors. Clause 9 “[r]ecalls that States should ensure that non-State service providers:

- (a) Fulfil[] their human rights responsibilities throughout their work processes, including by engaging proactively with the State and stakeholders to detect potential human rights abuses and find solutions to address them;
- (b) Contribute to the provision of a regular supply of safe, acceptable, accessible and affordable drinking water and sanitation services of good quality and sufficient quantity;
- (c) Integrate human rights into impact assessments as appropriate, in order to identify and help address human rights challenges;
- (d) Develop effective organizational-level grievance mechanisms for users, and refrain from obstructing access to State-based accountability mechanisms.<sup>285</sup>

At the same time, the implementation of private sector involvement in water and sanitation services in many states appears to be fraught with problems largely because the states in question do not have the regulatory capacity or incentives to oversee and monitor large private providers.<sup>286</sup> Thus, although human rights remain neutral to the issue of privatization in theory, privatization remains problematic in practice in many instances. In fact, an early public draft of General Comment 15 actually called for the deferral of privatization until sufficient regulatory systems were in place; this language was removed from the final version.<sup>287</sup> At the same time, General Comment 15 highlights the critical importance of regulating of private sector actors.<sup>288</sup>

In the context of a state that does not have significant regulatory capacity, the obligations of private actors to respect human rights, as outlined in the recently endorsed Guiding Principles for Business and Human Rights, become even more critical. At the core of the Guiding Principles, which were adopted by the U.N. Human Rights Council in 2011, is a framework with three pillars of “protect, respect and remedy.”<sup>289</sup> The first pillar (protect) overlaps with the state’s existing duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and

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285. H.R.C. Res. 15/9, *supra* note 2, at 3-4.

286. See, e.g., Kate Bayliss, *Utility Privatisation in Sub-Saharan Africa: A Case Study of Water*, 41 J. MOD. AFR. STUD. 507, 508 (2003) (“In much of the [sub-Saharan African] region, the record of the public sector has been far from impressive. . . . [T]he privatisation of such strategic industries has raised a number of concerns. . . . [because in part] in much of the region state institutions are weak and this limits regulatory capacity.”); Marin, *supra* note 218, at 139 (“A key challenge in this regard remains the need to build institutional capacity within the government (ministries and regulators), so that the partnership between the private operator and the public authorities can be formed on an equal footing.”); Kirkpatrick et al., *supra* note 188, at 157 (“Transaction costs in water concessions reinforce serious weaknesses in government-regulatory capacity in developing countries.”).

287. Langford, TRAGEDY, *supra* note 158.

288. General Comment No. 15, *supra* note 4, ¶ 23; Riedel, *supra* note 58, at 29.

289. Human Rights Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011).



adjudication.<sup>290</sup> The second pillar (respect) is addressed to businesses, which have a duty to respect human rights because society has a basic expectation that businesses will do so. To respect human rights means that businesses should “avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”<sup>291</sup> or “that are linked to their operations . . . .”<sup>292</sup> The third pillar (remedy) reflects the need for greater victim access to effective judicial and nonjudicial remedies, because even the most concerted efforts cannot prevent all abuse.<sup>293</sup> Although the Guiding Principles have received their fair share of criticism from business interests<sup>294</sup> and human rights groups<sup>295</sup> alike, they certainly have moved the discourse forward on the responsibilities of businesses.<sup>296</sup> If a private corporation enters into an agreement to provide water and sanitation services, it should consider its conduct under these newly recognized Guiding Principles.

At the same time, it should be recognized that a human rights approach also suffers from several limitations. As alluded to above, human rights principles place significant emphasis on a state’s ability to regulate and monitor private actor activities, which is not always feasible, especially when the state has limited resources or is corrupt or incompetent. Moreover, the language of human rights, which focuses on state and non-state actors, does not always map well onto the debate over water privatization. For example, some communities have long-standing traditions of managing water as a commons, without any state involvement.<sup>297</sup> In addition, many non-profit, non-governmental organizations

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290. Ruggie, Guiding Principles, *supra* note 277, ¶ 6.

291. *Id.* Annex II.A.11 at 13.

292. *Id.* Annex II.A.13 at 14.

293. *Id.* ¶ 6.

294. *See, e.g.*, Michael D. Goldhaber, *A Sarbanes-Oxley for Human Rights?*, AMLAW DAILY (June 2, 2008), <http://amlawdaily.typepad.com/amlawdaily/2008/06/titans-of-corporo.html>.

295. *See, e.g.*, AMNESTY INT’L, SUBMISSION TO THE SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES (2008), available at <http://www.reports-and-materials.org/Amnesty-submission-to-Ruggie-Jul-2008.doc>; U.N. Human Rights Council: *Weak Stance on Business Standards*, HUMAN RIGHTS WATCH (June 16, 2011), <http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>; U.N. Human Rights Council *Adopts Guiding Principles on Business Conduct, Yet Victims Still Waiting for Effective Remedies*, INT’L FED’N FOR HUMAN RIGHTS (June 17, 2011), <http://www.fidh.org/UN-Human-Rights-Council-adopts-Guiding-Principles>.

296. *See, e.g.*, Steven Gibbons, *Protect, Respect and Remedy: What Does Ruggie’s Framework Mean for Ethical Trade?*, ETHICAL TRADING INITIATIVE, <http://www.ethicaltrade.org/news-and-events/blog/steve-gibbons/ruggie-framework-protect-respect-remedy>; Faris Natour, *U.N. Council Endorses Principles on Business and Human Rights*, BUS. ETHICS (June 16, 2011), <http://business-ethics.com/2011/06/16/un-council-endorses-principles-on-business-and-human-rights/>; Christina Ochoa, *The 2008 Ruggie Report: A Framework for Business and Human Rights*, 12 ASIL INSIGHTS (2012), <http://www.asil.org/insights080618.cfm>. *See also* HUMAN RIGHTS WATCH, *supra* note 96 (noting that at the Rio+20 summit, “Canada, the G77, and the US united against reaffirming the responsibility of businesses to respect rights”).

297. *See, e.g.*, BAKKER, *supra* note 31, at 173-183 (discussing management of the commons

provide water and sanitation services to poor and vulnerable populations around the world; they are non-state, private actors, but are different from the large corporations involved in the formal water and sanitation sectors.<sup>298</sup>

Nevertheless, the framing of water and sanitation as a human right complements traditional good governance approaches by clarifying the state's responsibility for services, while also empowering individuals as rights-holders. The traditional human rights framework (respect, protect, fulfill) and the new framework for business and human rights (protect, respect, remedy) can be understood as guideposts for regulation of private actors operating in the water and sanitation sectors. However, the real challenge ahead lies in better defining how those guideposts can be translated into law and policy, such as through the development of model regulations or model concession agreements.

Although the informal private sector has not been the primary focus of this article, it is worth pointing out that the human rights framework is relevant in that setting as well. The informal sector consists of a variety of water suppliers, including small-scale private vendors, private wells, NGOs, and other community-based organizations for water. In the context of formal service provision, the human right to water and sanitation can be understood as consistent with a "normative networked goal," meaning that everyone should have access to piped, clean water and to sanitation facilities that remove and treat the waste via a piped system. However, as previously discussed, people without reliable networked access, who often live in rural areas or urban slums, are forced to rely on other non-state sources operating in the informal sector. Without reliable sanitation options, they may be forced to engage in open-defecation. Karen Bakker uses the term "archipelago" to describe these "spatially separated but linked 'islands' of networked supply in the urban fabric,"<sup>299</sup> which is a useful metaphor to consider from a human rights perspective.

Where the state is unable to effectively provide water and sanitation services through formal provision, "islands" of informal supply fill the gap.<sup>300</sup> In this context, the state's obligation to protect an individual's right to water and sanitation from third-party abuse becomes even more critical. States must

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generally and specifically in Bolivia (*i.e.*, "*usos y costumbres*"); Bustamante et al., *supra* note 31, at 230-231 (explaining that at the start of the Cochabamba water movement, the leadership "understood water as a common good" and did not embrace rights language until "[a]ctivists from the North, where there is a much stronger relationship between the state and civil society, drove the idea of the water as a right . . .") (quoting a personal communication with Oscar Olivera, Coordinadora del Agua).

298. See BAKKER, *supra* note 31, at 47 ("Conflating 'public' with 'state' provision obscures collective forms of action not mediated by states. Equally, conflating 'private' with 'for-profit, corporate' activity is misleading, as it mistakenly assumes that all non-state activity is necessarily capitalist.").

299. *Id.* at 22.

300. Rep. of the Indep. Expert, June 2010, *supra* note 148, ¶ 4c (noting that "informal provision is the de facto participation of non-State actors").

develop appropriate legal and regulatory environments that allow local initiatives to flourish, while also ensuring quality and deterring predatory practices and corruption. In some instances in many parts of the world, lack of legal title prevents people from gaining access to basic water and sanitation services.<sup>301</sup> The human right to water and sanitation requires states to find ways to ensure that appropriate services are provided, even while the underlying land title issues remain unresolved.<sup>302</sup> Further, significant resources are being spent on NGO initiatives that seek to improve access to water and sanitation services, but bringing these projects to scale requires building governmental capacity. Conceptually, the human right to water and sanitation, with its attendant state duties to respect, protect, and fulfill, can be understood as trying to knit together the “islands” of services into a more coherent framework, so that the “archipelago” can begin to achieve the “normative network goal.”

#### CONCLUSION

Law is a reflection of social norms, and human rights law in particular is an articulation of global values and aspirations. Declaring a human right to safe drinking water and sanitation will not solve the drinking water and sanitation crisis alone, but it will lend moral, political, and legal momentum to efforts to improve access to these critical services, reaffirming their importance to human dignity. With General Comment 15 and two U.N. resolutions within the last decade, an arguably strong basis now exists for recognizing the human right to safe drinking water and sanitation under the International Covenant on Economic, Social and Cultural Rights.

That water and sanitation have been framed as a human right at this point in history can be understood as a response to global water management trends, which have emphasized the need to improve economic efficiency and environmental sustainability. In addition, the human right to water and sanitation was a rallying call for anti-privatization movements. Yet from the standpoint of international law, the human right to water and sanitation is not incompatible with private sector participation or with market-based approaches. However, real tensions do exist between markets and rights because the goal of a private

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301. DE ALBUQUERQUE, ON THE RIGHT TRACK, *supra* note 20, at 32, 58 (noting that around the world, “[a]uthorities frequently resist allowing people with insecure tenure to connect to the water and sanitation networks because such connections can confer legal rights over the land that they occupy, and thus be seen to encourage the development of informal settlements”).

302. BAKKER, *supra* note 31, at 46-47 (noting that in Dhaka, Bangladesh, official water policy requires that only legal households with official land permits be connected to the water supply. As a result, three and a half million slum dwellers do not have access and are in many ways, “‘citizens without a city,’ those to whom modern norms of social citizenship do not apply.”). *See also* Sharmila L. Murthy, Mark K. Williams & Elisha Baskin, *The Human Right to Water in Israel: A Case Study of the Unrecognized Bedouin Villages in the Negev*, 46 ISR. L. REV. (forthcoming 2013) (discussing how disputes over land title underlie the right to water debate in unrecognized Bedouin villages in Israel).

actor is to create profits. In contrast, a state charged with realizing, albeit progressively, the human right to water and sanitation must take steps using maximum available resources to ensure that everyone, without discrimination, has access to adequate amounts of good quality, accessible, and affordable water.

The challenges of operating an urban water and wastewater system complicate private sector involvement in the delivery of services. The large amount of infrastructure required means that network provision of water is a natural monopoly that is expensive to maintain and upgrade. Moreover, in recent years, there has been a stronger emphasis on full cost-recovery and “ring-fencing” services, which reduces the ability to cross-subsidize across different municipal sectors. While the human right to water and sanitation does not require that services be free, they do need to be affordable and no one should be denied services for inability to pay. This is a difficult goal to reach and requires that states critically assess their tariff structures.

The involvement of the private sector in the delivery of water and wastewater services will not necessarily lead to efficiency. Case studies from around the world highlight that without proper oversight, a private operator’s drive to improve efficiency indicators by reducing costs can have significant impacts on water quality and consistent service delivery. Moreover, there are significant transaction costs associated with outsourcing to the private sector that need to be accounted for when considering proposed efficiency gains. Regulation and monitoring both play a key role in mitigating the tensions between market-based approaches and rights. Yet such oversight also requires strong institutional capacity, without which states are more likely to enter into private arrangements on unequal footing, resulting in terms that are not in the best interests of the public. Another challenge of engaging in private sector water contracts is that the international forums available for addressing such disputes are not transparent and may not provide a vehicle for addressing the concerns of individuals and communities who may seek to raise human rights concerns.

The relevance of human rights to the privatization debate is to affirm that with respect to the human right to water and sanitation, states cannot sidestep their responsibilities by involving the private sector, but instead retain the duties to protect, respect, and fulfill the right. The focus on *whether* to involve the private sector has obscured more important questions about *how* and *when* it can be successful, which requires ensuring that the human right to water and sanitation is protected, respected, and fulfilled. Human rights principles can be understood as guideposts for the critical regulation, monitoring, and oversight that are needed when the private sector is involved in the delivery of water and sanitation services.