The human right to water under international human rights law: Implications for the privatisation of water services

Khulekani Moyo

1. Introduction

1.1 The social context surrounding the delivery of water services

The World Health Organisation (WHO) estimates that more than one in six people worldwide or 894 million people do not currently have access to safe water for domestic use (water for drinking, cooking and cleaning). The WHO estimates that globally, 88 per cent of diarrhoeal deaths are due to inadequate availability of water for hygienic purposes. The United Nations Development Programme (UNDP)’s 2006 Human Development Report graphically depicts the dire situation in the water supply sector. The report states that:

[w]hether measured against the benchmark of human suffering, economic waste or extreme poverty, the water...deficit inflicts a terrifying toll.

The report further stresses that issues related to poverty, inequality and unequal power relationships cause the current water crisis. This dire situation prompted the then Vice President of the World Bank, Ismail Serageldin to warn in 1995 that “if the wars of this century were fought over oil, the wars of the next century will be fought over water-unless we change our approach to managing this precious and vital resource”.

The world water crisis highlighted above saw the World Bank in collaboration with governments and regional development banks vigorously pushing for privatisation of water supply services. They promoted the involvement of multinational water corporations in particular as the panacea to the global water crisis. The private sector was viewed as bringing the much needed financing, efficiency, management skills and technology to the water services sector. Water privatisation therefore became the centrepiece of the World Bank’s policies in the water and sanitation sector.

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3 Ibid.
5 Ibid.
6 Ibid.
7 Ibid.
9 See Bond “Water commodification and decommodification narratives: Pricing, policy debates from Johannesburg to Kyoto to Cancun and back” 2004 (15) Capitalism Nature Socialism 7at 8.
11 See Lundqvist 1988 (8) Journal of Public Policy 1at 7. See also Parker “The new right, state ownership and privatisation: A critique” Economic and Industrial Democracy 1995 (8) 349-378 who argues that arguments about privatisation improving service performance and public finances remain uncorroborated as privatisation
The premises underlying the privatisation drive in water services is the expansion of tradable goods to include water. This has resulted in the reconceptualisation of the utility sector as a profitable business rather than a provider of public goods which may require subsidies. The global water scarcity is depicted as justifying the privatisation of water and adoption of cost-reflective pricing.

The question of the human right to water under international human rights law has been the subject of scholarly study. Scholars such as Gleick and McCaffrey have focused mostly on the question as to whether international human rights law currently recognises a right to water. There is considerable literature that has taken the issue further by attempting to elucidate the nature and scope of the right to water under international human rights law. There is presently anecdotal literature that has dealt with the issue of the right to water and arrangements to privatise water supplies to non-state actors. It is also noteworthy that there has been little effort in the scholarship to constructing a human rights accountability model to deal with the accountability gap engendered by the privatisation of water services.

The first part of this article will give an historical account of the emergence of the human right to water under international law, analysing the legal bases for a right to water under international human rights law. I will proceed to analyse the various international human instruments in which the right to water has been recognised. I will proceed to analyse and evaluate the scope and content of the right to water under international human rights law.

The second part of this article will start by defining privatisation and the divergent meanings of the concept. The rise of privatisation as a political-economic concept and increased private sector participation in sectors hitherto dominated by the State and its agencies will be described. Particular focus will be given of increased participation by non-state actors in the water services sector.

I will follow this by analysing the nature of the obligations that the right to water imposes on States. Using the typology of respect, protect and fulfill as a framework, I will analyse the obligations and duties which the right to water imposes (if any) on non-state actors. This article will also proceed to analyse the question as to whether international human rights law, and in particular the human right to water, is binding on non-state actors involved in the provision of water services. This final part of this article will focus on the creation of an accountability model to guide States and non-state actors in the event of privatisation of water services.

may run counter to what its proponents claim. The author cites the privatisation of the British Council housing being a case in point.

12 Bakker 2007 (39) Antipode 430 at 433.
13 Ibid 435.
The human right to water under international human rights law

Peter Gleick, writing more than a decade ago asserted that one of the fundamental failures of development in the 20th century was a lack of universal access to water.\(^{16}\) Gleick further poses the following question:

> Is water so fundamental a resource, like air, that it was thought unnecessary to explicitly include reference to it at the time these agreements were forged? Or could the framers of these agreements have actually intended to exclude access to water as a right, while including access to food and other necessities?\(^{17}\)

The legal status of water as a human right under international human rights law is still unsettled and contested.\(^{18}\) The Universal Declaration of Human Rights (UDHR) does not expressly mention a human right to water. The two major international human rights treaties, the International Covenant on Civil and Political Rights (ICCPR)\(^ {19}\) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)\(^ {20}\) do not explicitly refer to a right to water. The only explicit references to the right to water are in the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW),\(^ {21}\) the Convention on the Rights of the Child (CRC),\(^ {22}\) and the recently adopted International Convention on the Protection and Promotion of the Dignity and Rights of Persons with Disabilities (the ‘Disability Convention’).\(^ {23}\)

A study carried out by McCaffrey in 1992 concluded that there was a right at least to sufficient water to sustain life and that a State has the due diligence obligation to safeguard these rights as a priority.\(^ {24}\) Gleick expanded upon McCaffrey’s study and concluded that international law and evidence from the practice of States strongly and broadly support the human right to a basic water requirement.\(^ {25}\) Bluemel notes that the absence of an explicit reference of a right to water under any universal human rights instrument means that under the current international framework, a right to water may be characterised as subordinate and necessary to achieve the primary human rights recognised directly by international human rights treaties.\(^ {26}\)

The following section will review the possible bases for deriving a right to water under international law as developed in the academic literature. It will also suggest what I regard as the most promising lines of inquiry regarding the derivation of the right to water under international human rights law.

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\(^{16}\) Gleick Water Policy 487 at 488.

\(^{17}\) Ibid 490.


\(^{19}\) International Covenant on Civil and Political Rights (1966) UN. Doc. A/6316 (hereafter “ICCPR”).


\(^{26}\) Bluemel 2004 (31) Ecology Law Quarterly 957 at 963.
2.1 Possible legal basis of the right to water under international human rights law

A survey of literature broadly identifies two sources as the possible legal basis for the right to water under international law: treaty law and custom.

2.1.1 International human rights treaties

McCaffrey, writing nearly two decades ago argued that the human right to water is implicit in the provisions of the International Bill of Rights (the ICESCR and the ICCPR) that refer to directly related rights. These include the rights to an adequate standard of living, food, health and life the fulfillment of which is impossible without water. Gleick argued that access to water can be inferred as a derivative right necessary to meet the explicit rights to health and an adequate standard of living contained in the ICESCR as such rights are interdependent.

Interdependence of human rights means that the realisation of one right (or group of rights) may require the enjoyment of others despite their distinctiveness as particular rights. Understanding interdependence of human rights is important as it helps elaborate the extent to which distinct rights are mutually dependent on each other thereby making rights effective and non-illusory.

Craig Scott has argued that the interdependence of human rights may be understood in two senses: organic and related interdependence. Organic interdependence means that “one right forms part of another right and may therefore be incorporated into that latter right”. According to Scott, the organic rights perspective means that “interdependent rights are inseparable or indissoluble in the sense that one right (core right) justifies the other (derivative right)”. Scott notes that ‘related interdependence’ refers to a situation where rights are treated as complementary yet separate, “for instance to protect right x will directly protect right y”. The significance of the organic framework to the understanding of the interdependence of human rights is that protecting a core right will mean directly protecting a derivative right as “[t]he goal is to render rights meaningful and non-illusory”. Interdependence in the “related rights” sense means that the rights in question are “mutually reinforcing or mutually dependent but distinct”. According to the related interdependence perspective, rights are treated as equally important yet separate hence “[to protect right x will

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32 Ibid.
33 Ibid 779-780.
34 Ibid 783.
36 Ibid 783.
indirectly protect right y". The significance of the related interdependent framework in the understanding of the interdependence of human rights is that protecting one right indirectly results in the protection of another right.

Applying this analysis, it can be argued that the absence of an explicit reference to a right to water in the ICESCR is not a sufficient argument to deny access to water the status of an independent human right. The Committee on Economic, Social and Cultural Rights (CESCR) has declared that the right to water is implicit in other rights enumerated in the ICESCR in its General Comment 15. In particular the CESCR has interpreted articles 11(1) and 12(1) of the ICESCR as implicitly including the right to water. Article 11(1) of the ICESCR, regarding the right to an adequate standard of living, provides that:

The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing.

Article 12(1) of the ICESCR, regarding the right to the highest attainable standard of health, provides that:

The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

It is noteworthy that although General Comment 15 is not itself legally binding, it is an authoritative interpretation of the provisions of the ICESCR, which is legally binding on States that have ratified or acceded to it.

The CESCR pointed out in General Comment 15 that:

Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realisation of the right to an adequate standard of living, including adequate food, clothing and housing...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...The right to water is also inextricably related to the right to the highest attainable standard of health...and the rights to adequate housing and adequate food...The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity. The right to water is therefore implicit within the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of health outlined in the ICESCR.

The above interpretation by the CESCR is important as it supports the existence of a human right to water derived from articles 11 and 12 of the ICESCR.

The right to water has also been inferred from the right to life enshrined in article 6 of the ICCPR which recognises every human being’s inherent right to life. The basis of such an inference is that it is impossible to sustain life without water. Such an expansive view of the

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37 Ibid.
39 See General Comment No 15 (2002).
42 See General Comment No 15 (2002).
right to life finds favour with a number of notable scholars. Gleick for instance points out that the right to life implies the right to fundamental conditions necessary to support life. McCaffrey asks the poignant question as to whether the right to life can be interpreted to embrace the right to water. He points to the contemporary trend towards an expansive interpretation of article 6 of ICCPR. McCaffrey cites as an example the Human Rights Committee’s assertion that the right to life as the most fundamental right may not be understood in a restrictive sense. Its protection requires States to adopt positive measures hence the right to life would encompass water.

The above interpretation of the right to life as encompassing the right to water comports with Scott’s understanding of the interrelated nature of human rights discussed above. There is an organic interdependence between the right to water and the right to life as life cannot be guaranteed in the absence of access to safe water.

2.1.2 Regional treaties encompassing right to water

The human right to water is increasingly being recognised in regional agreements. Specific human rights treaties in Africa, Europe and the Americas also explicitly or implicitly provide for the right to water. In Africa, most States are party to the African Charter on the Rights and Welfare of the Child. This regional human rights treaty contains similar provisions to the CRC, and again explicitly references access to water for children.

The African Charter of Human and People’s Rights (African Charter), (ratified by almost all African countries) recognises the right of every individual to “enjoy the best attainable state of physical and mental health”. It also guarantees all peoples “the right to a general satisfactory environment favourable to their development.” Commentators have argued that the right to water can thus be inferred from the above provisions as such guarantees are unattainable without access to water. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa provides for women’s right of access to water and has also been cited to support the existence of a right to water in international law.

In the Americas, several States are party to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). The Protocol of San Salvador entitles everyone to “the right to live in a

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46 Ibid 10.
48 Article 14(2)(c) of the African Charter on the Rights and Welfare of the Child states: Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health...State Parties...undertake to pursue the full implementation of this right and...shall take measures...to ensure the provision of adequate nutrition and safe drinking water.
50 Ibid art. 16.
51 Ibid art. 18.
53 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2000) CAB/LEG/66.6. Article 15 of the Protocol provides that: States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to ensure...women with access to clean drinking water.
healthy environment and to have access to basic public services”.

In Europe, several States are party to the European Social Charter which implicitly recognises the right to water. The revised European Social Charter also recognises the right to housing, whereby States are enjoined to promote access to housing of an adequate standard. The European Committee on Social Rights, a treaty body charged to monitor State compliance with the European Social Charter held in the case of Defence for Children International v The Netherlands that the right to clean water has to be a component of the right to adequate housing. Such an interpretation constitutes an endorsement of the organic interdependence of rights articulated above as a framework to derive the right to water from related rights.

2.1.3 Customary international law

Sanchez-Moreno & Higgins have argued that the right to water is also emerging as a matter of customary international law. Customary international law is one of the primary forms of international law. Goldsmith & Posner defined it as “the collection of international behavioural regularities that nations over time come to view as binding as a matter of law”. As confirmed by the International Court of Justice in the Nicaragua case, customary international law requires two elements for its formation. Firstly, there must be a widespread and uniform State practice. Evidence of State practice may be gathered from statements made by government spokespersons to parliament, at international conferences and at meetings of international organisations. State practice may also be reflected through State constitutions, laws and judicial decisions. Secondly, States must engage in the practice out of a sense of legal obligation. This second requirement, often referred to as opinion juris is the second important element in the formation of customary international law.

There is a growing recognition of the right to water in a significant number of countries’ national constitutions. The South African Constitution, for example, provides: “Everyone has the right to have access to . . . sufficient food and water.” At least twenty-four countries have recognised the right to water in their constitutions or draft legislation. The constitutions

55 Ibid art 11.
57 European Social Charter, 529 U.N.T.S.89 (1965). Article 11 of the Charter enjoins member States to: take appropriate measures...to remove as far as possible the causes of ill-health...to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health...(and) to prevent as far as possible epidemic, endemic and other diseases”.
58 See article 31 European Social Charter (revised) ETS No. 163 (1966).
59 See Defence for Children International v The Netherlands, Complaint no. 47/2008.
62 Nicaragua v USA (Merits) ICJ Reports (1986) at 97.
63 Janis An Introduction to International Law (2003) 44.
67 See sect. 27(1)(b) of the 1996 Constitution of the Republic of South Africa.
68 Belgium (specifically the jurisdictions of Wallonia, Flanders and Brussels), Burkina Faso, Angola, Uganda, Ukraine, South Africa, Ecuador, Algeria (2005), Kenya (2005 draft Constitution), Guatemala (2005 draft water law) and Uruguay (2004) had included the right to water in their constitutions. Since 2002, when the General Comment No 15 (2002) was adopted, at least an additional seventeen countries have revised – or have taken steps to revise – their laws or constitutions to explicitly include the right to water. These include the Democratic Republic of Congo (2006), Indonesia (2004), Mauritania (2005), Mozambique (2005), Namibia...
of over a hundred countries recognise the right to a healthy environment which has been interpreted to incorporate a right of access to water.\textsuperscript{69} This growing evidence of States enshrining the right to water in their national constitutions provides further evidence to support the emergence of a right to water under customary international law.

Sanchez-Moreno & Higgins have further pointed out that most States have engaged in a consistent practice of adopting measures to ensure water provision for their citizens.\textsuperscript{70} This also supports the requirement that a norm of customary international law be evidenced by general practice of States.\textsuperscript{71} It could be argued that States are motivated by the belief that they have a legal obligation to ensure access to water for their inhabitants. This is evidenced by the binding treaties highlighted above in which the right to water has been inferred or expressly stated such as the ICESCR, CRC, CEDAW and regional treaties.

2.2 Objections to the existence of a right to water

It must however be noted that the existence of a right to water under international law has been disputed by some scholars. Two American lawyers have accused the CESCR of rewriting the provisions of the ICESCR as “the derivation of a separate right to water is without precedent.”\textsuperscript{72} Dennis and Stewart have further accused the CESCR of unilaterally altering the substantive content of the ICESCR as well as the States’ obligations by “deconstructing” the right to an adequate standard of living in article 11 into at least four separate and distinct rights to adequate food, water, clothing and housing.\textsuperscript{73} The two authors question the legal basis upon which the CESCR identified and elaborated a distinct right to water under article 11 of the ICESCR as there is no mention of water in the negotiating history of the ICESCR.\textsuperscript{74}

It is significant to point that Craig Scott’s interdependence of human rights framework articulated above is important to understanding the existence of the human right to water under international human rights law. This is because there is an organic and related interdependence between human rights as the right to water forms part and is incorporated into other rights such as the right to health, life and food.\textsuperscript{75} The significance of such a framework is its bid to define a coherent scope of a right to water that takes account of its relationship to directly protected rights. Such an exercise is important for clarifying its status as a fully autonomous right.

Following from the above is the question whether the right to water is binding on non-state actors. The question is necessitated by the greater incidence of private actors involved in the distribution of water services. More significantly, State-owned corporations or public-private partnerships are increasingly adopting market principles such as full cost recovery in the management and distribution of water services. This article will examine more closely the

\textsuperscript{69} See Final Report of the Special Rapporteur, Mr. El Hadji Guissé, Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realisation of the right to drinking water supply and sanitation, UN. Doc. E/CN.4/Sub.2/2004/20 (July 14, 2004).
\textsuperscript{70} McFarland Sanchez-Moreno & Higgins 2003-2004(27) Fordham International Law Journal 1663 at 1728.
\textsuperscript{71} Ibid 1728.
\textsuperscript{72} Dennis and Stewart “Justiciability of economic, social and cultural rights: Should there be an international claims mechanism to adjudicate the rights to food, water and health?” 2004 (98) American Journal of International law 462 at 493-494.
\textsuperscript{73} Ibid.
\textsuperscript{74} Ibid 494.
\textsuperscript{75} See Scott 1989 (27) Osgoode Hall Law Journal 769 at 799-784.
arguments used to deny and to uphold the extension of human rights responsibilities on non-state actors. This is necessary because if non-state actors are to be subjected to direct and legally enforceable obligations to observe the right to water, the grounds for doing so must be strong and conceptually unassailable.

It is also important to highlight that the issue of private sector participation in water services is particularly high on the UN agenda. The UN Independent Expert on the human rights obligations related to access to safe drinking water and sanitation has made studying the implications of private sector participation in the water sector one of her focus areas during her mandate.76

3 Privatisation and the right to water

3.1 The concept of privatisation

Privatisation as a term is mired in definitional uncertainty.77 Various definitions of the term have been proposed. Savas defined privatisation as the “act of reducing the role of government, or increasing the role of the private sector, in an activity or in the ownership of assets.”78 Lundquist defined privatisation as denoting “actions taken by actors legitimately representing the public sector, to move or transfer something that has hitherto been within that sector away from there into the private sector”.79

A number of authors have adopted a broad definition of privatisation. Martin, for instance, suggested privatisation as entailing “a change in the role, responsibilities, priorities and authority of the State,” rather than simply a change of ownership.80 Such a definition will not just encompass a transfer of hitherto publicly owned assets from State ownership to private ownership. It encompasses an understanding of privatisation in which the public enterprise (State) remains the primary service provider and producer. It also incorporates a more entrepreneurial approach, including market-stimulating decision-making techniques.81 This may be through the adoption of market principles such as full-cost recovery.82 This broad understanding is consistent with viewing such concepts as “commercialisation” of public enterprises and the so-called public-private partnerships as forms of privatisation. This paper will adopt the latter expansive understanding of privatisation.

3.2 The rise of privatisation

The concept of privatisation is not new. Peter Drucker famously argued nearly half a century ago that “government should spend more time governing and less time providing.”83 In the

78 Savas Privatisation: The key to better government (1987) 3.
80 Ibid.
81 Bakker “From State to market?: Water mercantilism in Spain” 2002 (34) Environmental and Planning 767 at 770.
82 Ibid.
83 Ibid 768.
past two decades, privatisation has been deemed as the solution to State failure to provide for basic services as the private sector was deemed more efficient and cost effective.\(^{84}\)

### 3.3 Privatisation of water services

The degree of water privatisation across the world is significant. Grusky & Fiil-Flynn have noted that from 1990-1997 over one hundred World Bank-inspired water projects with private participation were undertaken, with a total investment of US$ 25 billion.\(^{85}\) The water and sanitation sector constituted 18 per cent of all private infrastructure projects, ranking third behind the telecommunications and power sectors.\(^{86}\)

A global review study carried out on the privatisation initiatives in the water sector between 2000 and 2004 clearly shows the pervasive nature of the water privatisation agenda. The World Bank lent over US$ 1.26 billion to water and waste water service delivery in Asia. Ninety-five percent of these loans were conditioned on increased cost recovery and 88 per cent promoted increased private sector involvement.\(^{87}\) During the same period, the World Bank lent a total of US $ 1002, 55 million to 14 African countries in respect of which 80 per cent promoted full-cost recovery and 100 percent championed increased private sector involvement.\(^{88}\)

In Latin America, loans targeted towards the water and sanitation sector to the tune of US $ 573, 6 million were granted to a total of eight countries accompanied with the same explicit conditions promoting cost recovery and privatisation.\(^{89}\)

Some of the more notable privatisation initiatives in the water sector included the privatisation of the Jarkata water supply and management to Lyonnaise des Eaux, a French multinational entity. The introduction of water markets in Chile, privatisation of water services in Cochabamba in Bolivia and Argentina, the sale of publicly owned water companies to private entities in England and Wales and the introduction of public-private partnerships in rural water resources development in South Africa are some of the privatisation initiatives.\(^{90}\)

### 3.4 Forms of water privatisation

The bulk of private sector participation in the water services sector has taken seven major forms. These are the service contract, the management contract, the lease contract, The Build

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\(^{85}\) Bakker 2002 (34) *Environmental and Planning* 767 at 770-771.

\(^{86}\) Ibid 769.


\(^{88}\) Ibid 10. These African countries are Burkina Faso, Chad, Comoros, Ghana, Guinea, Guinea Bissau, Mauritania, Malawi, Mozambique, Nigeria, Rwanda, Senegal, Tanzania and Tunisia.

\(^{89}\) Ibid 12.


In small towns and cities like Dolphin Coast, Nkonkobe and Nelspruit, which were meant to be model private participation pilot projects, participation with international water companies were failures. In Nkonkobe, Suez was tossed out entirely...(due) to popular protest by ending the company’s contract nearly two decades ahead of schedule. In Dolphin Coast, Saur insisted on a controversial contract rewrite to assure higher profits. In Nelspruit, Biwater was on the verge of withdrawing because of high levels of consumer dissatisfaction and non payment. In Johannesburg, riots erupted in August 2003 when the company attempted to install prepaid meters and shallow sanitation system in Orange Farm and Soweto.”
Operate Transfer, the concession contract, the joint venture and divestiture. It is noteworthy that the degree of private sector participation varies from one form of privatisation to the other.

The privatisation movement in the water sector has generated immense debate, linked to the status of water as a human right on one hand, and the characterisation of water as an economic good on the other. A pertinent question which arises is whether the privatisation of water supply is compatible with the status of water as a human right. What are the implications of the privatisation of water services for access to a secure supply of decent quality water? Three streams of argument generally identifiable in the literature are highlighted below.

3.5 Objections to water privatisation

The World Bank, donor agencies and development banks’ promotion of water privatisation as highlighted above has contributed to a growing anti-privatisation social movement. Standing in firm opposition to the privatisation of water, this emerging global movement declares water as a human right, a public good, and part of the global commons and not a commodity that can be bought and sold for profit. It is argued that the involvement of private entities introduces a pernicious logic of the market into water management which is incompatible with guaranteeing citizens’ basic right to water. Opponents of the water privatisation trend point that the single-minded focus on privatisation and cost recovery ignores the need to protect and enhance universality of access to water. To buttress their arguments, they cite examples from Argentina, Bolivia, The Philippines, Ecuador and KwaZulu-Natal in South Africa to show that water privatisation initiatives have been disastrous. They cite unaffordable water rates, public health crisis and social turmoil.

In many developing countries the bulk of the population is poor and live below the poverty datum line. It is virtually impossible for private corporations to meet shareholders’ profit

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91 Perard & Mattei Private Sector Participation and Regulatory Reform in Water Supply: The Middle East and North African (MEDA) Experience (2008). Available online at http://www.privatizationbarometer.net. (accessed 10-05-2010). In a service contract, the public sector still retains ownership but when it comes to operations and maintenance of the system, the public sector retains overall responsibility but contracts out to the private sector specific services such as meter reading, billing and collection, equipment rental and construction. With a management contract responsibility for operations and maintenance is transferred to the private sector whereas under the lease contract the private sector assumes the legal responsibility for operating the service in exchange for payments for the use of the fixed assets. Under a Build-Operate-Transfer contract, the private sector is in charge of designing, building and financing a new investment project. It has also to operate and maintain it for the concession period and then hand it over to the public sector. The concession contract is similar to the lease contract, but the concessionaire is in charge of financing the expansion and the rehabilitation of the network. As in the lease contract, users are direct clients of the private contractor. Under a joint venture contract, the state or municipality and a private operator co-owns the water operator whereas full divestiture the assets are entirely sold to the private sector and the private operator is in charge of financing, operation, management and bears all the risks.

98 Ibid 1.
expectations and at the same time implement universal coverage with acceptable quality and affordable water. This is because the private sector has little incentive to improve access to water when large swatches of the population are very poor as investment costs in water are too high to expand access and the future revenue flows will be low.\(^99\)

This group thus opposes the commodification of water, endorsing water as a human right claiming that water is a \textit{res publica} on a planetary scale, a “patrimonial good vital to all humanity...and therefore an inalienable individual and collective right”.\(^{100}\)

3.6 Arguments in favour of water privatisation

Those who advocate for water privatisation argue that water is an economic good and a price should be charged for the service of treating and supplying it.\(^{101}\) They argue that the private sector constitutes an obvious alternative for the delivery of services in the face of governments’ current financial struggles.\(^{102}\)

Proponents of water privatisation further argue that water is increasingly a scarce resource which must be priced at full economic cost to facilitate access to water to those who currently lack access.\(^{103}\) To support their contention they point to the failure by governments to achieve the goal of universal water supply during the International Water and Sanitation Decade (1981-1990). The World Bank argued that through increased efficiency, private companies will be able to improve performance and increase cost recovery thereby improving access by a large number of people.\(^{104}\)

The other group to the contestation argues for the recognition of water’s public nature as well as recognising its basic human rights status. It advocates for the guarantee of universal access to safe water despite the involvement of non-state actors.\(^{105}\) This group envisages private sector participation with the State having regulatory oversight in order to protect the water’s public nature.\(^{106}\)

The above analysis raises the question as to the human rights obligations of State actors and non-state actors in situations where water provision has been privatised. It is important to note that international human rights law does not prohibit the privatisation of water services. The CESCR clearly stated that the realisation of human rights obligations enshrined in the ICESCR:

\begin{quote}
Neither requires nor precludes any form of government or economic system...provided that it is democratic and all human rights are thereby respected.\(^{107}\)
\end{quote}

The following sections will discuss and analyse the nature and extent of State and non-state actor’s human rights responsibilities in relation to the right to water.

\(^{99}\) Ibid 3-4.


\(^{101}\) Megginson \textit{The financial economics of privatisation} (2005) at 6 notes that the water industry is one industry where privatisation as well as increasing welfare has been very ambiguous.


\(^{104}\) Ibid.


\(^{106}\) Ibid 22.

4 The nature of the obligations imposed on the State by the right to water

The State is the basic unit of international law and international law primarily imposes human rights obligations on States rather than individuals. While individuals are the beneficiaries of human rights, the State holds the primary responsibility for protecting those rights. Within the context of the international human right to water, the General Comment 15 has elaborated the obligations that attach to States. These are the obligations to respect, protect and to fulfil the right to water. The following section is an overview of the nature of State obligations relating to the right to water as elaborated by the CESCR in its General Comment 15.

4.1 General Comment 15 and State obligations

General Comment 15 recognises water as an independent human right under articles 11 and 12 of the ICESCR and clarifies the nature and extent of State obligations related to the right to water. Although not legally binding on States, General Comments issued by the CESCR are authoritative interpretations of State obligations under the ICESCR and may be relied upon by international bodies in determining a State’s compliance with its international obligations under the ICESCR.

General Comment 15 defines the right to water as requiring water to be accessible, affordable, safe, and adequate for a life of dignity and provided without discrimination. General Comment 15 also establishes a strong presumption against retrogressive measures taken in connection with the right to water. It however qualifies this prohibition by stating that any party that deliberately resorts to retrogressive measures has a burden of justifying such measures “by the totality of the rights in the Covenant in the context of the full use of the State party’s maximum available resources”.

The CESCR classifies the obligations imposed on States by the right to water into a threefold typology: to respect; protect and fulfil. The duty to respect enjoins the State to ensure that the activities of its institutions do not interfere with people’s access to water. The duty to protect imposes on States an obligation to take measures to prevent third parties from interfering in any way with enjoyment of the right to water. Salman & McInerney-Lankford have pointed out that this obligation also requires preventing third parties, when they control or operate water services, from compromising equal, affordable and physical access to

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113 See General Comment No 15 (2002), paras 11-12.
114 Ibid para 19.
115 Ibid paras 20-29.
sufficient, safe and acceptable water. The duty to fulfil requires States to facilitate people’s enjoyment of the right to water.

Some scholars have questioned the CESCR’s use of the taxonomy of obligations to respect, protect and fulfil. Koch for instance has pointed out that using the above typology might lead to a simplification of complex problems. She points to the inadequacy of tripartite terminology on rights such as trade union rights or the right to a fair trial “because of their obvious...negative and positive features.” Koch however concedes the significance of the tripartite terminology by noting that “[the] use [of] the tripartite terminology...serves as a basis for asking a number of questions of relevance to the justiciability issue”. The importance of the above typology of State obligations is that it reflects the manner in which a State must behave to fulfil its obligations in relation to the right to water. The typology provides an analytical tool in which to understand the nature and scope of obligations imposed by the right to water.

Non-state actors are increasingly engaged in the provision of water services as a result of the water privatisation drive. The following section will analyse the human rights responsibilities of non-state actors when participating in the provision of water services. This will help in an attempt to elaborate the nature and scope the right to water imposes on non-state actors engaged in the provision of water services.

5 The right to water: Obligations of non-state actors

Definition of non-state actors in the context of privatisation of water

Andrew Clapham has a whole chapter exclusively dedicated to defining the term “non-state actor”. He starts from the premise that the concept of a “non-state actor” is generally understood to refer to any entity that is not a State such as armed groups, civil society and corporations. Clapham notes that the open-ended nature of the term defies a restrictive definition and as such “gives rise to misunderstandings and tensions as corporations find themselves branded in the same category as rebel groups and the UN finds itself branded with paramilitaries”.

This definitional problem is further noted by Philip Alston who concedes that “membership of this group is difficult to define and virtually open-ended”. Ratner has pointed out that in a legal system based and centred on States as the primary subjects, it is logical to describe the other actors as non-state actors.

Section 3.4 above provided a continuum of possible institutional arrangements for the provision of water services, with State-owned enterprises at one extreme and private

120 Ibid 11.
121 Ibid.
124 Ibid 200.
enterprise at the other end, while in between are various types of private-public partnerships. For the purposes of this article, the primary focus will be on divesture arrangements for the purposes of determining non-state human rights obligations in the provision of water services. Divesture is a form of privatisation where the water utility is wholly owned and controlled by the private sector.

5.1 Is international human rights law binding on non-state actors?

The relationship between human rights and non-state actors has become a highly topical area of scholarly research. One of the fundamental issues engendered by privatisation is the prevalence of non-state actor involvement in the provision of water services. This leads to the question whether a human right to water under international human rights law imposes any obligations on non-state actors involved in the provision of water services. This question is relevant because the involvement of non-state actors such as Multinational Companies (MNCs) in the water sector has brought to the fore the issue of lack of accountability. Of particular concern is the inadequacy of State responsibility as a mechanism for protecting groups and individuals from violation of the right to water by non-state actors. This is because:

The inadequacy of state responsibility stems fundamentally from trends in modern international affairs confirming that corporations may have as much or more power over individuals as governments.

The question of whether human rights law should be applied to non-state actors, such as private sector service providers requires consideration as to where the line should be drawn between public law and private law. As the human rights debate gets expanded to address non-state actors, the response has been far from uniform. Two broad approaches are identifiable in the literature on the question whether international human rights law does and should bind non-state actors, particularly those involved in the provision of public services as water.

5.1.1 Arguments against imposing binding human rights obligations on non-state actors

Some commentators have argued that international human rights law only governs the behaviour of States. This human rights model is based on the assumption that the State is the sole centre of institutional power that represents the most serious threat to individual rights and freedoms. This approach puts emphasis on the importance of States as the main actors in the international system and only bearer of human rights under international law. The view under this approach is that non-state actors are not bound by international human rights law. The legal obligations are those of States and not corporations or other civil society entities. This position is aptly captured by Eric De Brabandere who asserts that, “[t]o date multinational corporations have no direct human rights responsibilities under international law”.

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132 Ibid 1.
This conception of international human rights law is further buttressed by the fact that outside international criminal law, there are currently no international procedures for directly holding responsible a non-state violator of internationally recognised human rights.\textsuperscript{135} It is therefore argued that non-state actors do not have any positive duties to observe human rights. Their only duty:

\[ \text{[I]s to observe the law...it is for the state to regulate on matters of social importance...it follows that [corporations] can only be beneficiaries of human rights protection, not human rights protectors themselves.}\textsuperscript{136} 

Various arguments are posited against the extension of human rights obligations on non-state actors. One of the arguments advanced is that extension of human rights scrutiny to non-state actors will “chip away at the foundations of the human rights monument” and undermine the entire edifice of human rights.\textsuperscript{137} Advocates of this approach focus on State responsibility and argue that human rights concerns regarding non-state actors are most appropriately characterised as duties of the relevant State to ensure respect for human rights. Citarella for instance argues that whenever a State chooses to privatise basic services to non-state actors, the State remains liable for any violation of its international human rights obligations by such non-state actors.\textsuperscript{138} It is further argued that treaties are negotiated and entered into by States and such treaties are not binding on non-state actors who are not party to them.\textsuperscript{139}

5.1.2 Arguments in favour extending human rights obligations to non-state actors

Dinah Shelton notes that globalisation has led to the emergence of powerful non-state actors who have resources greater than those of many States.\textsuperscript{140} The sheer size and influence of some corporations is such that they are capable of determining national policies and priorities.\textsuperscript{141} Such non-state actors may violate human rights in ways that were not contemplated during the development of the modern human rights movement. Alston argues that:

\[ \text{[T]he international human rights regime’s aspiration to ensure the accountability of all major actors will be severely compromised in the years ahead if it does not succeed in devising a considerably more effective framework than the one that currently exists in order to take adequate account of the roles played by some non-state actors.}\textsuperscript{142} 

This development poses challenges to the international human rights movement, because for the most part, as noted above, that law has been designed to restrain abuses by States and State agents, not to regulate the conduct of non-state actors.\textsuperscript{143}

It is noteworthy that the emergence of these new forms of governance, involving non-state actors as service providers, complicates the operation of the classic model of human rights law. There is a growing concern that the enforcement of human rights imperatives set out in international human rights law is hindered by the lack of direct accountability placed on non-state actors. This is more so when public functions are delegated to them by the State.\textsuperscript{144} An

\begin{itemize}
\item \textsuperscript{135} Shelton 2002 (25) Boston College International and Comparative Law Review 273 at 282.
\item \textsuperscript{136} Muchlniski 2001 (77) International Affairs 31 at 33-35.
\item \textsuperscript{137} Clapham Human rights of non state actors (2006) 32.
\item \textsuperscript{138} Citarella International responsibility and privatisation UN Committee on the Rights of the Child Day of discussion on the private sector as service provider and its role in implementing child rights (2002) 4. Available online at www.crin.org/papers/treaties/crc.31/Discussion.asap (accessed 04-02-2010).
\item \textsuperscript{139} Ibid.
\item \textsuperscript{140} Shelton 2002 (25) Boston College International and Comparative Law Review 273.
\item \textsuperscript{141} Ibid.
\item \textsuperscript{142} Alston “The ‘not-a-cat’ syndrome” in Non-State Actors and Human Rights 2005 at 6.
\item \textsuperscript{143} Shelton 2002 (25) Boston College International and Comparative Law Review 273 at 279.
\item \textsuperscript{144} Mahinney Harmonising Good Governance (2002) 1 at 3.
\end{itemize}
accountability vacuum is created which results in diminishing international human rights standards.

Privatisation of hitherto publicly provided services puts into question the public/private dichotomy. Liebenberg has critiqued the public/private dichotomy in the context of adjudicating socio-economic rights by noting that:

[B]oth methodological and ideological considerations constrain the potentially transformative effect of socio-economic rights on private law rules and doctrines.145

The weakening of the public/private partition is particularly necessary in the context of privatisation of water services which has led to the involvement of non-state entities in the functions usually exercised by State organs.146

The distinction between State and non-state bodies for the purposes of determining the reach, or applicability, of human rights law becomes questionable and, it is suggested, requires adjustment in light of changing modes of governance.147 The impact non-state actors have on the realisation of human rights through their business activities makes many of the underlying assumptions of the arguments against imposing human rights obligations on them hard to sustain. This is because arguments against extending human rights obligations to non-state actors are based on a “remarkably resilient model of a liberal market society characterised by a clear distinction between the public and private spheres”.148

5.2 The UN Norms on Transnational Corporations and Other Business Enterprises

The Norms on the Responsibilities of Transnational Corporations and Other Business Entities with Regard to Human Rights, approved by the UN’s Sub-commission on the Promotion and Protection of Human Rights in 2003 (UN Norms)149 represent an attempt to create binding human rights responsibilities of non-state actors. The legal status of the UN Norms is uncertain. Bilchitz has stated that ‘[t]he norms as they currently stand rest in no-man’s land’.150 Bilchitz further points out that the drafters were faced with the difficulty that the norms were not to be a treaty yet the drafters wished them to be legally binding hence they argued that the legal authority of the norms derives from their sources in treaties and customary international law as a restatement of international legal principles applicable to companies.151 The UN Norms state that:

[W]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law.152

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145 Liebenberg Socio-Economic Rights Adjudication Under a Transformative Constitution at 375.
146 See generally Van Harten “The public-private distinction in the international arbitration of individual claims against the State” 2007 (56) International and Comparative Law Quarterly 371-394.
147 Ibid.
148 Muchlniski 2001 (77) International Affairs 31 at 36.
151 Ibid 767.
152 See UN Norms, para 1.
The UN Norms could be particularly important to protecting the right to water in the event of privatisation of water services. They explicitly state that transnational corporations and other business entities must contribute to the realisation and refrain from activities which inhibit the realisation of human rights, including the rights to adequate food and drinking water. This entails that:

[C]orporations that entered into privatisation agreements to provide water or water services would be required to meet both positive and negative human rights obligations...they should be required to ensure that the water was safe enough to protect health and that the provision of water met basic needs for adequate food and water, at least for some segment of the population.

It is noteworthy that even though the legal status of the UN Norms under international law is still uncertain, they mark a significant contribution to holding non-state actors as duty bearers of international human rights. They offer the “promise of holding private companies responsible for human rights violations which could lessens reliance on States as the primary implementers and enforcers of human rights”.

6 Towards an accountability model to guide State and non-state actors in water privatisation

The UN High Commission for Human Rights (the UNHCR)’s report on Liberalisation, Trade in Services and Human Rights pointed out the desirability of an accountability framework to aid States in privatisation initiatives. The UNHCR points out to two essential considerations for any privatisation initiative in the utilities sector, namely, ensuring equal access for basic services, and ensuring the State’s right and duty to regulate.

In its 2005 report on Human Rights and Privatisation, Amnesty International (Amnesty) pointed out that privatisation of basic services is no justification for the State to abdicate its responsibility to respect, protect, fulfil and promote human rights. The report further argued that the State has a duty to ensure that the ownership of the delivery system, public or private, does not compromise accessibility, availability, quality and acceptability of basic services. Amnesty argued that privatisation should not result in denial of access to vulnerable and poor people to socio-economic rights hence regulatory mechanisms must be put in place for the State to discharge its obligations.
The widespread privatisation of water service necessitates the construction of an accountability model ("accountability model" or "model") for guiding State and non-state actors involved in the water services sector.\textsuperscript{162} This model will be informed by the prescript of the international human right to water. Such a model must be adapted to be responsive to different forms of privatisation with greater emphasis on the responsibility of the State under management contracts and public-private partnerships. In the case of complete divestures, greater emphasis will be on non-state actor human rights responsibility. The model should also use the following normative criteria, namely: availability; accessibility; quality/safety and cross cutting issues such as non-discrimination; participation and accountability.\textsuperscript{163} Such a model, it is argued, will help in guiding States to fulfil their obligations in the context of non-state participation in the provision of water services. The model is also aimed at articulating the human rights responsibilities of non-state actors when participating in the provision of water services.

**Conclusion**

The global water crisis has spawned the push towards privatisation of water services. This article has highlighted the rise of the human right to water under international human rights, analysing the legal basis for a right to water under international human rights law. The rise of privatisation as a political-economic concept and increased private sector participation in sectors hitherto dominated by the State and its agencies was also analysed with particular focus on the impact of privatisation on the human right to water. This included an analysis of the question as to whether international human rights law, and in particular the human right to water, is binding on non-state actors involved in the provision of water services.

Increased privatisation of water services necessitates the creation of an accountability model to guide States and non-state actors in the event of privatisation of water services. Such a model must be adapted to be responsive to different institutional arrangements in the provision of water. Such a model must also be adapted to respond to the different institutional arrangements in the provision of water services. Direct responsibility for the realisation of the human right to water should be imposed on the State in the case where the State delegates the provision of water services through management contracts and public-private partnerships. In the case of complete divestures of water services to the private sector, it is imperative that such non-state actors be directly bound by the human right to water.

\textsuperscript{162} Brabandere *State-Centrism and Human Rights* (2009) 2.