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Advancing the Human Right to Water: The Question of Private Sector Participation in the Developing World

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ADVANCING THE HUMAN RIGHT TO WATER: THE QUESTION OF PRIVATE SECTOR PARTICIPATION IN THE DEVELOPING WORLD

By

GABRIELLA PALMI

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The members of the committee approve the thesis of Gabriella Palmi defended on October 8, 2010.

Sumner B. Twiss
Professor Directing Thesis

Terry Coonan
Committee Member

Talbot “Sandy” D’Alemberte
Committee Member

Approved:

Dr. Lee Metcalf, Chair, Department of International Affairs

David W. Rasmussen, Dean, College of Social Sciences and Public Policy

The Graduate School has verified and approved the above-named committee members.

This thesis is dedicated to those who suffer from a lack of clean water, with the hope that their rights will one day be realized.

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TABLE OF CONTENTS

List of Abbreviations vi
Abstract vii

INTRODUCTION 1

1. CHAPTER ONE: A BROAD OVERVIEW 5

The Development of the Human Right to Water 5
The Emergence of Private Sector Participation in Water Services 8

2. CHAPTER TWO: QUESTIONS OF COMPATIBILITY 12

Legal Compatibility 12
Theoretical Compatibility 14
The Free Market 14
Competition 15
Neoliberal Economic Benefits 16
Practical Compatibility 18
Private Sector Investments 18
PPIAF Study 22
PSP and Childhood Mortality in Argentina 24
Cochabamba, Bolivia 25
Buenos Aires, Argentina 27
Conclusions 30

3. CHAPTER THREE: QUESTIONS OF ACCOUNTABILITY 33

Domestic Implementation of the Right to Water 33
South Africa 35
Limitations 38
American Civil Law and the Alien Tort Claims Act 40
Limitations 41
The International Human Rights Regime 43
An Expanding Conception of Corporate Accountability 43
A Framework for Corporate Accountability 44
Judicial Instruments 47
Limitations 50
Soft Law 51
Types of Soft Law 53
Limitations 56
Conclusions 58

CONCLUSION 61

LIST OF ABBREVIATIONS

ATCA:	Alien Tort Claims Act
CSR:	Corporate Social Responsibility
ETOSS:	Entre Tripartito de Obras y Servicios Sanitarios ofArgentina
ICC:	International Criminal Court
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICJ:	International Court of Justice
ILO:	International Labour Organization
OECD:	Organization for Economic Co-operation and Development
OSN:	Obras Sanitarias de la Nación of Argentina
PCA:	Permanent Court of Arbitration
PPIAF:	Public Private Infrastructure Advisory Facility of the World Bank
PSP:	Private-sector participation
WSA:	Water Services Act of South Africa

ABSTRACT

The human right to water entitles everyone to basic water and sanitation, but over 2.6 billion people lack access to these essential services. Private sector participation has emerged as a potential model for improving these conditions, but its advancement has been followed with a concern that the private sector's profit-seeking focus does not encompass the social priorities embodied by the human right to water. The debate is also reflective of a concern relating to the increasing place of business in the international system. That transnational water companies lie outside the jurisdiction of the international human rights regime, but are in a direct position to impact the realization of rights, emphasizes the concern over advancing private sector participation as a model for water services. This thesis will assess two main questions. First, is private sector participation compatible with the human right to water? Second, can transnational water corporations be held accountable to human rights standards? Through the investigations of these questions, this research will determine whether private sector participation is capable of advancing the right to water. Moreover, the investigation of these questions will aid in an understanding of how the field of human rights is evolving to encompass contemporary developments in the field.

INTRODUCTION

The human right to water properly emphasizes that everyone is entitled to "sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses."[1] With nearly one billion people lacking access to basic water and over 2.6 billion lacking access to sanitation services,[2] it has become increasingly important to determine how to improve access to these services. Private sector participation (PSP) has emerged as a potential model for improving these conditions, but its advancement has been followed by concerns regarding its capacity to meet the standards of the right to water. The argument that the private sector's profit-seeking focus cannot encompass the social priorities embodied by human rights signifies the legitimate concern for acknowledging PSP as a reliable model for water services. Supporters of the model, however, assert that the private sector has the potential to improve services and contribute to rights realization. These diverging claims continue to command a fierce international debate about the appropriate role of the private sector in the provision of water and sanitation.

This debate is also reflective of the growing concern relating to the increasing place of business in the international system. The fact that corporations are often in a position to impact the realization of rights, but lie outside the scope of appropriate accountability, contributes to the apprehension of enlarging the role of the private sector. This concern has been particularly relevant in water services, since private water operators are in a direct position to contribute to or hinder the advancement of the right to water.

The international community is now left with several unanswered questions concerning the nature of these developments. Are there any restrictive qualities of private sector participation that limit its compatibility with human rights? Does the pragmatic application of the model meet the requirements of the right to water and advance access to services? Can the private sector be held accountable to standards of human rights? Through the investigation of these questions, this thesis aims to contribute to the understanding of whether private sector

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[1] United Nations Economic and Social Council, *General Comment No. 15*, Committee on Economic, Social, and Cultural Rights, Twenty-ninth session, E/C.12/2002/11, 2002, para. 2.

[2] United Nations Human Rights Council, *Human rights and access to safe drinking water and sanitation*, Resolution 7/22, March 2008.

participation can be understood as a credible model for advancing the realization of the right to water. Additionally, because these concerns reflect new and emerging issues within the study of human rights, the response to these developments can be applied to understand how the international community is reacting to contemporary developments in the field. Through this assessment, this thesis aims to determine whether the field is evolving to encompass a more collective vision of human rights that can embrace the future needs of the international community.

The initial chapter of this work serves as an introduction to water services, as it examines the development of the human right to water and the emergence of private sector participation as a model for water services. This chapter emphasizes the polarizing claims about private sector participation and assesses the current state of PSP within a human rights context. The second chapter evaluates the compatibility between private sector participation and the human right to water. Investigating the model's legal, theoretical, and practical fittingness to the requirements of human rights will serve to determine whether PSP is capable of advancing the right to water and improving access to services. Additionally, identifying the model's inconsistencies with human rights standards will serve to uncover the major challenges faced by the implementation of PSP. The final chapter of this work deals with the question of whether transnational corporations can be held accountable to standards of human rights. With regulation and accountability found to be persistent challenges with PSP, the identification of four mechanisms for improving corporate compliance to human rights will contribute to an understanding of the model's credibility. This thesis will conclude with an assessment on whether these developments are contributing to a more collective and expansive vision of human rights.

This thesis is focused mainly on the impacts of private sector participation in the developing world. Because the lack of realization towards the right to water is predominantly concentrated in low-income areas, there is a more urgent need to determine useful models for water management in the developing world. Moreover, a limited focus was chosen to ensure that the conclusions drawn are cohesive and robust. With studies asserting that private sector participation tends to be more successful in developed economies, including such regions could skew any conclusions on the efficacy of the model in the developing world.

Because the private sector entails a diverse and wide-ranging group of actors, it is necessary to determine what is meant by private sector participation in this analysis. The United

Nations Human Rights Council has proclaimed that PSP encompasses all non-state actors, ranging from the informal sector to large corporations.[3] This analysis however, will be limited to only larger, transnational water corporations. This more limited focus was chosen because the debate on private sector participation has been predominantly concerned with large corporate actors. Because transnational water corporations are powerful entities that are capable of playing a significant role in water services, it is especially necessary to assess their utility in the developing world. Also, with their great power, financial resources, and development potential, these actors have the greatest potential for abuse, indicating an urgent need to render conclusions about their legitimacy.

Additionally, the variation that would persist from analyzing many different actors within the private sector could lead to many research limitations. In order to obtain concrete conclusions, it is necessary to assess thoroughly one particularly group, rather than providing a limited analysis of many different actors. Though some conclusions of this research are likely to generate some broader generalizations concerning all private actors in the water sector, informal and small-scale providers are left out of this analysis in order to avoid distorted conclusions. For instance, if small service providers excel at water delivery to the poor while large corporations fail to deliver equitable results, it will be difficult to render any particular conclusion about the model. Focusing on one significant group of actors, such as large corporations, allows for a more cohesive analysis and a more robust understanding of the practice.

As a final note, this thesis takes a new perspective on the debate about private sector participation. Although the right to water still lacks a complete and legally binding formation, recent developments have bolstered its status as a recognized human right.[4] For this reason, interpreting private sector participation and the human right to water as competing models for water services is no longer tenable. The human right to water should be regarded as an international standard for all water service models to follow, and not as an entirely separate framework for water management. Though the human right to water lacks a binding formulation, its development as an internationally accepted standard now paves the way for its rights status to be formally recognized. In this sense, the right to water should be upheld in all water services,

[3] United Nations General Assembly, Human Rights Council Fifteenth Session, *Report of the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation*, Catarina de Albuquerque. A/HRC/15/31, 29 June 2010, 4.
[4] United Nations General Assembly, *The human right to water and sanitation,* Sixty-fourth Session A/64/L.63/Rev. 1, 26 July 2010.

leaving it to governments to decide which model, whether publicly or privately provided, will best facilitate their water service goals. Determining the effectiveness of PSP rests not in its efficiency over a human rights model for water management, but rather, by how well it advances the standards and the goals of human rights.

CHAPTER ONE

A BROAD OVERVIEW

The Development of the Human Right to Water

The recognition of an international human right to water began in 1948, with the creation of the Universal Declaration of Human Rights (UDHR). Although the document is legally non-binding, the UDHR provides the foundation for the modern human rights movement, where a broad vision of rights is grounded in the inherent dignity of the individual. The declaration proposed that "everyone has a right to a standard of living adequate for the health and well-being of himself and of his family…" Included in the article are the human rights to food, clothing, housing, medical care, and necessary social services.[5] Though the right to water is not explicitly included in the declaration, it has been inferred by its similarity to other socio-economic rights. Because water is as necessary as food, housing, or clothing to fulfill the right to an adequate standard of living, the argument has been made that it is implicit in the UDHR.[6]

The principles of the Universal Declaration of Human Rights were laid out in treaty form in the 1970s, with the development of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Article 6 of the ICCPR asserts that "every human being has the inherent right to life."[7] Similar to the way that the right to water is said to derive from the UDHR, the argument has been made that water is required to fulfill the right to life. Despite some criticisms that the article was meant to encompass only arbitrary deprivations of life,[8] most states now accept a broader conception of Article 6.[9] Indeed, the United Nations has held that "the right to life has been too narrowly interpreted. The expression 'inherent right to life' cannot be properly understood in a restrictive

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[5] United Nations General Assembly, *Universal Declaration of Human Rights*, adopted December 10, 1948, Article 25.
[6] Stephen McCaffrey, "A Human Right to Water: Domestic and International Implications," *Georgetown International Environmental Law Review* 5, issue 1 (1992): 6.
[7] United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), 16 December 1976, Article 6.
[8] See for instance, Yoram Dinstein, "The Right to Life, Physical Integrity, and Liberty," in *The International Bill of Rights: the Covenant on Civil and Political Rights*, edited by Louis Henkin, New York: Columbia University Press, 1981, 114.
[9] McCaffrey, 10.

manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."[10] This more expansive understanding of the right to life can be utilized to argue for the inclusion of water within binding international human rights law.

A similar interpretation can be derived from the ICESCR which recognizes the right to an adequate standard of living (Article 11) and a right to health (Article 12).[11] By the establishment of General Comment No. 15 in 2002, the United Nations Committee on Economic, Social, and Cultural Rights interpreted that the ICESCR implicitly includes the right to water. In the document, the Committee stresses that Article 11 specifies a number of rights emanating from the right to an adequate standard of living, including adequate food, clothing and housing. Moreover, it acknowledges that "use of the word 'including' implies that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living…"[12] General Comment No. 15 now stands as the leading document on the right to water, and although it lacks binding force, a consensus is emerging on the committee's interpretation that the right to water is meant to be inferred from the law.

Additionally, internationally codified treaties such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women verify the right to water by explicit acknowledgement. Despite their lack of inclusiveness to all individuals, the treaties carry great legal force by their widespread acceptance throughout the international community. Moreover, the explicit recognition of water within human rights law signals the status of the right to water in a legally binding formation.

In 2008, a resolution was proposed to the United Nations Human Rights Council to identify water as a human right. Despite its failure to adopt the resolution, the Council expressed a deep concern over the number of people who lack access to basic services and appointed Ms. Catarina de Albuquerque as an Independent Expert on the topic to clarify the human rights

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[10] United Nations High Commissioner for Human Rights, *General Comment No. 06: The Right to Life (art. 6)*, United Nations Convention on Civil and Political Rights, sixteenth session, 30 April 1982, para. 5.

[11] United Nations High Commissioner for Human Rights, *International Covenant on Economic, Social and Cultural Rights*, General Assembly Resolution 2200A (XXI), 16, December 1966, Articles 11 and 12.

[12] General Comment No. 15, para. 2.

obligations and identify the best practices for fulfilling the right to water and sanitation.[13] The completion of her mandate will provide additional clarification on the content of human rights obligations concerning the right to water.

Most recently, in July 2010 the United Nations General Assembly adopted a landmark resolution recognizing access to clean water and sanitation as a human right. By a vote of 122 in favor, none against, and 41 abstentions, the General Assembly took the position that access to clean water and sanitation is critical to the realization of all human rights.[14] Though it is also not legally binding, the Assembly's resolution signals a positive step towards a consensus of its status as a basic human right and emphasizes the international community's commitment to its realization.

It is evident that the international community is moving in a positive direction towards a full and legally binding right to water, but several caveats still limit its realization. Most notably, the challenge of rights fulfillment stems from the fact that the lack of access to water is a symptom of widespread poverty that has no immediate solution. It is for this reason that the ICESCR calls for the progressive realization of rights, comprising few immediate obligations on states. A common critique of this approach rests on the idea that the ICESCR exists "more in the nature of goals than of presently existing entitlements."[15]Additionally, the state obligation to devote their maximum available resources is difficult to measure. Given that states' available resources vary considerably, so too will their specific obligations. These difficulties have led to the common presumption that socio-economic rights are unenforceable rights that persist as little more than "idealistic rhetoric."[16]

Moreover, the lack of an explicitly binding international human right to water limits the full span of legal protection for the right. Critics make the case that its lack of full encompassment within international law contributes to the challenges of enforcing its standards and punishing for violations. This lack of recognition is also identified by the fact that several states have refused to acknowledge that access to water is a basic human right. Canada for instance, has remained opposed to the right to water based on a fear that its recognition would

[13] United Nations Human Rights Council, *Human rights and access to safe drinking water and sanitation*, Resolution 7/22, March 2008.
[14] United Nations General Assembly, *The human right to water and sanitation,* Sixty-fourth Session A/64/L.63/Rev. 1, 26 July 2010.
[15] McCaffrey, 14.
[16] Robert E. Robertson, "Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights," *Human Rights Quarterly* 16, issue 4 (1994): 694.

permit other countries access to Canadian resources.[17] The United States has also refused to recognize the right to water.[18]

The Emergence of Private Sector Participation in Water Services

The debate over the appropriate role of private sector participation in water services has a long history. The first services in Europe and North America were established by the private sector, but were gradually taken over by governments based on the argument that services relating to public health should be managed by the public sector.[19] Supported by the rationale that water is a public good, public sector management of water and sanitation services occurred almost exclusively throughout the twentieth century.

By the late 1970s however, a new ideological shift moved away from statist ideology and toward neoliberal economic policies. Premised on the belief that market-led developmentalism could "increase stability, efficiency, productivity, and competitiveness," privatization and free market principles were viewed as more reliable means for improving the underdevelopment that plagued much of the world.[20] Moreover, the private sector was highlighted as a way to bring greatly needed financial assets to more adequately fund services in the developing world. These notable benefits to be gained from a neoliberal approach provided evidence that it was a more credible method for improving the services that low-income countries so greatly require. Moreover, the movement towards neoliberalism was supported by the fact that publicly-run utilities had been singularly unsuccessful in providing reliable water supply and sanitation. [21] Burdened by corruption, limited resources, and poor efficiency, it was clear by the late 1980s that "state-led developmentalism had suffered a major blow."[22]

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[17] Ashfaq Khalfan and Thorsten Kiefer, *Why Canada Must Recognize the Human Right to Water and Sanitation*, Centre on Housing Rights and Evictions, 26 March 2008, 1-2. This assumption is based on a misunderstanding that the ICESCR and other standards for the right to water would require that states share water resources to fulfill any water needs. However, the human right to water would not restrict Canada's territorial sovereignty or control of resources.

[18] United Nations General Assembly, *The human right to water and sanitation,* Sixty-fourth Session A/64/L.63/Rev. 1, 26 July 2010.

[19] Jessica Budds and Gordon McGranahan, "Are the Debates on Water Privatization Missing the Point? Experiences from Africa, Asia, and Latin America," *Environment and Urbanization* 15 (2003): 90-91.

[20] Shamsul Haque, "The Fate of Sustainable Development Under Neo-liberal Regimes in Developing Countries" *International Political Science Review* 20, no. 2 (1999): 199.

[21] Brocklehurst, Clarissa. *New Designs for Water and Sanitation Transactions: Making Private Sector Participation Work for the Poor*, (Washington, DC: PPIAF and Water and Sanitation Programme, 2002), 8.

[22] Ibid.

The influence of neoliberalism was particularly apparent in the international community's policies towards water management. International financial institutions such as the World Bank and the International Monetary Fund heavily promoted privatization policies in water services throughout the developing world. Proceeding from the assumption that "private participation can help extend access to goods and services at reasonable prices,"[23] the World Bank pursued these strategies through structural adjustment policies and loan conditionalities that required countries to enact privatization projects.[24] The Bank emphasized its approach by the shortcomings of the public sector:

> Given that water is essential for life, when it is scarce, governments tend to base allocations on political and social considerations rather than on purely economic criteria. Government involvement reflects the understandable concern that relying exclusively on unregulated markets would not work. In many countries, the result has been a tradition of heavy dependence on centralized command and excessive reliance on government agencies to develop, maintain, and operate water systems. In many instances, this has stretched too thin the government's already limited implementation strategy.[25]

In pointing out an unnecessary reliance on overextended governments who have failed to price water appropriately, the World Bank justified its strategy of market forces in the private sector for carrying out water-related projects.

At the International Conference on Water and Environment in 1992, a set of guidelines adopted by the United Nations called the Dublin Principles further advanced the commercialization of water. Principle No. 4 asserts that "water has an economic value in all its competing uses and should be recognized as an economic good."[26] It is worth noting that the document does acknowledge that "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,"[27] but the Dublin Statement has become best known as a supporting document for the commodification of water and has served as great momentum for neoliberal economic initiatives in the sector.[28]

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[23] The World Bank. "Approaches to Private Participation in Water Services: A Toolkit." Washington, DC: World Bank, January 2006, 3.
[24] Budds and McGranahan, 91.
[25] Ibid.
[26] International Conference on Water and the Environment, *The Dublin Statement on Water and Sustainable Development*, adopted on January 31, 1992 by the United Nations in Dublin, Ireland.
[27] Ibid.
[28] Karen Bakker, "The 'Commons' Versus the 'Commodity'" Alter-globalization, Anti-privatization and the Human Right to Water in the Global South," *Antipode* 39, no. 3 (June 2007): 430.

Private sector participation and neoliberal economic policies continue to be utilized in water services to date, but negative outcomes of many PSP projects have caused the international community to modify how the model is executed. Though still heavily reliant on neoliberal policies, purely private program initiatives are now rarely implemented. Instead, models employing the private sector are implemented through public-private partnerships (PPPs), where a more balanced approach is established between the roles of the public and private sectors. These partnerships have emerged as an improved form of PSP, where the limitations of the private sector are mitigated by granting increased responsibilities and decision-making authority to a public partner. Other reforms comprised in PPPs include ensuring adequate financial stability of corporations, implementing approved tariff structures, providing government and corporate subsides, and providing incentives for service providers to reduce costs.[29] By maintaining private financial flows into the sector while reserving regulatory powers to the public sector, public-private partnerships have been established as a more reliable approach for water services.

The debate over private sector participation however, continues to spark an intense international debate with highly polarized perspectives. Critics of the model argue that businesses find it difficult to restrict financial returns to meet the demands of low-income countries. Indeed, the assumption that "the social responsibility of business is to increase its profits"[30] has remained an enduring concept in private sector affairs. Moreover, many examples of the operational implementation of PSP have indicated that criticisms of neoliberal economic theory have been well-founded. Increased tariffs, high-profile contract terminations, and unmet coverage targets provide support the fact that businesses find it challenging to seek both profit and social ends simultaneously.[31] Premised on the belief that only the state can fulfill equitable and universal access to clean water, opponents of PSP also argue that maintaining water's status as a human right and public good requires that it remain under the authority of the public sector.[32]

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[29] World Bank, *Public and Private Sector Roles in Water Supply and Sanitation: Operational Guidance for World Bank Group Staff* (Washington, DC: The World Bank, 2004), 2.
[30] Milton Friedman, "The Social Responsibility of Business is to Increase its Profits," *New York Magazine*, Spetember 13, 1970.
[31] Jeremy Allouche and Matthias Finger, "Two Ways of Reasoning, Out Outcome: The World Bank's Evolving Philosophy in Establishing a 'Suitable Water Resource Management' Policy," *Global Environmental Politics* 1, no. 2 (2001): 12.
[32] Bakker, 432.

On the other side of the debate, supporters of PSP defend the private sector's capacity for contributing to improved water services by expanding accessibility and increasing investments in the sector. Responding especially to the fact that the public sector has been unsuccessful at improving access to services, private sector champions continue to emphasize the virtues of neoliberalism to make the case for PSP in water services.[33]

Because of these polarizing claims, the argument is often made that water cannot be classified as both an economic good and a human right. For this reason, the debate has persisted through attempts to determine whether private sector participation or the human right to water best facilitates access to water, classifying each as a competing model for water services. However, with a growing consensus on the status of water as a basic human right, the categorization of the human right to water should no longer be considered one model amongst others as a system for water management. The Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation has emphasized that "the human rights framework does not express a preference for models of service provision, but insists that in all instances, the human rights to water and sanitation be guaranteed."[34] Questions concerning the legitimacy of private sector participation still remain, but it is now clear that a human rights framework must guide any future policy of water management.

With both benefits and limitations apparent in the model of private sector participation, the question now becomes whether PSP can be verified as a useful and legitimate model for meeting the standards of the right to water. This requires answers to two specific questions. Is private sector participation compatible with the human right to water? If so, how can the private sector be regulated and enforced to ensure that it upholds the standards of human rights? The answers to these questions will be assessed in the next chapters to aid in satisfying the inquiry concerning the value of PSP as a model for advancing the human right to water.

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[33] Ibid.
[34] United Nations General Assembly, *Report of the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation*, Catarina de Albuquerque, Human Rights Council, Fifteenth Session, A/HRC/15/31, 29 June 2010, 1.

CHAPTER TWO

QUESTIONS OF COMPATIBILITY

With the human right to water now considered the standard for any water services model, it is necessary to determine whether private sector participation is compatible with the standards provided by the right to water. Indeed, General Comment No. 15 asserts that strategies for water services "should be reviewed to ensure that they are compatible with obligations arising from the right to water, and should be repealed, amended, or changed if inconsistent with Covenant requirements."[35] Assessing the private sector's legal, theoretical, and practical compatibility to human rights standards will aid in determining whether PSP is a useful model for advancing the right to water.

Legal Compatibility

Compatibility requires first, that private sector participation be confirmed as a legally permissible model under the standards of the right to water. However, General Comment No. 15 makes no explicit statement concerning the permissibility of private sector participation. In fact, the final version of the draft excluded any statements on the matter because the Committee agreement "not to politicize the issue."[36] Without any direct affirmation of the model's legitimacy, it is necessary to assess the document to confirm that PSP does not contradict the basic tenets of the document.

General Comment No. 15 defines water as a public good and places the onus of responsibility for respecting, protecting, and fulfilling the right to water on the State. Despite the integral role that is given to the public sector, the document does not require that the state be the facilitator of services. General Comment No. 15 asserts that "every State party has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances."[37] The document does not rule out particular models of water services, making private sector participation seemingly permissible. The document also states that "where water services are

[35] General Comment No. 15, para. 46.
[36] Gustavo Capdevila, "UN consecrates water as public good, human right," *Inter-Press Service,* 27 November 2002.
[37] General Comment No. 15, para. 45.

operated by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe, and acceptable water." [38] Accordingly, states appear to have the capacity to choose their model of water services, which can include a third party, private operator.

It is evident that there is a broad legal permissibility for PSP under General Comment No. 15, but other stipulations within the document must also be assessed to ensure that it upholds all legal standards of the right to water. For instance, General Comment No. 15 asserts that to protect against abuses, "an effective regulatory system must be established, in conformity with this Covenant and this General Comment, which includes independent monitoring, genuine public participation, and imposition of penalties for non-compliance."[39] Because this requirement commands a significant role for the State, the legal permissibility of PSP requires that the model be executed in a way that maintains heavy public involvement. Since PSP models can vary in the extent of private involvement, the scope of participation is instrumental in determining legal legitimacy. Full divestiture privatization, for instance, which transfers all ownership of assets to the private entity, provides minimal decision-making authority for the State that may present a challenge in meeting the requirements of regulation under General Comment No. 15. Other private sector participation arrangements, such as concessions or leases, where the State retains significant authority, are more inclined to meet requirements of the human right to water.

Private sector participation can thus be verified as legally permissible under General Comment No. 15, but it requires that a significant regulatory role is preserved by the State. This does indeed limit the scope of appropriate private participation, as it requires that the private sector carry on its functions through a partnership with governments, rather than as a singular actor in water services. The legal permissibility of the private participation additionally requires that it is adequately monitored and regulated, including the implementation of appropriate complaints procedures and enforcement strategies. To this end, any water services design that includes the private sector should take great care to ensure that the public sector has a legitimate and well-defined role in the system to ensure that the private sector is appropriately monitored and regulated. It can thus be concluded that PSP is legally compatible with the human right to water, insofar as the public sector maintains its place in the design.

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[38] Ibid., para 24. General Comment No. 15 states that "third parties" include individuals, groups, corporations, and other entities, as well as agents operating under their authority."
[39] Ibid.

Theoretical Compatibility

Premised under the advantages of neoliberal economic theory, private sector participation was originally advanced as a means of improving access to services in the developing world. However, questions still remain concerning the compatibility between the theoretical tenets of neoliberalism and the principles of human rights. For instance, does the use of the free market and full-cost recovery align with the principles of universal access and non-excludability? Indeed, the argument against private sector participation is based on the belief that there is an underlying contradiction between market forces in the provision of a public good and the guarantee of universal access to water.[40] In order to ensure compatibility, the basic elements of private sector participation must be found to be reliably in conformity with the standards of the human right to water.

The Free Market

With neoliberal economic theory largely founded on the principles of the free market, verifying compatibility requires that free market principles are in alignment with fundamental human rights standards. In the context of water services, free market ideology implies that the price of water should be unregulated and established by its market value. This principle has transpired within private sector participation through full cost recovery, where the costs it takes to recover an investment are incorporated into the price of water.

There is an underlying challenge in utilizing full cost recovery principles in a human rights context. General Comment No. 15 asserts that states must adopt pricing schemes for free or low cost water and that "any payment for water must be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households."[41] The challenge of applying a free market approach within a human rights context is the principle of *affordable to all*, which requires a restraint of the market and appropriate governmental regulation. Because free market policies operate on ever-changing values, such a principle alone cannot guarantee the central requirement of affordability.

[40] Bakker, 437.
[41] General Comment No. 15, para 27.

Moreover, defining water as a commodity suggests that water is excludable and can be denied for non-payment. [42] This can be seen as a fundamental contradiction to the human right to water, which requires that water be provided based on the principles of non-discrimination and universal provision. Though General Comment No. 15 does not outwardly discredit the commodification of water, the document's classification of water as a public good and human right minimizes the role that the market should play in the provision of water services.

It is thus evident that there is an apparent contradiction between free market ideology and the requirements of a human right to water. However, this does not inevitably mark a true incompatibility between the private sector and human rights. The implementation of free market principles rarely exist in the purest form and most PSP models now provide market regulation to ensure a more fitting approach to the requirements of human rights. Indeed, public-private partnerships, where governments retain decision-making and regulatory authority, typify most private participation models and provide a more reliable means for appropriate market control.[43] Certainly, if governments can restrain the market in a way that meets the obligations of the right to water, private sector participation can be seen as a model that reaps the benefits of the free market while maintaining the obligations of affordability and non-excludability.

Accordingly, it is the scope of free market policies within private participation that will determine the degree of compatibility with the human right to water. There is an evident contradiction between the free market in its purest form and the requirements of human rights, but governmental regulation and market restrictions can make it possible for PSP to uphold the standards of affordability and non-excludability. Most importantly, this requires a central role for governmental regulation to ensure that equitable pricing standards are met.

Competition

The market value of water is deemed to be one that produces efficiency and conservation when it is in a free and competitive market. However, private water services often persist under the conditions of a natural monopoly, where competition is limited because water is provided by

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[42] David A. McDonald and Greg Ruiters, *The Age of Commodity: Water Privatization in Southern Africa* (London: Earthscan, 2005), 20.

[43] Eric Gutierrez, *Framework Document: A Survey of the Theoretical Issues on Private Sector Participation in Water and Sanitation* (Water Aid and Tearfund, 2001), 2.

a singular private provider.[44] Under these conditions, private water operators have an incentive to overprice goods and under-produce services, making abuse more likely occur under a natural monopoly than under a competitive market.[45] The danger of monopolistic abuses poses a serious threat to PSP's compatibility with the human right to water, as overpricing schemes are unfitting with the requirements of affordability and equitability.

Despite the contradiction that is fundamentally posed by monopolistic conditions, a private entity acting under non-competitive circumstances can still meet the requirements of human rights if it occurs under appropriate governmental regulation. Assuming that a governmental authority can regulate the private entity to protect against monopolistic abuses, affordability can still be secured. The important factor in a water services design that produces a natural monopoly is the proper balance of ownership and supervision, ensuring that exploitation does not result from the lack of competition. As long as this balance can be obtained to uphold the benefits of the free market, PSP and free market policies can be deemed a theoretically fitting model for advancing the human right to water.

Moreover, competitive bids for private water contracts also offer the means for protecting against monopolistic abuse. When private corporations bid on a water service contract, the government and private entity can establish contractual obligations for an appropriate pricing scheme for services. As long as suitable pricing policies are established and corporations comply with the contract, human rights standards can theoretically prevail under neoliberal economic conditions.

Neoliberal Economic Benefits

Treating water as an economic good was introduced under the assumption that its theoretical attributes are conducive to advancing universal access to water.[46] Understanding the credible qualities of the theory will contribute to an understanding of the benefits that can be incurred from private sector participation. Principle No. 4 of the Dublin Statement lays out the basic advantages of neoliberal theory: "Managing water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of

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[44] United Nations Development Program, *Human Development Report 2006: Beyond Scarcity: Power, Poverty, and the Global Water Crisis* (New York: Palgrave MacMillan, 2006), 22.
[45] Budds and McGranahan, 93.
[46] Isabelle Fauconnier, "The Privatization of Residential Water Supply and Sanitation Services: Social Equity Issues in the California and International Contexts," *Berkeley Planning Journal* 13, (1999): 39.

water resources."[47] This argument holds that when the public sector provides water for free, or for a low cost, consumers are likely to overuse them.[48] When they are managed by the private sector however, the price of water reflects its true cost, and consumers are more likely to limit their use. Efficiency is also said to improve under PSP because private companies have the resources to improve technology and update infrastructures.[49] Certainly, improving efficiency and encouraging conservation are conducive to the universal realization of the right to water, providing evidence that PSP is a theoretically well-suited model for water services.

The United Nations Conference on Trade and Development (UNCTAD) emphasizes other benefits to be derived from private sector participation that include:

- reducing the financial burden of states,
- transitioning limited State resources in areas where private participation is not as practical (i.e. public health and primary education),
- developing a competitive market economy to make certain that goods and services are provided at the lowest cost,
- attracting foreign capital for bolstering capitalism and expanding economies.[50]

The benefits understood by UNCTAD are recognized in a broad understanding of private sector participation, but are largely applicable to the provision of water. If these benefits are harnessed in water services, it provides support that PSP models are capable of contributing to the advancement and realization of the human right to water.

Reducing the burden of financially strained governments and improving the flow of resources into the sector mark the most valuable benefits to be derived from private sector participation. The World Water Council and the Global Water Partnership have acknowledged the necessity of increasing the flow of capital in water services by asserting that "investments in the sector would need to at least double in poor countries in order to meet basic water needs."[51] With the private sector representing a more viable option for achieving these investments, it can be inferred that PSP has a great capacity to contribute to meeting basic water needs. Moreover,

[47] The Dublin Statement, Principle No. 4.
[48] Budds and McGranahan, 99-100.
[49] Melina Williams, "Privatization and the Human Right to Water: Challenges for the New Century." *Michigan Journal of International Law* 28 (2006): 495.
[50] United Nations Conference on Trade and Development, *Comparative Experiences with Privatization: Policy Insights and Lessons Learned*, (New York: United Nations, 1995), quoted in Faucconnier, 44.
[51] World Water Council and Global Water Partnership *Financing Water For All: Report of the World Panel on Financing Water Infrastructure*, Report prepared by James Winpenny, March 2003, 13.

increasing capital is likely to improve efficiency in the sector, as the influx of investments and technology are likely to aid in overcoming the notable challenges faced by the public sector.[52] Over time, efficiency gains should contribute to lower prices that would make it possible for private sector participation to contribute to affordable water that is fitting with the right to water.

Practical Compatibility

The assessment on theoretical compatibility confers that private sector participation can be designed in a way that meets the requirements of the right to water. However, the caveats portrayed make it necessary to confirm that private sector participation can, in practice, uphold the standards of the right to water and advance access to services. Indeed, how the model is implemented, to what extent, and to what result are paramount considerations for rendering private sector participation a credible model for water services.

Private Sector Investments

Securing compatibility between private sector participation and the human right to water requires that the model meet the standards of human rights, but because private sector participation is executed in a revenue-raising awareness, conferring compatibility also demands that business in the developing world be capable of returning a profit. Indeed, the World Bank has asserted that "private water operators will not invest unless they believe their investments will be profitable."[53] Accordingly, profits and a corporate willingness to invest are integral to securing that private sector participation is compatible to the human right to water.

Meeting both social and business ends however, is often found to be problematic in the developing world. It has been observed that a "corporations' ideal customer is the well-off urban customer who can pay the full rate for water supply without burdening the company with infrastructure costs. Companies face a difficulty of matching locally acceptable prices with cost recovery."[54] If corporations are met with the costs of improving infrastructures and must curb the prices to meet the affordability requirements of the right to water, challenges pertaining to profitability are likely to arise.

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[52] World Bank, *Approaches to Private Participation in Water Services: A Toolkit*, (Washington DC: The World Bank, January 2006), 6.
[53] Ibid., 2.
[54] Peter T. Robbins, "Transnational Corporations and the Discourse of Water Privatization," *Journal of International Development* 15 (2003): 1078.

In January 2002, CEO and Chairman J.F. Talbot of SAUR International made evident these extensive challenges of water delivery to the poor. In a presentation to the World Bank Water Division, Talbot asserted that "the scale of the need far out-reaches the financial and risk taking capacities of the private sector."[55] He also noted that business in the developing world is resulting in "poor and diminishing returns for private investors," leading them to turn to more worthwhile investments.[56] Questioning the feasibility of recovering costs and asserting that the private sector has limited funds, he declared that business in the developing world is not a typically "good and attractive business."[57]

Moreover, Talbot questioned the utility of regulation in the sector, noting that risks are often increased through "unreasonable contractual restraints" and "unreasonable regulator power and involvement." The fact that there are "attempts to apply European standards in developing countries" and demands for "connections for all" contribute to the unrealistic expectations of the private sector.[58] The challenges relating to regulation in the sector provide evidence that private sector participation cannot appropriately function under the requirements of the right to water. Because regulation is an indispensible feature of any private sector contract and required to meet human rights obligations, regulation that exacerbates challenges in the sector highlights an inconsistency with the model's compatibility to the right to water.

These challenges suggest that the private sector requires a guarantee on investments in order to secure a financial return on projects in the developing world. Talbot's presentation confirmed the need to offset the risks faced by the private sector. His solution called for the World Bank to establish itself as a partner with corporations, as opposed to being a "counterbalance to private sector interests." The new role would require the World Bank to act as an "investment financier," providing grants and subsidies to offset the risks endured by the private sector.[59] Talbot concluded that without the necessary safeguards, "international water companies will end up being forced to stay at home."[60]

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[55] J.F. Talbot, "Is the International Water Business Really a Business?" World Bank Water and Sanitation Lecture Series, 13 February 2002.
[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid.

The evidence provided by Talbot indicates that the theoretical benefit of private sector financial flows may not be as adventitious in practice. Although safeguards against risks could improve the private sector's willingness to invest, its inability to meet the requirements of the right to water while meeting business needs signals a serious practical challenge of private sector participation in the developing world. While this evidence does not necessarily mean that the private sector cannot produce successful projects, it does indicate that regulation and risk management are plausible barriers to the successful implementation of PSP.

Other large water corporations have similarly identified these challenges of investing in the developing world. Suez for instance, pulled out of a concession with the Philippines following the country's currency crisis in 2002. The company claimed $303 million to recover its investment in the contract.[61] Gerard Mestrallet, chief executive officer of Suez also called for a role of the financial institutions to "perfect appropriate intervention measures" to protect corporations from financial or political risks.[62] Without a guarantee of profit in US dollars, Suez has declared that that it will not invest or be forced to pull out of contracts.[63] Following these claims, Suez restructured its investment strategy in 2003 by decreasing its activities in poorer areas, cutting its investments in the development world by one-third. Suez acknowledged that it would instead focus its investments on the sounder markets of Europe and North America.[64]

Vivendi has expressed related concerns, acknowledging that their investments will be made in "big cities where the GDP/capita is not too low."[65] The corporation has held that their investment will depend on either "sufficient and assured revenues from the users of the service" or on a guarantee by governments on payment.[66] Accordingly, the world's largest water corporations have expressed concerns about investing in developing countries, indicating that there are vast practical challenges associated with water delivery to the poor. Thus, the improved financial flow that was deemed so theoretically adventitious may not be enough to secure private sector participation as a feasible model for water services in the developing world.

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[61] Robbins, 1080.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] David Hall, *Water Multinationals—No Longer Business as Usual*. (London: Public Services International Research Unit, 2003), 8.
[66] Ibid.

Moreover, despite high expectations that private sector investments could improve funding in water services in the developing world, the amount of private funds implemented into the sector have been minimal.[67] The majority of investments in water and sanitation services are still provided by the public sector and private involvement continues to decline.[68] Even where private sector participation does occur, corporations must recoup their investments largely from tariffs through the course of the contract. This does not inevitably imply that PSP cannot establish water prices that are affordable for all, but it does provide evidence that private investments are singularly insufficient for financing water projects. Accordingly, pricing water based on the recovery of costs reflects uncertainty in the price of water and minimizes the pragmatic benefits of neoliberal economic theory.[69]

On the contrary however, corporations have insisted that their involvement can greatly contribute the realization of human rights. For instance, Suez Environment has recently proclaimed its commitment to business in the developing world, asserting that through increasing connections to public networks, they have extended access to around eight million people in non-OECD countries.[70] The company has also made evident their proclaimed duty of advancing a right to water, stating: “we see progress towards universal access to water and sanitation as one of the raisons d’être of a private water operator.”[71] Contrary to evidence that Suez has decreased its activities in the developing world, Suez’s statement fosters the idea that it is capable and willing to expand services in low income areas. The contradiction makes it unclear the extent that Suez is capable of or interested in investing in the developing world.

The question of whether business in the developing world is conducive to sound investments and profitability is inconclusive, but it is at least clear that several of the world’s largest water corporations are skeptical about their involvement in low-income areas. It is certainly not impossible for the private sector to incur a profit, but the evidence suggests that there are legitimate challenges of investing in the developing world. Third-party financial partners that can protect against risks or contracts that are paired with more government subsidies may help to curb these challenges, but the private sector’s inability to bring in the

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[67] Budds and McGranahan, 100.
[68] Ibid.
[69] Ibid., 101.
[70] Suez Environment, *Human Rights and Access to Drinking Water and Sanitation,* Written contribution to OHCHR Consultation, Human Rights Council Decision 2/104, April 2007.
[71] Ibid. *Raisons d’être* translates from French to “reasons for being.”

financial flows that were deemed so adventitious should be well noted. Importantly, a lack of profitability should be seen as a barrier to the human right to water because of the close relationship that such a scenario could have on the price of water. If corporations cannot cover the costs of their investment through an equitable pricing structure, the principles of full cost recovery would entail raising the price of water, which would be likely violate the affordability requirement of the right to water. Accordingly, problems of profitability reflect a serious limitation of the private sector's fully compatibility to the right to water.

PPIAF Study

The Public Private Infrastructure Advisory Facility of the World Bank (PPIAF) published a study in 2009 proving empirical evidence concerning the productive role of the private sector. By asking the question of whether private sector participation improves performance in water distribution, the study finds that by comparing both public and private performances between the beginning of the 1990s and 2002, privately operated utilities out-perform state controlled utilities.[72] This study is the largest data set of its kind, consisting of 977 utilities, including 141 PSP utilities and 836 state owned enterprises (SOE) from seventy-one transitioning and developing economies.[73] With such a large data set, this study is particularly relevant for determining the efficacy of the private sector because most studies on natural monopoly industries have been limited by small sample size and take the form of case studies, which make it difficult to produce generalizations."[74]

The study finds that the private sector improves operational efficiency and labor productivity.[75] Comparing the average annual values for performance indicators from before and after the implementation of private sector participation, the following results were noted to be associated with PSP:

- twelve percent increase in residential connections for water utilities,
- fifty-four percent increase in residential connections per worker for water utilities,
- nineteen percent increase in residential coverage for sanitation services.[76]

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[72] Katharina Gassner, Alexander Popov, and Nataliya Pushak, *Does Private Sector Participation Improve Performance in Electricity and Water Distribution?* (Washington DC: The World Bank, 2009), 2.
[73] Ibid., 23.
[74] Ibid., 2.
[75] Ibid.
[76] Ibid., 3.

Additionally, the study finds no systematic change in the residential price of water as a result of PSP.[77] This is a particularly important finding, as it indicates that improvements in the sector are not necessarily associated with increases in the price of water. Thus, private sector participation appears to increase water connections and sanitation services, while maintaining pricing structures similar to prices under public sector control. This is an especially essential characteristic for water services in the developing world, since it is often feared that full-cost recovery will produce tariff structures that are incompatible with human rights standards.

The study also acknowledges that the scope of PSP plays a significant role, noting that concessions and leases are associated with the greatest gains. The authors indicate that this may reflect the fact that full divestiture is rare, but acknowledges that the contractual obligations that are manifest in concessions and leases facilitate improved results.[78] This is an important revelation in relation to compatibility, since concessions and leases were the most theoretically attuned to meeting the regulatory requirements found under General Comment No. 15.

The PPIAF acknowledges that the efficiency gains that were found in the study's results should have translated into lower costs for the operator and lower prices for the consumers. However, the study found no systematic change in the price of water.[79] The fact that prices did not increase bodes well for PSP's compatibility to the right to water, but determining why decreases did not occur is important for this assessment. According to the PPIAF, the unchanged tariffs could reflect the fact that the private sector reaps profits while transferring none of the benefits to the consumer.[80] It is worth noting that profit gains would only be considered a violation to the right to water if affordability or equitability requirements were not met as a consequence of these gains. Because this study found that prices did not increase, the profit gains of the private sector should not be seen as a contradiction to the right to water. Still, the fact that no benefits were translated to consumers should be well noted. Transnational water corporations consistently rank among the most profitable in the world, and it could be considered disturbing that the sector's profitability did not translate to the social betterment of the consumers. Overall, no contradiction to the right to water can be established from this evidence, but the potential for human rights abuses should be acknowledged by the sector's lack of social prioritization.

[77] Ibid., 45.
[78] Ibid., 48.
[79] Ibid., 45.
[80] Ibid., 49.

PSP and Childhood Mortality in Argentina

It is estimated that each year, over three million children die from easily preventable water-related diseases, contributing to the lack of rights realization throughout the world.[81] This statistic provides evidence that the compatibility to the human right to water should be rendered not only by a fulfillment of the legal obligations of human rights, but also by the private sector's ability to achieve rights realization. A 2005 study concerning the impact of privatized water serviced on childhood mortality in Argentina provides evidence of the private sector's capacity to obtain this realization.[82]

From 1970-1980, Argentina's water was managed by the federal company Obras Sanitarias de la Nación (OSN), but the system was plagued with challenges.[83] By 1990, over thirty percent of Argentina's municipalities privatized their water resources, spanning across sixty percent of the population.[84] Because the rest of the population continued to receive water services from public companies, it allowed for a study to be conducted that had a control of publicly run utilities and made use of a group of private operators to observe changes as it related to the introduction of PSP. The study found that newly privatized water operators were more efficient, provided better service, invested more in the infrastructure, and increased network connections.[85] Moreover, it was observed that child mortality fell by around eight percent in areas with privatized water services.[86] The effect was greatest in the poorest areas, accounting for twenty-six percent of change.[87] The study's findings were robust, as it checked for cause-specific mortality to indicate that water privatization was associated with only water-related diseases, and uncorrelated with deaths that were not water related.[88]

The study shows that PSP improves access to services and increases efficiency in the sector. Importantly, it also demonstrates that PSP has a direct positive effect on health and mortality in the developing world. This connection to compatibility with the right to water is to

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[81] World Health Organization and United Nations Children's Fund, *Global Water Supply and Sanitation Assessment: 2000 Report* (WHO and UNICEF Joint Monitoring Programme for Water Supply and Sanitation,2000), 2.
[82] See generally, Sebastian Galliani, Paul Gertler, and Ernesto Schargrodsky, "Water for Life: The Impact of the Privatization of Water Services on Child Mortality," *Journal of Political Economy* 113, no. 1 (2005): 83-120.
[83] Ibid., 88.
[84] Ibid., 89.
[85] Ibid., 113-114.
[86] Ibid., 114.
[87] Ibid., 83.
[88] Ibid.

be properly acknowledged, as it achieves the essential goal of improving livelihoods that is embodied by human rights. That the study provides how private sector participation is connected to these ends is evidence for its compatibility with the human right to water.

Cochabamba, Bolivia

Despite a prevalent acknowledgement of the positive results associated with private sector participation, several instances of PSP illustrate the sector's challenges of securing human rights standards in their services. Cochabamba, Bolivia's experience with private sector participation stands as an important illustration of this fact and is frequently cited to illustrate how the private sector fails to meet the standards of the right to water.

From 1967-1999, Cochabamba's water was provided by the municipal company, SEMAMPA, but the system was plagued by poor performance and low coverage rates.[89] In 1997, only fifty-seven percent of Cochabamba's residents were connected to water and limited resources made services available only once or twice per week in much of the city.[90] In 1998, the World Bank offered Bolivia a twenty-five million dollar loan for improving their water infrastructure, contingent on a reform in the water system that would introduce private sector participation.[91] Aguas del Tunari, a subsidiary of the American corporation Bechtel Enterprises was granted a forty-year concession with the city of Cochabamba.[92] The arrangement gave the company control over the water network, rights to the water in the area, and a return on the investment of fifteen to seventeen percent annually. The company was mandated to provide water to existing consumers, expand the water system under the direction of the Superintendent of Basic Sanitation, and be "accessible, fair, and efficient" to consumers.[93]

Aguas del Tunari structured the price of water on a system of full-cost recovery and accordingly, an increase of thirty-five percent was agreed upon during negotiations to account for the financial input needed to improve the infrastructure and for the thirty-million dollar debt

[89] Andrew Nickson and Claudia Vargas, "The Limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia," *Bulletin of Latin American Research* 21, no. 1 (2002): 104.
[90] Sanchez-Moreno, Maria McFarland Sanchez-Moreno and Tracy Higgins, "No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia," *Fordham International Law Journal* 27 (2004): 1748.
[91] Ibid., 1749.
[92] Ibid., 1748.
[93] Ibid., 1756.

that the company accrued from the government.[94] Additionally, the increase incorporated a negotiated guarantee of sixteen percent return on the investment for Aguas del Turnari.[95]

In alignment with the contract, the concession did lead to an average tariff increase of thirty-five percent, but there was significant variation in price amongst consumers, with some facing price increases up to two hundred percent.[96] The increased rates led to what is now termed the "Cochabamba Water War," characterized by widespread protests, violence, and the implementation of martial law.[97] By 2000, the government was forced to terminate the concession with Aguas del Tunari.

The Cochabamba Water War stands as a stark verification of the challenges pertaining to the equitable implementation of private sector participation. This particular concession was in violation of several requirements of the right to water, including affordability and the state duty to protect against third-party operators. In regards to affordability, despite an overall compliance to the contract's requirements for tariff increases, the design failed to meet the requirements of General Comment No. 15, as the variation in price increases was not aligned with prices that are affordable to all. The guaranteed return of sixteen percent, policy of full-cost recovery, and the burden of the thirty million dollar debt contributed to the price hikes that made water unaffordable to large segments of the population.

According to General Comment No. 15, the state duty to protect requires that governments prevent corporations from interfering with the enjoyment of the right to water.[98] The organization of the concession caused interference on the state duty to protect by leaving little room for the government to regulate the affairs of the corporation. Because the company controlled the water network, there was minimal authority for the government to exert control over the concession or ensure that human rights requirements were met. Although the Superintendent of Basic Sanitation maintained the role as supervisor of the system with the authority to approve tariffs for water service delivery, the stipulations of full-cost recovery and the sixteen percent guaranteed return made it difficult for the Supervisor to appropriately execute its regulatory role.

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[94] Nickson and Vargas, 111.
[95] Ibid.
[96] Ibid.
[97] Williams, 497.
[98] General Comment No. 15, para. 23.

Interestingly, the concession contract did uphold various requirements of General Comment No. 15. By a contractual requirement that the company be accessible, fair, and efficient to consumers, and by preserving a place for the Superintendent of Basic Sanitation, human rights obligations were theoretically well-attuned to human rights standards. However, implementing these standards became difficult when faced with the requirements for ensuring a profitable return for the corporation. Thus, the Cochabamba concession provides evidence of the challenges associated with maintaining profits in the developing world while securing the standards of human rights.

Buenos Aires, Argentina

Despite empirical evidence suggesting that private sector participation has made positive welfare contributions to Argentina's water services, the Buenos Aires concession provides another example of how private sector participation can negatively impact the poor. The contract, which ended in a high-profile premature termination, illustrates the challenges of meeting the requirements of the human right to water under a private water services model.

In December 1992, Aguas Argentinas, a company controlled by Suez, signed a thirty year contract with Buenos Aires, creating one of the largest concessions in the world.[99] The bid to Aguas Argentinas was granted with the contingency that the company would reduce tariffs by 26.9 percent.[100] Though this requirement was met, a complicated tariff structure calls into question the equity of the approach. For instance, before the contract commenced, tariffs were increased a number of times by the public sector, with the claim that the increase was to compensation for inflation.[101] By April of 1991, tariffs had been increased by twenty-nine percent. However, according to the Inter-American Development Bank, this strategy was useful for controlling potential resistance to privatization and to "soften the initial tariff impact."[102] The tariff increases contributed to the public's perception of a failing government-run system and

[99] Lorena Alcázar, Manuel A. Abdala, and Mary M. Shirley, *The Buenos Aires Water Concession* (Washington, DC: The World Bank, 2002), 1.
[100] Ibid., 20.
[101] Alexander Loftus and David McDonald, "Of Liquid Dreams: A Political Ecology of Water Privatization in Buenos Aires," *Environment and Urbanization* 13 (2001): 190.
[102] Sylvia Weyton and Charles Jenne, "Water and Sewerage Privatization and Reform," in *Can Privatization Deliver? Infrastructure for Latin America*, edited by Federico Basañes, Evamaria Uribe, and Robert Willig (Washington, DC: Inter-American Development Bank, 1999): 198. See also, Loftus and McDonald: 190.

made private sector participation appear to be a more promising solution.[103] When the contract began and tariffs were lowered, it gave the appearance that the contract requirements were begin met, despite any real reduction in the price of water.

A complicated tariffs structure exacerbated the challenges of the concession, as the arrangement allowed for tariffs to be restructured easily based on a number of different factors. Lot size, where the property was located, and the type of construction could factor into the price of water.[104] Additionally, the contract allowed for tariffs to be increased every five years if the corporation's costs increased by at least seven percent.[105] The World Bank has acknowledged that the complicated contract opened the way for "opportunistic behavior by the company," as it allowed Aguas Argentinas to restructure tariffs when it fit their interests.[106]

Accordingly, tariffs were increased in 1994 because the company faced what they referred to as extra-contractual demands by the public authority that included accelerating the expansion of services and granting immediate services to low income areas.[107] Claiming that these demands would increase their costs by fifteen percent, a 13.5 percent increase was charged for consumption and a forty-two percent increase was added for infrastructure surcharges.[108] Because the purpose of the infrastructure surcharge was to finance expansion plans, it often burdened the city's poorest citizens who were not originally connected to the network.[109]

Despite the increased costs brought upon the corporation, the Buenos Aires concession was considered one of the most profitable in the world, with rates of return at around forty percent.[110] It has been observed that "to demand a price increase and surcharge under these highly profitable conditions is problematic at best."[111] Indeed, the pricing structure proved too expensive for low-income citizens, leaving around thirty percent of newly connected consumers unable to pay the inflated price of water.[112]

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[103] Loftus and McDonald, 190.
[104] Alcázar et al., 21-22.
[105] Loftus and McDonald, 190.
[106] Alcázar et al, 22.
[107] Loftus and McDonald, 191.
[108] Ibid.
[109] Ibid..
[110] Rivera, Daniel, *Private Sector Participation in Water Supply and Wastewater Sector: Lessons from Six Developing Countries (*Washington, DC: The World Bank, 1996), 52.
[111] Loftus and McDonald, 191.
[112] Fauconnier, 51; Loftus and McDonald, 198.

As part of the contract with Aguas Argentinas, a public regulator agency, Entre Tripartito de Obras y Servicios Sanitarios (ETOSS) was created to monitor the corporation's contractual compliance.[113] Among its duties were to aid in the establishment of tariff structures, monitor the corporation's investment plans, represent consumers and investigate complaints, and establish penalties for non-compliance.[114] Despite the apparent compliance with the regulation requirement of the human right to water, the system was highly ineffectual. ETOSS was established hastily and accordingly, guidelines and procedures were poorly defined and inexperience plagued the agency. Aguas Argentinas also viewed ETOSS as unnecessarily harsh, claiming it was a hindrance to good water management.[115] As a result, the agency was not appropriate utilized. As an official of ETOSS stated, "the government turns first to the private company if there is a problem, not to the regulator."[116] Despite the agency's authorization to penalize the corporation for contractual breaches, ETOSS was unable to challenge various tariff increases enacted by Aguas Argentinas, providing evidence that the corporation was largely in control of its own decisions.

In 1997, Aguas Argentinas called for a renegotiation of the contract. A restructuring of the agreement did lead to a more beneficial pricing structure for the poor, but the new contract was still troubling for a number of reasons. Importantly, the new agreement shows that the corporation was able to renegotiate the terms of the contract when it no longer fit their interests. This demonstrates that there was little respect by the government or Aguas Argentinas for the original contract. Additionally, it demonstrates that the government was unwilling to fine the corporation for violations it had incurred under the original contract, presenting further evidence that the public authority was unable to appropriately regulate the corporation.

The Aguas Argentinas concession was eventually terminated in 2006. Overall, the thirteen year span of the contract resulted in some important improvements to water services in Buenos Aires, but the problems that occurred are notable. Interestingly, the design of the concession did succeed in meeting various human rights requirements. The contract was granted under a competitive bid, where the company offering the lowest tariff reduction was granted the concession. Moreover, the inclusion of a regulatory agency, independent of the private entity and

[113] Loftus and McDonald, 187, Alcázar et al., 23.
[114] Loftus and McDonald, 187.
[115] Ibid., 198.
[116] Ibid.

with the authority to penalize for contractual violations, signifies the appropriate dedication to accountability and public interests. However, the execution of the concession failed to deliver affordable water and ensure appropriate regulation, despite a proper contract design. This case study thus demonstrates that a theoretically fitting contract does not always suffice in securing that human rights standards are met. The challenges that occurred in the implementation of the concession are what made it questionable in its compatibility with human rights.

Additionally, this case study demonstrates that empirical studies may not reflect the full spectrum of challenges associated with private sector participation. Indeed, empirical evidence suggests that private sector participation is associated with lower child mortality and an expansion of infrastructure in Argentina. The Buenos Aires concession also brought important benefits to the sector. In spite of these improvements, the concession negatively impacted the poor. A confusing tariff structure, lack of subsidies, and disrespect for contract requirements demonstrate an especially higher burden on the city's poorest people. As such, the obligations of non-discrimination, equitability, and affordability are all challenged in the implementation of the concession, calling into question the true compatibility between the private sector and the right to water. Though the contrasting evidence from Argentina should be equally acknowledged, it should be well noted that the Buenos Aires concession illustrates negative impacts that were not found in an overall analysis of private sector participation.

Conclusions

The evidence provided in this analysis makes it possible to generally conclude that private sector participation is compatible with the human right to water, albeit several serious limitations are apparent. Importantly, there are no true inconsistencies within the legal framework for the right to water. General Comment No. 15 does not prohibit the use of the private sector for water services, making it possible to conclude that PSP is a legally permissible model for water provision. However, the greatest degree of compatibility requires that the scope of PSP be limited to models with heavy public participation and regulatory authority. So long as private sector participation persists with an ability of the government authority to protect against abuses, it can be rendered legally compatible with the right to water.

The theoretical breakdown of PSP is also found to be compatible with the human right to water, as no absolute contradictions were found. However, the elements of neoliberal economic

theory including the free market and full-cost recovery raise significant concerns for securing the human rights standards of affordability and equitability. Nonetheless, designing PSP in a way that regulates the market to protect against unreasonable tariffs can make it well-suited for meeting the requirements of the right to water. The characteristics of natural monopolies further hinders theoretical compatibility, but utilizing the public sector to offset the lack of competition can aid in the protection against monopolistic abuses and secure a more fitting approach for meeting the standards of human rights. Finally, the benefits associated with neoliberalism that include improved efficiency, the encouragement of conservation, and greater financial flow into the sector provide evidence that the sector is able to make positive improvements and facilitate the realization of the right to water.

The assessment of the private sector's practical compatibility to the right to water is more difficult to decipher. Empirical studies of private sector participation suggest that the model can bring significant improvements to the sector, but case studies make evident the various challenges associated with the private sector's ability to meet the standards of the human right to water. Overall, it is evident that private sector participation has the vast potential for facilitating the realization of the right to water, but the caveats presented make apparent the extensive challenges of private participation in the developing world. Notably, the amount of private investments into the sector has been minimal, with evidence to suggest that corporations find business in the developing world an unproductive venture. When companies do invest, it is often difficult to match socially acceptable prices to full-cost recovery, indicating that the principles of neoliberal economic theory are conflicting with affordable water. Moreover, the examples of Buenos Aires and Cochabamba illustrate that corporate abuses often stem from private sector participation. High prices on water and low governmental regulation were found to be the most prevalent challenges of PSP.

According to the World Water Council, meeting basic water needs is a daunting undertaking that will require the efforts of all parties working together.[117] A lack of absolute contradictions makes it possible to conclude that the private sector should be included in the goal meeting basic water needs, but legitimate obstacles emanating from PSP reflect the need to improve the model to achieve human rights objectives. Importantly, the challenges pertaining to regulation and an appropriate balance between public and private sector interests reflect the fact

[117] World Water Council and Global Water Partnership, 5.

that private sector participation is largely unregulated to human rights standards. In order for private sector participation to be considered an effective model for advancing the right to water, it is necessary to determine how to regulate the sector and improve its accountability to the human right to water. The next chapter explores ways in which to advance this objective.

CHAPTER THREE

QUESTIONS OF ACCOUNTABILITY

Questions relating to the legitimacy of private sector participation in the developing world are reflective of an increasing concern about the lack of private sector regulation and accountability in the international system. The fact that private water corporations are often in a direct position to impact the realization of the human right to water, but lie outside the scope of appropriate accountability signals the appropriate apprehension about regarding private sector participation as a credible model for water services.

There are two primary challenges with securing corporate compliance to the human right to water. First, a lack of international codification limits compliance to its standards. Even with a growing consensus on the right to water's status as a basic human right, the lack of an explicit and legally binding law reduces its justiciability. Moreover, corporate compliance to human rights is limited by a lack of jurisdiction over the private sector at the international level. Despite a growing consensus about the need to regulate corporate actors, binding authority over the private sector is currently minimal. Accordingly, regulation and accountability of the private sector are found to be recurrent challenges of PSP models.

This concern has triggered an increasingly powerful movement to suggest that although the human rights regime does not find the private sector under its jurisdiction, corporations have obligations to human rights and should be regulated accordingly. It is now evident that the international community is moving decisively in the direction of extending human rights obligations to the private sector.[118] Expanding these direct obligations has the vast potential for improving the utility of PSP, as commanding accountability from both the public and private sectors is likely to alleviate many challenges associated with the model.

If international human rights duties are to be ascribed to corporations, it is necessary to determine how to sufficiently accomplish this transition. Four different mechanisms have been identified for regulating the private sector: the domestic implementation of the right to water, American civil law and the employment of the Alien Tort Claims Act, an expansion of the

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[118]Carlos M. Vázquez, "Direct vs. Indirect Obligations of Corporations Under International Law," *Columbia Journal of Transnational Law* 43 (2004): 948.

international human rights regime, and the development of corporate social responsibility and norm penetration to secure corporate compliance. The useful qualities of each of these mechanisms will be assessed in this chapter to determine how to regulate the private sector for improving accountability to the human right to water.

Domestic Implementation of the Right to Water

As the primary duty-bearer of human rights, states have an integral role in securing corporate compliance to human rights. General Comment No. 15 asserts that States parties should accord "sufficient recognition of the [right to water] within the national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to realize this right…"[119] Besides meeting a requirement of General Comment No. 15, the domestic implementation of the right to water provides several benefits for pursuing corporate compliance. Since the private sector is subject to the laws of the countries in which they operate, codifying the right to water within the domestic context presents the immediate benefits of jurisdiction, as corporations come under the authority of state laws. With the right to water lacking in a binding formation at the international level, the domestic application of the right provides a system for securing accountability that is absent in the international context.

Moreover, the domestic implementation of the right to water properly calls attention to the nature of water as a public good and emphasizes the appropriate role of governments as the protector of public interests. John Ruggie, Special Rapporteur to the United Nations Secretary General on the issue of business and human rights, has highlighted this approach by acknowledging that corporate compliance is best facilitated by maintaining the state duty to protect and emphasizing the corporate responsibility to respect domestic laws that reflect international standards.[120] This strategy is thus beneficial for its restatement of core human rights principles, where states have the primary duty to protect human rights. Since domestic legal systems already provide the means for holding corporations accountable to criminal violations, this approach utilizes an already established system for ensuring corporate compliance to standards of human rights. This emphasis on responsibility is particularly important in dealing with dominant corporate actors, as they are often more powerful than the states in which they

[119] General Comment No. 15, para. 26.
[120] Ibid., 830.

operate. Acknowledging their role as subordinate to government authorities properly situates their responsibility to abide by domestic laws.

According to Ruggie, there are benefits of bolstering domestic actions towards human rights over pushing for international remedies. Indeed, if a set of obligations for the private sector were developed at the international level, a complicated system of rights follows. Especially when corporations begin to perform traditional state functions such as the provision of water, the spheres of responsibility become more complicated, making it difficult to delineate the particular obligations of each entity. For this reason, it is necessary to retain the core obligations of the state as the duty-bearer of human rights. Attributing responsibilities to corporations can still be facilitated, but their obligations should be clearly defined, with no overlap into the sphere of governmental obligations. Moreover, the domestic implementation of the right to water has a great benefit over the international legal context, since imposing a full range of duties on transnational corporations under international law diminishes the discretion of individual governments within the scope of those duties.[121] Leaving the duties in the hands of a state allows the state to retain governmental authority, but commands responsibility of the corporation by its operations within the country. Especially relating to developing countries, where improving human rights should be viewed as a larger project of improving development, utilizing their discretion for adjudicating human rights allows countries to hold corporations accountable while improving their judicial procedures.

Another advantage of implementing the right to water in the domestic context is the full range of domestic remedies to hold corporations responsible to national laws. With minimal enforcement strategies for holding transnational corporations accountable to human rights at the international level, domestic legal systems provide the most capable means for ensuring corporate compliance. Particularly relating to the judicial remedies of states, national courts have a far-reaching potential for holding corporations accountable to the right to water. Moreover, legislative policies, laws, and other enforcement measures can be tailored to the specific needs and preferences of each particular country.

[121] Vázquez, 950.

South Africa

The implementation of the right to water in South Africa provides an example of how domestic mechanisms can help secure corporate compliance to the right to water. In 1996, South Africa implemented a post-apartheid constitution, geared towards alleviating the oppressive conditions from the old regime and improving the socio-economic status of its citizens.[122] Economic, social, and cultural rights, including a right to water, became an integral feature of the new constitution.[123] Moreover, an interpretation clause of the constitution bolsters the status of the right to water, as it requires courts to consider international law in the adjudication of domestic court cases.[124] Accordingly, General Comment No. 15 and other international standards for the right to water can be applied in South African courts. The constitution also situates the right to water in a language similar to General Comment No. 15, facilitating the international standards of the right within the country. It provides that the state must "respect, protect, and promote the rights in the Bill of Rights" of the constitution and that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights."[125] It is thus clear that implementing such standards at the domestic level allows for international law to be facilitated with the use of international mechanisms.

South Africa's national water policy and legislation provides further support for the right to water. The Water Services Act (WSA) was created to establish a framework to give effect to the right to water by clarifying the obligations of water service providers.[126] It requires that an authorized government authority monitor the performance of all water institutions to ensure compliance with all water service standards.[127] To regulate the private sector, the WSA requires that any implementation of PSP be authorized by a relevant Water Services Authority.[128] This

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[122] Ramin Pejan, "The Right to Water: The Road to Justiciability," *George Washington International Law Review* 36 (2004):1195.
[123] Constitution of the Republic of South Africa, 1996, Chapter 2, s 27.
[124] Pejan, 1196.
[125] Constitution of the Republic of South Africa, 1996, Chapter 2, s 7 and s 27.
[126] Michael Kidd, "Not a Drop to Drink: Disconnection of Water Services for Non-Payment and the Right of Access to Water," *South African Journal on Human Rights* 20 (2004): 122.
[127] Pejan, 1205-1206.
[128] Ibid., 1205. Water Services Authorities are defined in the Water Services Act as municipalities, including district or local councils with "a duty to all consumers or potential customers in its area of jurisdiction to progressively ensure efficient, affordable, economical, and sustainable access to water services." See Republic of South Africa, *Water Services Act*, Government Gazette 390, no. 18522, December 1997, Chapter III, Section 11.

requirement properly situates the responsibility of water services to the public authority, but permits private participation through clearly defined standards of operation.

Section 4(3) of the WSA is particularly effective for the regulation of corporate behavior, as it sets guidelines for the discontinuation of water services by requiring that a water services authority or other authorized provider comply with specific conditions before services are ceased.[129] It declares that procedures for the limitation or discontinuation of water services must "not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant service authority, that he or she is unable to pay for basic services."[130] To this end, the WSA upholds the international standards for the right to water by requiring that no provider interfere with a minimum level of water. Moreover, these clearly defined requirements for disconnections protect the interests of the private sector in instances of lawful service discontinuations, but also protect consumers against illegitimate service terminations. Because violations of the right to water often occur through disconnections based on an inability to pay, establishing this balance between public and private interests serves to overcome a difficult challenge of PSP by protecting against abuses and clarifying when disconnections are legitimate.

South Africa's judicial system has further protected the right to water against corporate violations of the right to water. Although a case involving the right to water has yet to be brought before South Africa's Constitutional Court, lower courts provide examples of justiciability at the domestic level. In *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*, an urgent application was brought before the court when disconnections were applied to a group of households due to non-payment for water services.[131] The Court ruled that any disconnection of water supply is a *prima-facie* violation of the constitutional right of access to water.[132] Relying on the Water Services Act, the Court decided that the burden of proof was on the Council to justify water disconnections. Because the Council did not provide evidence to validate the disconnection, the ruling was in favor of the residents and the Court mandated that water supply be immediately restored to the residents.[133] It is worth noting that this case did not concern a

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[129] Pejan, 1206.
[130] Water Services Act, Section 4(3).
[131] John C. Mubangizi and Betty Mubangizi, "Poverty, Human Rights Law, and Socio-economic Realities in South Africa," *Development South Africa* 22, issue 2 (June 2005): 285-286.
[132] Kidd, 127.
[133] Ibid., 120.

private party water operator, but it plausible to believe that the same standards would have been upheld, since private service providers operate under the same requirements as public providers in South Africa. Overall, the Court's ruling is symptomatic of the country's ability to protect the right to water against inappropriate water service operations. Moreover, it demonstrates that judicial mechanisms can be utilized to uphold that basic services cannot be denied due to non-payment. Because disconnection for non-payment is a common violation of the right to water, the *Bon Vista Mansions* case set a relevant precedent for all water service operators.

South Africa's water policies highlight several important benefits of the domestic implementation of the right to water. First, and most importantly, implementing the right to water within a national constitution creates a legally binding right that generates the capacity for judicial enforcement. With a lack of justiciability at the international level, domestic remedies are able to fill the enforcement gap of holding corporations accountable to standards of human rights. Second, domestic policies can provide clarifications of responsibility for the private sector. Because the private sector commonly acts under poorly defined expectations, explicit guidelines for service operators that are emphasized through legal, legislative, and judicial mechanisms provide the missing clarification that is needed to improve corporate compliance to the human right to water. The Water Services Acts has proven to be an especially reliable mechanism for improving corporate accountability, as it provides explicit expectations for water service providers, including the private sector.

By situating this responsibility at the domestic level, South Africa is able to obtain several advantages for holding corporations accountable to the human right to water, including its fulfillment of its international responsibility of protecting against third party actors, facilitating equitable water services through clearly defined laws and guidelines, and enforcing human rights standards through judicial mechanisms. Accordingly, South Africa has appropriately utilized its legislative, legal, and judicial resources for fulfilling the standards of the right to water and protecting against violations by the private sector.

Limitations

Despite the evident benefits of advancing the right to water at the domestic level, there are extensive obstacles that may limit its full span of advantages. John Ruggie has acknowledged that states should be responsible for addressing corporate involvement in human rights abuses, but acknowledges that "few states have policies, programs, or tools in place to deal with

corporate human rights challenges."[134] This issue raises the challenge of underdevelopment, where governments of low-income countries are burdened by insufficient legal systems, prohibitive costs, and limited resources to enhance their infrastructures. Overcoming this hurdle is a timely and challenging undertaking, as strengthening national courts systems and developing the rule of law are long term projects without an immediate effect. Even in more developed economies, Ruggie questions the ability of states to adequately fulfill this role in an equitable manner. Too often governments take a narrow approach in managing their business and human rights agenda, allowing for corporations to resist any real form of judicial enforcement or monitoring authority.[135]

It has been inferred that the domestic implementation of the right to water is beneficial in its restatement of the core human rights principles, where the state maintains its role as the duty-bearer of rights. However, this approach has the potential for minimizing the private sector's own responsibilities towards human rights, as the domestic responsibility for protecting against third party abuses should not diminish the fact that the private sector can have a direct impact on the realization of rights. This is not a concern if states can appropriately regulate the private sector, but if they are unable, corporations continue in a state of impunity to human rights standards. Indeed, transnational corporations have argued that it is the duty of the state to improve the socioeconomic conditions of their citizens, indicating that there is presently a corporate mentality of a minimal requirement to conduct their policies with welfare conditions in mind.[136] This issue is particularly relevant to transnational water corporations, since governments in the developing world, burdened by a lack of domestic resources, often have no option but to utilize the private sector's resources and investment capacity. Moreover, the push for private sector participation by inter-governmental organizations such as the World Bank in the 1980s indicates that decision-making authority is not always in the hands of the state. Such scenarios indicate that private sector participation often persists with little governmental oversight.

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[134] John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, United Nations General Assembly, Human Rights Council, fourth Session, UN Doc A/HRC/4/35, 2007.

[135] John Ruggie, *Protect, Respect, and Remedy: a Framework for Business and Human* Rights, United Nations Human Rights Council, eighth session, UN Doc A/HRC/8/5, 7 April 2008, 8.

[136] Mahmood Monshipouri, Claude Emerson Welch, and Evan T. Kennedy, "Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities," *Human Rights Quarterly* 25, no. 4 (November 2003): 972.

Accordingly, human rights realization would benefit from corporations acknowledging their own responsibilities towards human rights.

A final drawback of the domestic implementation of the right to water is understood by the variation that is created from independent national developments. Even if international standards are implemented at the domestic level, how they are applied in practice is likely to generate varying standards amongst states. For a more cohesive standard on the right to water to develop, and for a true consensus on corporate obligations to human right to emerge, greater harmony through international standards will be need to overcome disparities between nations.[137]

This approach emphasizes that there is an appropriate and greatly needed place for states to protect against corporate abuses of human rights, but various limitations are acknowledging of the challenges that it immediately presents. It is reasonable to conclude that future policies regarding business and human rights will certainly make state responsibility an integral part of the strategy, but it is apparent that other mechanisms will need to be simultaneously developed to ensure corporate compliance to the human right to water.

American Civil Law and the Alien Tort Claims Act

American civil law has been observed as the most practical method for regulating corporate behavior.[138] It is executed through the Alien Tort Claims Act (ATCA), which provides extraterritorial jurisdiction to transnational corporations. Created in 1789, the ATCA allows federal judges jurisdiction over any civil action committed in violation of the law of nations or a treaty of the United States. Although the act remained dormant for nearly 200 years, in 1980, a court ruled in the landmark case, *Filártiga v. Peña-Irala*, that the ATCA provided federal jurisdiction and a right of action for adjudicating violations of international law outside the United States.[139] Since the decision, the Alien Tort Claims Act has been expanded to apply jurisdiction over transnational corporations for violations of international law.[140] This expansion presents the possibility for transnational water corporations to be made justiciable to international human rights standards as they become subject to civil law.

American courts have yet to hear a case specifically relating to a corporate violation of the human right to water, but cases involving other socio-economic rights provide useful

[137] Ruggie, "The Evolving International Agenda," 832.
[138] Monshipouri et al, 966.
[139] Shamir, 639.
[140] Ibid.

precedents for the possibility of trying transnational water corporations. For instance, in *Aguinda v. Texaco*, citizens of Ecuador filed a class-action suit against Texaco for alleged environmental and personal harm. The citizens of the Oriente region claimed that the operation of an oil pipeline caused environmental degradation and resulted in illness and the destruction of the citizens' livelihoods from the ruined forests.[141] The allegations were brought forth on three counts: cultural genocide, ethnic discrimination, and infringement of the indigenous population's right to a healthy environment.[142] Texaco has proclaimed that all environmental laws were followed in its operations in Ecuador, but the citizens maintained that they faced an increase in serious diseases to themselves and their livestock.

Although the case was eventually dismissed for *forum non conveniens*, the principles of the case illustrate the potential capacity of the ATCA.[143] The counts of violation can be qualified as legitimate under the ATCA, as the only place in which the court found merit to dismiss the case was in Texaco's motion for *forum non conveniens*. Applying the right to a healthy environment illustrates the expansion of international law that may be particularly useful for adjudicating the right to water. Scholars have held that hearing a case involving the right to a healthy environment provides a precedent for the continued expansion of the ATCA, as it asserts the *jus cogens* status of environmental rights.[144] Certainly, the status of environmental rights as preemptory norms could be challenged, but the expanding scope of ATCA cases illustrates an evolving capacity for courts to hear cases involving the right to water. Indeed, if the right to a healthy environment can be applied through the ATCA, the right to an adequate standard of living or the right to health could be presumably applied as well. Because broad readings of these rights have allowed the international community to establish the right to water's appropriate place within existing laws,[145] there is a sufficient capacity for the right to water to be applied through the ATCA.

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[141] Lisa Lambert, "At the Crossroads of Environmental and Human Rights Standards: Aguinda v. Texaco, Inc. Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in U.S. Courts," *Transnational Law and Policy* 10.1 (Fall 2000): 111.

[142] Shamir, 640.

[143] Lambert, 111. *Forum non conveniens* (inconvenient forum) may be qualified due to the position of the defendant that claims should be made in Ecuadorian Courts. However, if the Court finds that the plaintiffs will not receive justice in Ecuadorian Courts, the lawsuit may continue in the United States.

[144] Ibid.

[145] See, for example, General Comment No. 15.

Limitations

The ATCA has a proven ability to bring justice for corporate violations of human rights, but the legitimacy of its expanding jurisdiction has been called into question. Enacted through the Judiciary Act of 1789, the ATCA was originally intended to provide redress only for violations of safe conduct, infringement of the rights of ambassadors, and piracy.[146] In questioning the ability to bring causes extending past the original intent of the Act, it has been acknowledged:

> Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under [ATCA], we are persuaded that the federal courts should not recognize private claims under federal common law for violations of any international law norm with less definitive content and acceptance among civilized nations than the historical paradigms familiar when [ATCA] was adopted.[147]

This interpretation of the appropriate scope of ATCA jurisdiction creates a more stringent criterion for the types of cases that can be brought against transnational corporations. Accordingly, denying the justiciability of cases involving corporate violations of the right to water would best keep with this restrictive concept of jurisdiction.

The central issue of this debate over jurisdiction is the question of what rights most definitively fall under the law of nations. Despite an evolving international acceptance of socio-economic rights as protected human rights, the United States generally accepts a more limited interpretation of the law of nations. Typically, its collection of rights includes only universally recognized civil and political rights, while failing to acknowledge the justiciability of economic, social, and cultural rights.[148] If the ATCA is to be acknowledged as a feasible mechanism for making transnational water corporations justiciable, it must first be determined whether the ATCA is empowered with the legal capacity to hear cases involving socio-economic rights of international law.

Indeed, the United States' generally limited conception and support of international law limits the capacity for the ATCA to adjudicate matters such as the right to water. Most specifically, the United States has failed to ratify the ICESCR in which the right to water is most sufficiently derived. Moreover, the United States has refused to declare the right to water as a

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[146] Shamir, 642.
[147] Ibid.
[148] Ibid.

right under international law.[149] A lack of support for these standards of international law makes it plausible to believe that if a right is not definitively recognized by the United States, it is unlikely to be heard in U.S. court of law.

Sovereignty, as a cherished and persistent international norm, may further limit the extent to which extraterritorial jurisdiction is applied at domestic levels. Concerned with "legal imperialism," an argument against the use of the ATCA holds that extraterritorial jurisdiction could impose a breach of sovereignty on the nation-state, particularly in the developing world.[150] It is argued:

> Developing countries have a legitimate interest in determining their own policies in areas such as economic development and environmental protection…if American courts interpret the law of nations to include norms that are not sufficiently defined or universally recognized, they will encroach on the legitimate authority of foreign states."[151]

This position holds that a broad reading of ATCA jurisdiction breaches the legitimate authority of the United States and encroaches upon the legal autonomy of other states. Moreover, it is observed that the ATCA could hinder the proper development of autonomous legal systems, especially in the developing world. In this context, it should remain the duty of autonomous states to hold transnational corporations who operate under their territory accountable under their own domestic courts. This interpretation of the ATCA is understood through the United States' interests as well. With a great insistence on preserving its own legal sovereignty, the United States may be leery of expanding its jurisdiction to encompass the affairs of other nation-states.

The International Human Rights Regime

The traditional perception of the international human rights regime focuses on state responsibility to secure international human rights standards. However, the ever-increasing place of the private sector in the international system has triggered the notion that human rights law should reflect direct obligations on corporations with subsequent jurisdiction over corporate actions. The fact that transnational corporations have greater power than some states to affect the realization of rights properly emphasizes the need to secure international accountability of the

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[149] United Nations General Assembly. *General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right*. Sixty-fourth General Assembly, GA/10967, July 28, 2010. The United States was one of forty-one abstentions for the resolution recognizing access to water and sanitation as a human right.
[150] Shamir, 653.
[151] Ibid.

private sector.[152] Moreover, the limitations of domestic remedies illustrate why international mechanisms are needed to fill the gaps in accountability.

An Expanding Conception of Corporate Accountability

At the inception of the human rights regime, states were bestowed with the responsibility for protecting the rights of their citizens based on the fact that governments were largely in control of what happens to their internal affairs.[153] Now, new realities in the context of a changing global system make apparent the need to readdress this strategy. The Commission on Global Governance has said:

> When the United Nations system was created, nation-states, some of them imperial powers, were dominant. Faith in the ability of governments to protect citizens and improve their lives was strong…Moreover, the state had few rivals. The world economy was not as closely integrated as it is today. The vast array of global firms and corporate alliances that has emerged was just beginning to develop. The huge global capital market, which today dwarfs even the largest national capital markets, was not foreseen.[154]

An expansion of the human rights model, where corporations can bear some responsibility under the regime, is required to protect against these emerging global trends. In order to sufficiently accomplish this expansion, it is necessary to move beyond the narrow conception of the state as the exclusive holder of human rights duties to acknowledge the reality that corporations, like states, are capable of violating human rights. This expansive conception of rights is more consistent with Universal Declaration's foundation as derivative from the inherent dignity of the human person, where "every individual and every organ of society" is responsible for promoting and respecting human rights.[155] In reference to this proclamation, Professor Louis Henkin has asserted that "every individual and every organ of society excludes no one, no company, no market, and no cyberspace. The Universal Declaration applies to them all."[156] To maintain the standard of human dignity, it is necessary that the international human rights regime harness the capacity to challenge all actors capable of violating human rights.[157]

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[152] Ruggie, "The Evolving International Agenda," 824.
[153] Chris Jochnick, "Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights." *Human Rights Quarterly* 21.1 (1999): 58.
[154] Commission on Global Governance, *Our Global Neighborhood: The Report of the Commission on Global Governance* (New York: Oxford University Press, 1995), 3.
[155] Universal Declaration of Human Rights, *Preamble*.
[156] Louis Henkin, "The Universal Declaration at 50 and the Challenge of Global Markets," *Brooklyn Journal of International Law* 25 (1999): 25.
[157] Jochnick, 79.

A departure from the traditional role of the state as the duty bearer of human rights has already occurred by the ratification of the Rome Statute of the International Criminal Court, establishing that individuals can be tried under international law.[158] This development sets an example of the expanding conception of obligations towards human rights, in which entities other than states become subject to the law. Additionally, it has been argued that the expansion of jurisdiction to encompass corporate actors would represent no more of a departure from the classic model of state responsibility than this recognition of individual obligations.[159]

A Framework for Private Sector Accountability

Though still a nascent concept, the movement towards corporate accountability is already well underway. Efforts to develop the means for binding regulation of corporate behavior began in 1998, when the UN Sub-Commission on the Promotion and Protection of Human Rights established a working group on the relationship between business and human rights. The 2003 report, *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* recognizes that "even though States have the primary responsibility to promote, secure the fulfillment of, respect, and protect human rights, transnational corporations and other business enterprises, as organs of a society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights."[160]

The report focused on determining a limited list of rights for which the private sector should bear responsibility, but the drawbacks from this strategy were found to be substantial. It was inferred that because businesses have the capacity to impact nearly all human rights, a limited set of rights would minimize their appropriate scope of obligation.[161] Additionally, the report generated a range of responsibilities similar to the duties of states.[162] According to Ruggie, this is problematic, since the very nature of corporations as actors with economically driven interests diverges greatly from the nature of the state as public interests organs.[163] As two

[158] Vázquez, 932.
[159] Ibid., 944.
[160] United Nations Economic and Social Council, *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, United Nations Sub-Commission on the Promotion and Protection of Human Rights, fifty-fifth session. UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003, Preamble.
[161] Ruggie, *Protect, Respect, and Remedy*, para 52.
[162] Ruggie, "The Evolving International Agenda," 827.
[163] Ibid.

fundamentally different entities, it is now understood that the obligations of governments and corporations must differ. Consequently, in maintaining its role as the protector of public interests, it is necessary that states maintain their role as the primary duty-bearer of rights, and that corporate obligation be distinguishable from the state.[164] This separation would also make it possible to determine the responsible party in instances of violation.

Ultimately, the report of the Sub-Commission failed to take effect. It marked the first non-voluntary initiative on the subject, but the Commission on Human Rights refused to adopt the text, noting that it "contained useful elements and ideas" but that it had ultimately not been requested and that it had no legal standing.[165] The Sub-Commission was further directed not to engage in any monitoring of corporate activities.[166]

The challenges for the establishment of a legal framework still continue, but the issue of business and human rights has sustained its place on the agenda. In 2005, John Ruggie was appointed as a Special Representative of the Secretary General on the issue, with a mandate to clarify the international standards of business and human rights and compile a compendium of best practices.[167] In the report *Respect, Protect, and Remedy: A Framework for Business and Human Rights*, Ruggie establishes a framework with three core principles of human rights obligations:

1. the state duty to protect against human rights abuses by third parties, including businesses,
2. the corporate responsibility to respect all human rights,
3. the need for more effective access to remedies to people affected by corporate-related human rights abuses.[168]

The framework separated the duties of states from the duties of corporations and provided only a baseline responsibility of corporations to respect human rights. This minimum obligation now enjoys a reliable consensus amongst the international community, but developing a framework for corporate responsibilities to human rights standards is only a first step for ensuring that

[164] Ruggie, *Protect, Respect, and Remedy*, para 6.
[165] Ruggie, "The Evolving International Agenda," 821.
[166] United Nations Office High Commissioner on Human Rights, *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/DEC/2004/116, April 2004.
[167] See Commission on Human Rights Report on the 61st Session, UN Doc. E/2005/23-E/CN.4/2005/135, for the full mandate of the special representative.
[168] Ruggie, *Protect, Respect, and Remedy*, para. 9.

individuals are protected against abuses from the private sector. Many questions still remain. What obligations emanate from the corporate responsibility to respect human rights? What are the consequences of violations? What international authority is responsible for ensuring complicity?

Ruggie's baseline responsibility of corporations to respect all human rights arises positive obligations, where corporations are expected to exercise due diligence for preventing and addressing human rights impacts.[169] Determining complicity to these standards will inevitably be based on each scenario, but some universal guidelines have been posed. The framework establishes that three sets of facts should be considered:

1. the local context in which business activities occur, to understand any specific human rights issues that may arise,
2. the specific human rights impacts that their activities may have within that context (in their role as service providers, producers, or employers, for example),
3. whether they could exacerbate human rights abuses through their connections from business activities, such as State agencies, other non-State actors, or business partners.[170]

Additionally, Ruggie identifies that compliance to the due diligence process should include corporate human rights policies, impact assessments to consider the potential impacts of their activities, integration of human rights policies throughout the company, and performance tracking to monitor human rights compliance within company operations.[171]

The novelty of this topic means that its implementation is still lagging as a matter of binding law, but the framework has been well established. Though some scholars still insist that international law does not yet recognize corporate obligations to human rights,[172] it can at least be inferred that transnational corporations have become, at a minimum, participants in the international legal system. According to Rosalyn Higgins, former president of the International Court of Justice, this participation now encompasses "the capacity to bear some rights and duties under international law."[173]

[169] Ibid., para 56.
[170] Ibid., para. 57.
[171] Ibid., para. 60-63.
[172] Vázquez, 943.
[173] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (New York: Oxford University Press, 1994).

Judicial Instruments

Bearing rights and duties under international law entails that the private sector can be held accountable under an international court of law. Adjudicating cases involving corporate violations of the human right to water runs up against two main challenges. First, a nominal embodiment of the corporate duty to respect restrains the jurisdictional capacity of international courts to hear cases involving the private sector. To this end, most judicial mechanisms are presently ill-equipped for embracing jurisdiction over corporations. Additionally, the lack of a resolute status on the right to water as a matter of binding international law further limits the adjudication of such cases. Even more, the challenges relating to the justiciability of socio-economic rights as a whole, in which water would be categorized, are further acknowledging of the obstacles for appropriate adjudication.[174] As it has been observed by the Committee on Economic, Social and Cultural Rights:

> States and the international community as a whole continue to tolerate all too often breach of economic, social and cultural rights, which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they are far more serious, and more patently intolerable, than massive and direct denials of economic, social, and cultural rights.[175]

It is evident that there are extensive challenges for the justiciability of the right to water, particularly in relation to corporate abuses. Nonetheless, there are some judicial remedies at the international level that may be capable of trying corporations for human rights violations.

The International Court of Justice (ICJ) and the International Criminal Court (ICC) are the two primary judicial mechanisms under the international human rights regime. Though utilizing these courts to hear cases involving transnational water corporations will require an expansion of their current jurisdiction, emerging developments may increase the likelihood of such an expansion. The ICC for instance, though it harnesses jurisdiction only over individuals, may qualify as a possible avenue for trying corporations. The preparatory committee of the International Criminal Court and the Rome Conference debated the inclusion a proposal that

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[174] Audrey R. Chapman, "A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly* 18 (1996): 26.

[175] United Nations Committee on Economic, Social, and Cultural Rights, *Statement to the World Conference*, UN Doc. E/1993/22/, 1993, para. 5.

would have given the Court jurisdiction over all legal persons other than individuals, but diverging viewpoints prevented its ultimate adoption.[176] If the concept of legal persons could be expanded to include the private sector, the ICC may present itself as a useful mechanism for justiciability over corporate entities.[177] It is particularly promising that most States Parties to implement the Rome Statute have not limited jurisdiction to individuals alone. Domestic implementations of the Statute have made no distinction between "legal persons" and have included corporations as well as individuals.[178]

It is worth noting that the ICC's capacity to try cases involving the human right to water will depend on how such rights will be defined by international law. With jurisdiction over cases involving genocide, crimes against humanity, or war crimes, a violation of right to water would need to be recognized as a crime against humanity, or its jurisdiction would need to be expanded in order for it to be heard by the ICC. The capacity to hear cases involving the right to water would thus depend on whether an expansive or restrictive interpretation is applied to this group of rights. Currently, the ICC's interpretation of rights makes it an inadequate forum to hear violations of the right to water, but as socio-economic rights establish their place as justiciable rights, a more expansive jurisdiction of the ICC could ensue.

The International Court of Justice is also limited in its capacity to hear matter of corporate abuse, as it is immediately restricted by its jurisdiction to settle only legal disputes between states. However, current efforts to extend access of the court to non-state actors indicate a future potential to bring cases involving transnational business or other third parties under the jurisdiction of the ICJ.[179] Because this expansion would require a reform of the ICJ Statute, it should currently be acknowledged as an unrealistic forum for holding corporations accountable to the human right to water.

The Permanent Court of Arbitration (PCA), also seated in The Hague, currently offers the most appropriate forum for hearing disputes related to corporate violations of the right to water. Its jurisdiction to provide dispute resolution services for states, inter-governmental organizations,

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[176] Ruggie, "The Evolving International Agenda," 830.
[177] Ibid., 831.
[178] Anita Ramasastry and Robert C. Thompson, *Commerce, Crime, and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law* (Norway: Fafo Research Foundation, 2006), 16.
[179] Alfred Rest, "The Indispensability of an International Environmental Court," *Review of European Community and International Environmental Law* 7, issue 1 (1998): 64.

and private parties enables it to hear cases for direct corporate violations of human rights. [180] Although most of the cases that have been brought before the PCA are between two state entities, its expansive jurisdiction provides a promising place in the emerging developments of international law.[181] Situated between public and private law, the PCA additionally offers the capacity to hear a diverse variety of cases, ranging human rights issues to environmental disputes. This diversity comprises a unique avenue for cases that do not neatly fit into the jurisdiction of courts such as the ICC and the ICJ, where only the gravest violations of human rights are heard. To this end, the PCA can be considered a particularly viable mechanism for adjudicating violations of economic, social, and cultural rights, which do not qualify as rights under the jurisdiction of any other major international court.

It is clear that by current standards, the PCA extends far beyond the capacity of the ICC or the ICJ to fill the gaps of corporate justiciability to human rights and to the right to water. However, the PCA has been greatly underutilized in its capacity for hearing cases involving corporations.[182] The full legitimacy of this mechanism can be extended when the court establishes precedents alluding to its ability to combat the impunity of corporations for violations of human rights. In time, the PCA could serve as an appropriate forum for trying corporations for violations of the human right to water, but precedents are need to legitimize the justiciability of such new expansions within the human rights field. Moreover, the nature of the PCA as an arbitration facility, rather than a permanent court for human rights, limits its capacity to apply human rights standards. Still ad-hoc in nature, a treaty or a contract would be needed in order to make it a body capable for specific kinds of disputes.

It is evident that existing mechanisms must be reformed or strengthened if they are to overcome the private sector's impunity to human rights. If existing international forums are found to be inadequate for adjudicating cases involving transnational water corporations, the development of a new judicial mechanism may present a more viable approach. Such a development should take into account certain criteria. Since expanding international jurisdiction to corporations does not diminish the state as the primary duty-bearer of human rights, a new international mechanism should take care not to infringe upon the sovereignty of states to

[180] Ibid.,65.

[181] United Nations Conference of Trade and Development, *Dispute Settlements: General Topics: Permanent Court of Arbitration*, UNCTAD/EDM/Misc.232/Add.26, (New York and Geneva: United Nations, 2003), 8.

[182] Ibid.

adjudicate violations of corporate behavior within their boundaries. Similar to the ICC, this requires that international legal recourse be utilized only when domestic remedies fail and as a matter of last resort. Maintaining this criterion will allow international mechanisms to fill the gaps in accountability while encouraging the development and stability of domestic legal systems. Additionally, any new judicial developments must establish a careful balance between corporate interests and human rights concerns, as there is likely to be strong opposition to such a development by the corporate community.[183]

Limitations

Imparting the responsibility to respect human rights to the private sector requires an effective legal framework and a judicial forum for identifying violations, adjudicating cases, and providing access to remedies. The enhancement of judicial processes will unquestionably improve the justiciability of transnational corporations, but the process will likely be plagued with difficulties. Most notably, the scope of extraterritorial jurisdiction still remains poorly understood. Ruggie's framework has aided in the establishment of a general consensus on the corporate duty to respect human rights, but the application of these standards is likely to take effect slowly. This obstacle is exacerbated by the fact that existing international legal forums are ill-equipped to effectively try corporations for violations of the right to water. It will require the strengthening of the PCA, a reform of the ICC or ICJ, or the development of a new court for a judicial forum to secure a truly adequate forum for the adjudication of such matters.

With both the right to water and the corporate duty to respect human rights only minimally contained within the international human rights regime, there is likely to be instances of conflicting principles between domestic and international contexts. The novelty of these expanding standards of human rights means that they are unlikely to enjoy a broad consensus amongst the international community. Indeed, this is particularly true of the right to water, as there continues to be low political will to enshrine the right to water by certain states.[184] Likewise, the legitimacy of the corporate duty to respect will depend on its enumeration as a

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[183] Monshipouri, Mahmood, Claude Emerson Welch, and Evan T. Kennedy. "Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities." *Human Rights Quarterly* 25, number 4 (November 2003): 984.

[184] Pejan, Ramin. "The Right to Water" The Road to Justiciability" *George Washington International Law Review* 36 (2004): 1208.

binding legal principle under international law. Until these developments occur, the obstacles of justiciability are likely to continue.

Soft Law

With serious flaws evident in the legal mechanisms for corporate compliance, the field now relies heavily on soft law mechanisms and standards of corporate social responsibility, with numerous scholars supporting it as the most prominent mechanism for holding transnational corporations accountable to human rights. As a standard definition, soft law can be understood as regulatory mechanisms most notably characterized by their voluntary and non-binding nature. In the context of private sector accountability, the application of soft law has occurred through the concept of corporate social responsibility, where businesses make voluntary commitments to align their practices with ethically responsible principles. Although soft law mechanisms lack a legally binding formulation, they represent an increasingly useful formula for holding transnational corporations accountable to the human right to water.

The benefits of soft law are best understood through the theory of constructivism, which holds that behavior is a reaction of social norms and by what is considered good and appropriate. Though constructivism is typically applied to the actions of states, scholars such as John Ruggie have applied the theory as a normative force for corporate behavior.[185] Focusing on the concept of norm penetration, the theory suggests that corporations will be inclined to adapt their policies and behavior in response to social expectations.[186] In this sense, socially constructed norms have the capacity to modify corporate behavior to align with standards of human rights. The number of companies world-wide to have adopted principles of human rights in their business objectives grants credence to the fact that, at a minimum, corporations are inclined to adopt policies that are pleasing to the public.

The theory further holds that entities are driven not only by interests, but also by the standards of social correctness. Termed the "logic of appropriateness," scholars of constructivism emphasize that human action is driven in large part, by rules of appropriate behavior embedded by society.[187] To this end, though corporations may be first and foremost profit-seeking entities, their behavior will also be reflected by what is right and appropriate.

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[185] Ruggie, *Mapping International Standards*, para. 45.
[186] Ibid.
[187] Martha Finnemore, *National Interests in International Society*, (New York: Cornell University Press, 1996), 29.

Rules and codes of conduct, even without having the force of law, will be followed because they are seen as natural, right, and legitimate. This appropriateness is not the product of an innate moral code, but rather, a reflection of learned social values that are promoted by discourse, law, and voluntary initiatives.[188]

The application of this theory suggests that CSR and soft law can facilitate the penetration of appropriate social conduct and result in compliance to the human right to water. As a consensus forms to appropriate standards, breaking these norms of behavior could result in social ramifications. For instance, the public shaming effect of NGO "corporate watchdogs" casts businesses in an unfavorable light that may ultimately result in improved compliance to human rights standards. The effect of this could be substantial, as it has been observed that "the contemporary level of monitoring of corporate activities is historically unprecedented. There are thousands of organizations actively seeking out corporate malpractices all over the world."[189] The numerous corporate codes of conduct that are seen internally and through IGOs indicate an awareness of expected corporate behavior and the subsequent responsibility that follows from expectations.

The business case for corporate social responsibility also suggests reasons why businesses may choose to follow voluntary initiatives. Reputation management for instance, has become an important reason for adopting codes of corporate responsibility and following in line with the human right to water. Again, with NGOs seeking to challenge irresponsible corporate behavior, businesses have an interest in complying with human rights standards to maintain their status as a reputable company.[190] Similarly, a corporation's desire to manage risks could be seen as a strong reason to yield to public pressures. Particularly relating to water corporations who maintain a close relationship to governments, failing to abide by contractual human rights standards could result in the loss of a contract or a failure to renew one. These ramifications could ultimately end in a loss of business and a subsequent loss of income. Indeed, high-profile PSP contracts in developing countries have been terminated for poor social policies and a failure to abide by human rights.

Perhaps most importantly, the business case for corporate responsibility suggests that higher financial returns would motivate corporations to abide by standards of human rights. If a

[188] Ibid.
[189] Leslie Sklair, *The Sociology of the Global System* (Baltimore: John Hopkins University Press, 1995), 68.
[190] Shamir, 647.

link can be established between corporate social responsibility and increased profits, soft law is likely to be regarded as an extremely fruitful mechanism for corporate compliance. Although more evidence is needed to render a robust conclusion, at least one empirical study suggests that there is a statistical association between social responsibility and financial performance, indicating that socially responsible companies perform better financially.[191]

Types of Soft Law

Without a binding formula for holding transnational corporations accountable to international law, initiatives created by inter-governmental organizations have been instrumental in the development of social expectations towards human rights. In 1976, the Organization of Economic Co-Operation and Development (OECD) produced a document titled the "OECD Guidelines for Multinational Enterprises" which established that corporations should consider the views of all stakeholders and "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."[192] The International Labour Organization's (ILO) implementation of the 1997 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy is another prominent example of IGO soft law. The document emphasizes that businesses should respect the Universal Declaration of Human Rights, providing principles to guide corporations in adopting good business practices.[193] Additionally, the United Nations Global Compact serves as a voluntary initiative to promote standards of human rights, labor, environmental protection, and anti-corruption amongst corporations. It currently stands as the largest corporate social responsibility initiative, with over three thousand participating companies, focusing particularly on the participation of companies working in the developing world.[194] The culmination of these three organizational frameworks has paved the way for an emerging consensus on corporate obligations towards human rights.

A second type of soft law is presented through corporate self-regulation, where businesses establish their own guidelines for protecting human rights. With nearly all water

[191] See for instance, Marjorie Kelly, "Holy Grail Found: Absolute, Positive, Definitive Proof CSR Pays Off Financially," Business *Ethics: Corporate Social Responsibility Report* 18, no. 4 (Winter 2004).
[192] Organization for Economic Co-operation and Development. *OECD Guidelines for Multinational Enterprises*. OECD, 2008, II (2), 14.
[193] International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises* (Geneva: International Labour Office, 1977), 2.
[194] Ruggie, "The Evolving International Agenda," 819-820.

corporations now boasting an internal code of conduct and promoting their commitment to the right to water, it is evident that self-regulation is a wide-spread mechanism with the potential for strengthening a corporate consensus towards the duty to respect. The primary benefit to be derived from these standards is that, although they do not carry the force of law, corporate derogation may still result in legal consequences.[195] For instance, some companies have been challenged in U.S. courts for making false claims or breaching their own company policies.[196] Additionally, self-regulatory initiatives are strengthening the consensus on corporate expectations, as most corporate codes of conduct reference the same international human rights instruments and inter-governmental initiatives in their policies.[197] A standard-setting effect is rendered in the fact that the prevalence of these developments will make it increasingly more difficult for future companies not to implement similar standards, as they will ultimately become the expectations of society.

The development of industry-specific standards marks another influential formation of soft law. A prominent criticism of Ruggie's framework for the corporate duty to respect human rights was the lack of specific guidance for companies to execute their human rights policies. However, industry-specific initiatives can overcome this obstacle with more definitive obligations for particular fields. For instance, Aquafed, an international federation of private water providers, has established a Code of Ethics that proclaims the responsibilities of its members to "carry out their business while promoting integrity and ethical practices in every aspect of water services: in particular supporting and respecting international human rights within their sphere of influence."[198] Aquafed has aided in establishing specific guidance on issues such as fair competition, health and environmental stewardship, community needs, value of services, and stakeholder education.[199] With a membership of over three hundred private water providers from forty countries world-wide, Aquafed's standards span across a great bulk of the world's transnational water corporations, including the world's most powerful corporations, such as Suez Environment, Veolia Water, and Saur.[200]

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[195] Ibid., 835.
[196] Ibid., See footnote 86, for a list of cases brought before U.S. courts.
[197] Ruggie, *Mapping International Standards*, para. 69.
[198] Aquafed, *Code of Ethics*. Aquafed Official Website, adopted July 11, 2005, available at: http://www.aquafed.org/pdf/AquaFed_Code_of_Ethics_2005-07-11.pdf (accessed March 23, 2010), 2.
[199] Ibid., 2-3.
[200] Aquafed, "Membership." Aquafed Official Website, http://www.aquafed.org/geography.html, (accessed March 23, 2010).

The CEO Water Mandate of the UN Global Compact also serves to guide execution strategies for private water operators. To align with the standards of the right to water and the corporate duty to respect, the Water Mandate suggests that business policies should abide by national standards of host governments, expand services to marginalized areas or groups, ensure the affordability of services, protect against arbitrary disconnections, and ensure that citizens have access to information and a participatory role in decision-making.[201] It provides further guidance on how to fulfill these obligations. For instance, to ensure affordable water services, it requires regular monitoring of pricing standards and the establishment of flexible payment terms.[202] Though these guidelines are not binding rules, their implementation can aid in meeting the same goal of compliance to the right to water.

Other industry-specific standard initiatives have approached regulation through collaborative initiatives that serve to strengthen the accountability of both companies and governments. By implementing operational standards for companies and regulatory functions of governments, these new "hybrid" forms of regulation are based on the idea that human rights abuses are more efficiently combated by shared responsibility between the public and private sectors.[203] The Kimberly Process, a certification scheme introduced by the United Nations General Assembly to certify the origin of rough diamonds, has been recognized as a particularly successful hybrid initiative for the development of industry-specific standards. The process attempts to stem the flow of conflict diamonds through certification of diamond origin by national governments, and a chain-of-custody certification by companies. Since its implementation, the Kimberly Process has reduced the flow of conflict diamonds to one percent of the total market.[204]

This type of hybrid process could be particularly relevant for protecting the right to water from private abuses, as private sector participation is implemented through close relationships with government entities. If specific standards and obligations can be applied through a collaborative approach between a host government and a contracting private operator, the operational impact could be significant.

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[201] Salil Tripathi and Jason Morrison. *Discussion Paper: Water and Human Rights: Exploring the Roles and Responsibilities of Business*. United Nations Global Compact, March 2009, 6.
[202] Ibid.
[203] Ruggie, *Mapping International Standards*, para. 53-54.
[204] Ibid. para. 59.

Limitations

The benefits of soft law and corporate social responsibility suggest a vast potential to realize corporate compliance to the right to water, but prominent criticisms have been invoked concerning its actual capacity to produce behavioral change. While some studies imply that soft law regulations can be superior to hard law mechanisms, obtaining conclusions on the efficacy of corporate social responsibility is difficult, since empirical studies to render these deductions are minimal.[205]

Rendering conclusions on the legitimacy of soft law is further challenged by the difficulty of quantifying such results. Determining the social responsibility of businesses should be measured not by the frequency of procedural implementation, but by tangible, substantial results.[206] It has been asserted that measuring these results requires a set of verifiable guidelines to cover all facets of corporate activity. [207] These indicators have however, proven rather elusive. In fact, benchmarks for the measurement for CSR have been termed the "holy grail" of the field,[208] whereby acknowledging the difficulties of obtaining universal standards of measurement for determining the efficacy of CSR initiatives.

The most significant criticism of soft law is that most initiatives lack appropriate monitoring capacity to ensure compliance. Although soft law initiatives are characterized by their non-binding formations, a lack of appropriate accountability mechanisms limits the robustness of the approach. This regulatory deficiency is most notably troubling by its capacity for corporate abuse. [209] That soft law serves as little more than a public relations exercise to corporations has become a recurrent critique and constrains the legitimacy of the practice.[210] To this end, critics have argued that corporations can reap reputational benefits from their affiliation to corporate social responsibility initiatives without inducing any real behavioral change. This criticism has been largely invoked towards the Global Compact, which, despite its success in

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[205] Marco Schäferhoff, Sabine Campe, and Christopher Kaan, "Transnational Public-Private Partnerships in International Relations: Making Sense of Concepts, Research Frameworks, and Results," *International Studies Review* 11 (2009): 456.
[206] Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy (*Cambridge: Cambridge University Press, 2002), 224.
[207]Oxfam International, *White Paper on Globalization*, 2003, quoted in Shamir, 648.
[208] See generally, Carin Lavery, *CSR Measurement: The Holy Grail of Corporate Social Responsibility*. CSR Network, June 2002.
[209] Ruggie, "The Evolving International Agenda," 836.
[210] Scott Jerbi, "Business and Human Rights at the UN: What Might Happen Next?" *Human Rights Quarterly* 31 (2009): 304.

engaging a wide range of corporations to commit to a set of shared principles, lacks any monitoring capacity to ensure that its standards are upheld.

Another prominent argument against soft law is its inherent contradiction between voluntary initiatives and the concept of human rights as a matter of law. That human rights are so fundamental that they deserve the full range of legal enforcement mechanisms is a primary argument against soft law. Indeed, legal accountability is a defining feature of human rights, and it is argued that voluntary initiatives undermine this fundamental value. According to Oxfam International:

> At their best, voluntary codes of conduct can act as a guide to corporate practice and set standards for others to follow…At their worst, they are little more than a public relations exercise. But the deeper point is that corporate behavior is too important for poverty reduction to be left in the field of voluntary codes and standards defined by the corporate sector itself.[211]

The fundamental importance of human rights requires legal enforcement measures to ensure compliance to its standards. For this reason, voluntary initiatives are perceived as damaging to the image of human rights and the high level of enforcement required for their protection. In this sense, any measure to fall short of dignified legal measures is insufficient for the protection of human rights.

Conclusions

Processes for adjudicating transnational water corporations are facilitated by the belief that enforcement and accountability will improve their performance to the poor and aid in the realization of the right to water. What is evident from this analysis is that there is a significant movement towards greater corporate accountability towards standards of human rights. That the movement is moving in both legal and voluntary ways signals the fact that corporate justiciability for the right to water is evolving in a positive direction. There are notable benefits to be obtained from each mechanism to advance corporate accountability, but their evident limitations render the conclusion that the most complete scope of accountability requires the fullest maturation of each.

The assessment on the domestic implementation of the right to water has emphasized that there is a proper and greatly needed place for states to ensure protection against corporation

[211] Oxfam International, quoted in Shamir, 648.

abuses of human rights, but acknowledges the limitations that it immediately presents. With the nation-state as the foundation of the human rights regime, it is reasonable to conclude that any future policy regarding business and human rights will surely make state responsibility an integral part of the strategy. However, limitations regarding underdevelopment and accountability gaps render the conclusion that other mechanisms must be simultaneously developed in order to secure corporate compliance.

Civil law is presently considered one of the most viable mechanisms for holding corporations accountable to international standards of human rights. Most importantly, the utilization of the ATCA offers the capacity to overcome the impunity of transnational corporations who are in a position to escape the jurisdiction of ineffectual domestic legal systems. To this end, the ATCA has been able to compensate for the lack of international jurisdiction over corporations and deficient domestic systems. However, its indefinate authority over modern extraterritorial issues may limit its future capacity to hold transnational water corporations to standards of human rights.

Expanding the jurisdiction of the international human rights regime could present a promising approach for protecting against corporate abuses of the human right to water, but many developments need to ensue. Because the right to water as a matter of international recognition remains a contested issue, its indoctrination as an explicit and binding international law is necessary for ensuring compliance. Additionally, the expansion of international jurisdiction over the private sector will prove necessary. A framework for the corporate duty to respect human rights is developing, but its novelty signifies that more clarity is needed. The expansion of jurisdiction will additionally require the advancement of international judicial mechanisms. Several forums have been identified as viable options, but the process for jurisdiction is likely to be plagued with difficulties. Overall, the current movement towards corporate responsibilities to human rights will likely strengthen international mechanisms in the future, but its current capacity is deficient for ensuring corporate compliance to the right to water. Importantly, the international human rights regime is critical to the fullest protection against the human right to water. With limitations in domestic remedies, international mechanisms are required to ensure protection when other outlets fail. Just as the ICC was developed as a court of last resort, similar safeguards should be provided to protect against the impunity of corporate actors and to defend the rights of individuals from corporate abuses.

With serious flaws apparent in each of these legal recourses, soft law has developed as a primary mechanism to fill the holes of corporate accountability. Its theoretical premises make promising its capacity to facilitate corporate compliance to the human right to water, but several limitations are apparent in the model. Nonetheless, it has been identified by Ruggie and other legal scholars as a leading method for advancing the issue of business and human rights. Non-binding standards for corporate conduct are significant in their capacity to build fundamental values and a common culture of corporate obligations towards human rights. In this sense, corporate social responsibility models and soft law initiatives are a good "first step" for making corporations justiciable to the right to water.

The future of the corporate relationship to human rights is moving positively in the direction of accepted responsibilities and subsequent accountability schemes. Legal developments should be regarded as necessary and inseparable mechanisms for ensuring corporate compliance to the right to water, but the benefits to be derived from non-legal mechanisms should not be understated. The consolidation of norms and ideas is fundamental to the success of corporate accountability and the improvement of private sector participation in water services. As Charles Malik, a draft of the Universal Declaration of Human Rights wrote, "men, cultures and nations must first mature inwardly before there can be effective international machinery to adjudicate complaints about the violation of human rights."[212] Indeed, corporate compliance to the human right to water will require the inward maturation of the international community and a global consensus of its legitimacy before legal mechanisms can truly take effect.

[212] Human Rights Commission, Drafting Committee, Second Session, E/CN.4/AC.1/SR.11, p. 10. Quoted in Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights, Random House Inc.: New York (2002), 239.

CONCLUSION

This analysis has served to answer the question of whether private sector participation should be considered a credible model for advancing the human right to water. The compatibility assessment revealed that PSP has the capacity to meet the requirements of human rights and improve access to services. For this reason, the model should be considered a productive model. However, it can also be concluded from this research that there are several prominent challenges emanating from private sector participation. Accordingly, the model should be implemented in water services cautiously, taking care to ensure that human rights considerations are prioritized.

The biggest challenges found in this assessment relate to private sector accountability and compliance to human rights. Deficient corporate justiciability and a lack of consensus towards corporate obligations have greatly limited the private sector's ability to advance the realization of the human right to water. Chapter 3 recognized several mechanisms to improve this process, but it is evident that there are many challenges apparent in the justiciability of the private sector. Particularly relating to the utilization of the international human rights regime, it was found that major developments must ensue for the corporate impunity to be overcome at the international level. Most importantly, mitigating these challenges requires a more expansive interpretation of human rights, where jurisdiction is expanded to include corporations. This development should be based on the fact that ensuring human dignity requires the protection against corporate abuse. Importantly, this expansive conception of human rights will be best realized through the inward acceptance of these truths by the international community. Obtaining this acceptance commands an important role for soft law mechanisms. Indeed, it has been inferred that "legal remedies work best where their legitimacy is widely acknowledged."[213] Legal mechanisms must undoubtedly play an integral role in the future security of rights compliance in the context of the private sector, but the novelty of this development renders the conclusion that a broad consensus and acceptance of these standards must first be established.

Although the legitimacy of private sector participation can be conferred, many developments should still ensue to fully legitimize private sector participation as a model for water services. Importantly, the human right to water should be implemented into binding

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[213] Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, (New York: Random House, 2001), 237.

international law since its current exclusion provides an outlet for its lack of enforcement. Similarly, improving the recognition of economic, social, and cultural rights could aid in improving the justiciability of the right to water. Since socio-economic rights are often viewed as inferior to civil and political rights, making more concrete the indivisibility of rights will aid in securing that the private sector has equal obligations to all rights and can be regulated accordingly.

Consequently, the full legitimacy of private sector participation is still far into the future, as many developments are needed to ensure that PSP positively contributes to the right to water. Nonetheless, it is evident that the international community is moving in a positive direction towards the security of the right to water and corporate accountability to the sector. Thus, the legitimacy of private sector participation as a model for water services is most prominently perceived by the movement's advancement of human rights as a whole. The development of a corporate duty to respect speaks to a broader vision of human rights, where protection is expanded to keep up with new developments in an increasingly globalized world. Additionally, protecting the right to water against corporate actors properly emphasizes that the human rights system serves to protect not just against the most severe human rights atrocities, but also the rights required by all individuals to live a life in human dignity.

These developments are aligned with the original conception of human rights as it was provided by the creation of the UDHR. One of the declaration's drafters, Dr. Peng-chun Chang, asserted that the main goal of the declaration was "to build up better human beings, and not merely to punish those who violate human rights."[214] These developments within the human rights regime signal that the international community is fulfilling this mission, as working towards the realization of the right to water embraces this broader mission of the human rights regime. These developments are geared towards securing dignified livelihoods for all individuals and orienting the international community towards a nobler world.

The question of private sector participation as a model for advancing the right to water can be concluded with a definitive affirmation of its legitimacy, despite the flaws apparent in the model. The legitimacy of private sector participation should be perceived, not simply by of the virtues of the model, but because the human rights regime is evolving to embrace the

[214] United Nations Human Rights Commission, Drafting Committee, second session, E/CN.4/AC.1/SR.11, quoted in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House Inc.: New York 2002), 239.

contemporary challenges of an expanding world. With governments, individuals, and corporations emerging in a consensus that every individual is entitled to clean water and sanitation services, it is evident that private sector participation can effectively aid in the realization of the human right to water.

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BIOGRAPHICAL SKETCH

Gabriella Palmi was born on December 11, 1985 in Miami, Florida. She graduated cum laude from the University of Florida in 2008, where she studied Political Science, with a concentration on International Relations and History. In 2010, she received her Master of Science degree in International Affairs from Florida State University. Gabriella's primary areas of interest are in economic, social, and cultural rights and corporate social responsibility.