

# PRIVATISATION OF THE COMMONS: WATER AS A RIGHT; WATER AS A COMMODITY

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## 1 Introduction

Access to safe water is necessary to sustain human life and indispensable to ensure a healthy and dignified life.<sup>1</sup> Furthermore, lack of access to water has been considered as one of the greatest obstacles to development. The linkage between poverty and water shortage is well established. Those who do not have access to sufficient water are geographically located in the poorer areas of the developing world.<sup>2</sup>

A 2010 joint World Health Organisation (“WHO”) and United Nations Children’s Fund’s Joint Monitoring Programme report indicate that more than one in six people worldwide or 894 million people do not currently have access to safe water for domestic use.<sup>3</sup> The report further estimates that globally 88% of diarrhoeal deaths are due to inadequate availability of water for hygienic purposes.<sup>4</sup> The United Nations (“UN”) Human Rights Council, in a key resolution, expressed its alarm that “approximately 1.5 million children under 5 years of age die and 443 million school days are lost every year as a result of water-related diseases”.<sup>5</sup> The 2009 UN World Water Report points out that in Sub-Saharan Africa, the percentage of the population living in absolute poverty is essentially the same as it was 25 years ago. The report further states that a staggering 340 million Africans lack access to safe drinking water.<sup>6</sup> The UN General Assembly, in a watershed resolution adopted in 2010 on the right to water and sanitation, graphically illustrates the dire magnitude of the global water crisis.<sup>7</sup> This dire situation prompted the then Vice President of the World Bank, Ismail Serageldin to warn in 1995 that “if the wars of

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<sup>1</sup> T Kiefer & V Roaf “The Human Right to Water and Sanitation-Benefits and Limitations” in M Mancisidor (ed) *The Human Right to Water: Current Situation and Future Challenges* (2005) 1 4

<sup>2</sup> SMA Salman & S McInerney-Lankford *The Human Right to Water: Legal and Policy Dimensions* (2004) vii

<sup>3</sup> See World Health Organisation *Progress on Sanitation and Drinking Water* (2010) 7 <[http://www.who.int/water\\_sanitation\\_health/publications/9789241563956en/index.html](http://www.who.int/water_sanitation_health/publications/9789241563956en/index.html)> (accessed 06-03-2010)

<sup>4</sup> 7

<sup>5</sup> See preamble to the UN Human Rights Council *Human Rights and Access to Safe Drinking Water and Sanitation* (2010) UN Doc A/HRC/15/L 14 para 6

<sup>6</sup> World Water Assessment Programme *The United Nations World Water Development Report 3: Water in a Changing World* (2009) xii <<http://www.unesco.org/water/wwap/wwdr/wwdr3/>> (accessed 23-09-2010)

<sup>7</sup> See preamble to the UN General Assembly *The Human Right to Water and Sanitation* (2010) UN Doc A/64/L 63/Rev 1 and Add 1 para 4

[the 20th] century were fought over oil, the wars of the [21st] century will be fought over water – unless we change our approach to managing this precious and vital resource”.<sup>8</sup>

The global water crisis has become so urgent an issue that it has been put on top of the UN agenda, and is “generating debate that has been both extensive and complex”.<sup>9</sup> The international community also expressed its determination to combat the water crisis at the global level by including it in the eight Millennium Development Goals (“MDGs”).<sup>10</sup>

## 2 Global response to the water crisis

The global water crisis resulted in calls for the treatment of water as an economic good. This is predicated on the argument that water is increasingly a scarce resource which must be priced at full economic cost to facilitate access to water to those who currently lack access.<sup>11</sup> This saw the World Bank, the International Monetary Fund and regional development banks vigorously pushing for privatisation of water supply services. These institutions promoted the involvement of multinational water corporations as the panacea to the global water crisis.

The conception of water as an economic good also stimulated the lobby for the explicit recognition of water as a human right. Human rights practitioners argued that water is a basic need, a human right, and a public good; and its commodification<sup>12</sup> would lead to lack of access, especially by poor and vulnerable members of society.<sup>13</sup>

The first part of this article will discuss the legal bases for a right to water under international human rights law. It will proceed to analyse the various international human rights instruments in which the right to water has been recognised. It will also analyse and evaluate the scope and content of the right to water under international human rights law. The second part will explore the rise of privatisation as a political-economic concept and increased private sector participation in the water supply sector. Particular focus will be given to increased participation by non-State actors in the water services sector. This will be followed by an analysis of the nature of the obligations that the right to water imposes on States in the event of privatisation of water services. The final section focuses on a human rights analysis of privatisation, paying particular attention to the importance of adopting independent regulatory and monitoring mechanisms, followed by the conclusion.

<sup>8</sup> See V Shiva *Privatisation, Pollution and Profit* (2002) ix

<sup>9</sup> Salman & McNerny-Lankford *The Human Right to Water: Legal and Policy Dimensions* vii

<sup>10</sup> See United Nations *United Nations Millennium Declaration* (2000) UN Doc A/55/L 2 para 19

<sup>11</sup> World Bank *The State in a Changing World: World Development Report* (1997) 64

<sup>12</sup> Commodification is the process of converting a good or service formerly subject to many non-market social rules into one that is primarily subject to market rules

<sup>13</sup> Shiva *Privatisation* ix

### 3 Legal basis and scope of the right to water under international law

The Universal Declaration of Human Rights (“UDHR”) does not expressly mention a human right to water.<sup>14</sup> Neither do the two major international human rights treaties – the International Covenant on Civil and Political Rights (“ICCPR”)<sup>15</sup> and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)<sup>16</sup> – explicitly refer to a right to water. The only explicit references to a right to water are contained in the Convention on the Elimination of All forms of Discrimination Against Women (“CEDAW”),<sup>17</sup> the Convention on the Rights of the Child (“CRC”),<sup>18</sup> and the International Convention on the Protection and Promotion of the Dignity and Rights of Persons with Disabilities (the “Disability Convention”).<sup>19</sup> The following section discusses and analyses the legal basis for the right to water under international law.

#### 3.1 International human rights treaties

Some authors had long argued that a human right to water is implicit in the provisions of the International Bill of Rights<sup>20</sup> as a derivative right.<sup>21</sup> These include the rights to an adequate standard of living, food, health and life. The argument is that the fulfilment of these rights is impossible without water.<sup>22</sup> The right to water has therefore been derived from the explicit rights to health and an adequate standard of living contained in the ICESCR. This is because the provision of safe and adequate water is necessary for the full realisation of such rights.<sup>23</sup> This section will examine whether a universal human right to water can be derived from international human rights law. The analysis will focus on the provisions of the ICESCR, CEDAW, CRC and the Disability Convention.

#### 3.2 International Covenant on Economic, Social and Cultural Rights

Article 11(1) of the ICESCR, provides:

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

<sup>14</sup> Universal Declaration of Human Rights (1948) UN Doc A/810

<sup>15</sup> International Covenant on Civil and Political Rights (1966) UN Doc A/6316

<sup>16</sup> International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316

<sup>17</sup> Convention on the Elimination of All Forms of Discrimination Against Women (1979) UN Doc A/34/46

<sup>18</sup> Convention on the Rights of the Child (1989) UN Doc A/44/49

<sup>19</sup> International Convention on the Protection and Promotion of the Rights of Persons with Disabilities (2006) UN Doc A/61/49

<sup>20</sup> The International Bill of Human Rights is the collective term for the UDHR, the ICESCR and its Optional Protocol, and the ICCPR and its two Optional Protocols

<sup>21</sup> See S McCaffrey “A Human Right to Water: Domestic and International Implications” (1992) 5 *Geo Int'l Env'tl L Rev* 1 8-10

<sup>22</sup> M McFarland Sanchez-Moreno & S Higgins “No Recourse: Transnational Corporations and the Protection of Economic, Social and Cultural Rights in Bolivia” (2003) 27 *Fordham Int'l LJ* 1663 1726-1728

<sup>23</sup> P Gleick “Human Right to Water” (1998) 1 *Water Policy* 487 492

The Committee on Economic, Social and Cultural Rights (“CESCR”) sets forth in General Comment 15 its criteria for deriving the right to water from other related rights by stating that

“[a]rticle 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realisation of the right to an adequate standard of living, including adequate food, clothing and housing ... The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”<sup>24</sup>

It may be questioned why the drafters of the ICESCR did not explicitly mention access to water in article 11(1) while arguably less fundamental elements of an adequate standard of living such as adequate clothing and housing are explicitly referred to. The inference of the right to water from article 11(1) has provoked criticism from some scholars.<sup>25</sup> Stephen Tully, for instance, has argued that article 11(1) offered no interpretive space for the reading of new rights given the seemingly endless list of other rights that could be added.<sup>26</sup>

The overwhelming literature is supportive of such a stance of deriving the right to water from article 11 of the ICESCR.<sup>27</sup> The main explanation for the omission seems to be that freshwater was not the scarce and competed-for resource it is today at the time the ICESCR was drafted.<sup>28</sup> This position is supported by Langford in his ensuing debate with Tully.<sup>29</sup> The use of the word “including” makes clear that the enumeration of adequate food, clothing and housing was not intended to be exhaustive, but rather serves as an indication of constituent elements of an adequate standard of living.

There is no doubt that access to a basic supply of safe and adequate water is a *conditio sine qua non* for the sustenance of human life itself. Keifer & Brölmann, for instance, argue that water must be “considered as a fundamental precondition for the realisation of an adequate standard of living”.<sup>30</sup> The two authors put the issue succinctly, arguing that the recognition of the right to an adequate standard of living necessarily encompasses the right to access essential freshwater supplies.<sup>31</sup>

The right to water has also been inferred from the right to health. Article 12(1) of the ICESCR recognises the right of everyone to the enjoyment of

<sup>24</sup> See UN Committee on Economic, Social and Cultural Rights *General Comment No 15: Right to Water* (2002) UN Doc E/C 12/2002/11 para 3

<sup>25</sup> See S Tully “A Human Right to Access Water? A Critique of General Comment No 15” (2008) 26 *NQHR* 35 63 Two American lawyers have also criticised the derivation of the right to water from the provisions of the ICESCR, see M Dennis & D Stewart “Justiciability of Economic, Social and Cultural Rights: Should There be an International Claims Mechanism to Adjudicate the Rights to Food, Water and Health?” (2004) 98 *Am J Int'l L* 462 477-489

<sup>26</sup> See Tully (2008) *NQHR* 35

<sup>27</sup> See generally McCaffrey (1992) *Geo Int'l Envtl L Rev* 1; Gleick (1999) *Water Policy* 478 See also T Keifer & C Brölmann “Beyond State Sovereignty: The Human Right to Water” (2005) 5 *NSAIL* 183 208

<sup>28</sup> See Keifer & Brölmann (2005) *NSAIL* 195

<sup>29</sup> Tully (2008) *NQHR* 35-36; M Langford “Ambition that Overleaps Itself? A Response to Stephen Tully’s Critique of the General Comment on the Right to Water” (2006) 24 *NQHR* 434 459; S Tully “Flighty Purposes and Deeds: A Rejoinder to Malcolm Langford” (2006) 24 *NQHR* 461 472; M Langford “Expectation of Plenty: Response to Stephen Tully” (2006) 24 *NQHR* 473 479

<sup>30</sup> Keifer & Brölmann (2005) *NSAIL* 195

<sup>31</sup> 195

the highest attainable standard of physical and mental health. The CESCR also derived a right to water from the above provision, stating that “[t]he right to water is also inextricably related to the right to the highest attainable standard of health”.<sup>32</sup> The CESCR further stated in General Comment 14, in its interpretation of the right to health in article 12(1) of the ICESCR, that the latter is not limited to a right to health-care services only. Rather, the right to health embraces such socio-economic factors that facilitate conditions in which people can lead a healthy life such as access to safe and potable water.<sup>33</sup> This interpretation by the CESCR is persuasive in light of the strong causal link between inadequate freshwater supplies and ill-health or even death, highlighted in the opening section of this paper. A purposive and teleological interpretation of article 12(1) of the ICESCR as done by the CESCR strongly endorses the argument that the right to health extends to the right of access to water. This is because safe water is perhaps the most fundamental underlying determinant of health.

The right to water has also been derived from the right to housing. The CESCR in General Comment 15 articulated the right to water as inextricably related to the right to adequate housing contained in article 11(1) of the ICESCR. Earlier on the CESCR had adopted the same interpretative stance in its General Comment 4.<sup>34</sup> The CESCR has interpreted the right to adequate housing in article 11(1) of the ICESCR to encompass access to safe drinking water.<sup>35</sup> In interpreting the right to housing enshrined in article 11(1) of the ICESCR, the CESCR in General Comment 4 on the right to adequate housing emphasised The ICESCR provides in article 11(1) and (2) for the right of everyone to adequate food.<sup>36</sup> The CESCR has interpreted this provision by implying a right to water as a component of the right to food. It stated that “[t]he right to water is also inextricably related to the right ... to adequate food”.<sup>37</sup>

The only explicit references to the right to water under the contemporary universal human rights instruments are in the CEDAW, CRC, and the Disability Convention. However, it must be conceded that none of these international instruments are meant to guarantee universal human rights. This is because these instruments are limited *ratione personae* since they target specific groups in society, namely, women, children and the disabled persons respectively.<sup>38</sup> The significance of these instruments lie in the fact that they explicitly provide for a right to water. The CEDAW explicitly refers to the

<sup>32</sup> UN Committee on Economic, Social and Cultural Rights *General Comment No 15* para 3

<sup>33</sup> See UN Committee on Economic, Social and Cultural Rights *General Comment No 14: The Highest Attainable Standard of Health* (2000) UN Doc HRI/GEN/1/Rev 6 para 43(c)

<sup>34</sup> See UN Committee on Economic, Social and Cultural Rights *General Comment No 4: Right to Adequate Housing* (1991) UN Doc HRI/GEN/1/Rev 6 para 8(b)

<sup>35</sup> Para 8(b)

<sup>36</sup> Art 11(1) and (2) of the ICESCR provides:

“The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food [and] recognising the fundamental right of everyone to be free from hunger”

<sup>37</sup> UN Committee on Economic, Social and Cultural Rights *General Comment No 4* para 8(b)

<sup>38</sup> See W Schreiber “Realising the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations” (2008) 48 *Nat Resources J* 431 440

right to water for rural women. It obliges State parties to cater for the specific needs of rural women and to ensure them the “the right to enjoy adequate living conditions, particularly in relation to ... water supply”.<sup>39</sup>

The CRC is the most widely ratified universal human rights treaty.<sup>40</sup> Article 24(2)(c) of the CRC provides for the right of every child to clean drinking water.<sup>41</sup> Furthermore, article 27(1) recognises the right of every child to an adequate standard of living. The latter provision has been consistently interpreted by the Committee on the Rights of the Child to include access to clean drinking water.<sup>42</sup> Additionally, article 28 of the Disability Convention enjoins States to ensure disabled people and their families an adequate standard of living, similar to article 25 of the UDHR and article 11(1) of the ICESCR. As discussed above, the right to water has been derived from these provisions. Additionally, the Disability Convention explicitly provides for the right of equal access by persons with disabilities to clean water.<sup>43</sup> Article 28(2)(a) obliges States to “ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services”. The following section discusses the obligations that the right imposes on States.

### 3 3 Obligations imposed by the right to water

States have general, specific and core obligations in relation to the right to water.<sup>44</sup> The CESCR classifies the obligations imposed on States by the right to water into a threefold typology. These are the obligations to respect, protect and fulfil the right to water.<sup>45</sup> The obligation to promote is subsumed under the duty to fulfil in the General Comments of the CESCR.<sup>46</sup> The duty to respect enjoins the State to ensure that the activities of its institutions do not interfere with people’s access to water.<sup>47</sup> The duty to protect imposes on States an obligation to take measures to prevent third parties from interfering with enjoyment of the right to water. Furthermore, the duty to protect arguably requires States to prevent third parties, when they control or operate water services, from compromising equal, affordable and physical access to sufficient, safe and acceptable water.<sup>48</sup> This duty is of cardinal significance in the light of privatisation of water services, as will be discussed below. This is because international human rights law has not sufficiently developed to address the accountability of private providers for impinging the

<sup>39</sup> See art 14(2)(h) of CEDAW

<sup>40</sup> The United States of America and Somalia are the only countries that have not ratified the CRC

<sup>41</sup> See art 24(1), and (2)(c) and (e), of the CRC

<sup>42</sup> See, for example, UN Committee on the Rights of the Child *Concluding Observations of the Committee on the Rights of the Child on Ethiopia* (2006) UN Doc CRC/C/ETH/CO/3 para 61

<sup>43</sup> Art 28 of the Disability Convention guarantees the rights to an adequate standard of living and social protection for persons with disabilities

<sup>44</sup> See R Pejan “The Right to Water: The Road to Justiciability” (2004) 36 *Geo Wash Int’l L Rev* 1181 1186  
See also M Williams “Privatisation and the Human Right to Water: Challenges for the New Century” (2007) 28 *Mich J Int’l L* 467 486-488

<sup>45</sup> UN Committee on Economic, Social and Cultural Rights *General Comment No 15* paras 20-29

<sup>46</sup> Para 25

<sup>47</sup> Williams (2007) *Mich J Int’l L* 486-488

<sup>48</sup> Salman & McInerney-Lankford *The Human Right to Water: Legal and Policy Dimensions* 68

right to water and the availability of adequate remedies against such entities. The duty to fulfil requires States to facilitate people's enjoyment of the right to water.<sup>49</sup> The question arises also in respect of this obligation in light of water privatisation as a right-holder is invariably entitled to the realisation of her right to water notwithstanding public or private provision. This inevitably raises the question of enforcing the positive obligations against private entities involved in the provision of water services. There is an imperative need for conceptual development in this area. This would entail imposing direct obligations on private water operators to provide minimum amounts of water for personal and domestic uses in respect of those sections of the community who cannot afford it. This issue will be fully canvassed in the final section of this paper where I discuss a privatisation model that is responsive to water as an internationally recognised human right.

General Comment 15 defines the right to water as requiring water to be accessible, affordable, safe, adequate for a life of dignity, and to be provided without discrimination.<sup>50</sup> Furthermore, General Comment 15 also establishes a strong presumption against retrogressive measures taken in connection with the right to water. However, this prohibition is qualified by stating that any party that deliberately resorts to retrogressive measures has a burden of justifying such measures "by the totality of the rights in the Covenant in the context of the full use of the State party's maximum available resources".<sup>51</sup>

States have, however, immediate obligations in relation to the right to water. These include the guarantee of non-discrimination in respect of the right to water, and the guarantee to take steps towards the full realisation of the right.<sup>52</sup> Such steps must be "deliberate, concrete and targeted towards full realisation of the right".<sup>53</sup>

The right to water imposes an overarching obligation on the State to ensure that access to adequate water is realised on a progressive basis if resource constraints are such that the right cannot be realised immediately.<sup>54</sup> This, according to the CESCR, is a flexibility device in light of the difficulties in ensuring full realisation of economic, social and cultural rights.<sup>55</sup> Progressive realisation of the right to water, however, does not alter the obligations of the State to marshal its resources in an expeditious manner towards the full realisation of the right.<sup>56</sup>

<sup>49</sup> UN Committee on Economic, Social and Cultural Rights *General Comment No 15* paras 25-29

<sup>50</sup> Paras 11-12

<sup>51</sup> Para 19

<sup>52</sup> Para 17

<sup>53</sup> Para 17 States also have core obligations in respect of the right to water. These include ensuring access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent disease; ensuring the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged and marginalised groups, ensuring physical access to water facilities within a reasonable distance from the household and with very little waiting period, ensuring equitable distribution of all available water facilities and services and most significantly, monitoring the extent of the realisation or non-realisation of the right. See UN Committee on Economic, Social and Cultural Rights *General Comment No 15* para 37

<sup>54</sup> See UN Committee on Economic, Social and Cultural Rights *General Comment No 3: The Nature of State Parties' Obligations* (1991) UN Doc E/1991/23 para 9

<sup>55</sup> Para 9

<sup>56</sup> Para 9

The above approach of deriving the right to water from related rights is in harmony with the purposes and values underlying human rights. Human rights constitute a mechanism to protect and advance certain values.<sup>57</sup> The above approach is also an endorsement that economic, social and cultural rights, such as the right to water, are a significant normative component of the International Bill of Rights.<sup>58</sup> Such a development is timely in light of the schism that had been created by the adoption of two distinct human rights instruments, the ICCPR and the ICESCR. This resulted in civil and political rights attracting much attention and recognition in theory and practise whereas economic, social and cultural rights were often relegated to the periphery.<sup>59</sup> The recognition of the right to water under international human rights law should therefore be seen in light of the importance that is being attached to socio-economic rights. Most recently, in 2008 the UN General Assembly adopted the Optional Protocol to the ICESCR<sup>60</sup> which establishes an individual complaints mechanism for violations of economic, social and cultural rights.<sup>61</sup> At the domestic level, the Constitution of the Republic of South African, 1996 (the “South African Constitution”), as well as the 2010 Kenyan Constitution (“the Kenyan Constitution”)<sup>62</sup> enshrines an assortment of justiciable socio-economic rights in their bills of rights, including the right to water.<sup>63</sup>

The full realisation of all human rights, including the right to water, therefore requires an understanding of the symbiotic relationship between all human rights. This is because human rights are deeply interconnected and cannot be realised in an isolated manner. Conceiving of human rights in this way works as a bulwark against an atomised and fragmented conception of human rights. Such an approach is in accordance with the interdependence and indivisibility of all human rights. The following section will discuss the rise of water privatisation as an alternative response to the global water crisis, as well as the ensuing debates.

<sup>57</sup> J Donnelly *Human Rights and Dignity* (2009) 13 paper presented in June 2009 at the Geneva Academy of International Humanitarian Law and Human Rights in the framework of the Swiss Initiative to commemorate the 60th Anniversary of the Universal Declaration of Human Rights <[www.udhr60.ch/report/donnelly-HumanDignity\\_0609.pdf](http://www.udhr60.ch/report/donnelly-HumanDignity_0609.pdf)> (accessed 09-02-2011)

<sup>58</sup> See M Scheinin “Economic and Social Rights as Legal Rights” in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (2001) 1 3

<sup>59</sup> 3

<sup>60</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008) UN Doc A/RES/63/117

<sup>61</sup> See generally L Chenwi “An Appraisal of International Law Mechanisms for Litigating Socio-Economic Rights, with a Particular Focus on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the African Commission and Court” (2011) 22 *Stell LR* 683, where she discusses the Optional Protocol among other mechanisms for litigating economic, social and cultural rights at the international level

<sup>62</sup> Constitution of the Republic of Kenya, 2010

<sup>63</sup> The South African Constitution provides in s 27(1)(b) that “[e]veryone has the right to have access to sufficient water” The Kenyan Constitution provides in art 43(1)(d) for the right of every person to clean and safe water in adequate quantities

#### 4 Privatisation of water services

Privatisation has seen a move away from service provision by the State in key sectors, such as water provision, towards a fragmented model of provision and contracting out the responsibility to non-State actors. The privatisation, liberalisation and deregulation engendered by neoliberalism<sup>64</sup> are principally aimed at reducing the role of the State in economic and social systems. This has resulted in a shift from public management of water services to private management. The State is increasingly arrogated only the responsibility for setting down the framework within which non-State actors operate. Such a framework departs radically from what before was a focus on significant State control in the production, management and supply of water services.

Privatisation as a concept is mired in definitional uncertainty.<sup>65</sup> This is because private sector participation has taken a variety of forms. In some instances, privatisation represents State withdrawal from a field of activity or from responsibility for providing services, as for example when a public entity sells off a State-owned entity to a private entity.<sup>66</sup> The other, more common model of privatisation is when the State engages private entities to provide services to the public on the State's behalf. This form of privatisation is normally characterised by government agencies giving private entities significant control over and responsibility for the provision of basic services ordinarily provided by the State.<sup>67</sup>

Martin, for instance, suggested privatisation as entailing “a change in the role, responsibilities, priorities and authority of the State”, rather than simply a change of ownership.<sup>68</sup> Such a definition will not only encompass divestiture (a complete transfer of hitherto publicly owned assets from State ownership to private ownership), but would also encompass an understanding of privatisation in which the State remains the primary service provider and producer. It also incorporates a more entrepreneurial approach, including market-stimulating decision-making techniques.<sup>69</sup> This may be through the adoption of market principles such as full-cost recovery.<sup>70</sup> This broad understanding is consistent with viewing concepts such as public-private partnerships as forms of privatisation. This paper will adopt the latter expansive understanding of privatisation.

<sup>64</sup> This paper will adopt David Harvey's definition of neoliberalism as entailing a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterised by strong private property rights, free markets and free trade. The role of the State is to create and preserve an institutional framework appropriate to such practices. See D Harvey *A Brief History of Neoliberalism* (2005) 2

<sup>65</sup> See L Lundqvist “Privatisation: Towards a Concept for Comparative Policy Analysis” (1988) 8 *J Publ Pol* 11

<sup>66</sup> With this form of privatisation, which is to be found in England and Wales, publicly operated monopolies are transferred as a whole to a private enterprise-oriented provider. In England and Wales ten water service companies were created in this manner and their shares were sold on the stock exchange

<sup>67</sup> E Metzger “Privatisation as Delegation” (2003) 103 *Columbia LR* 1367 1370-1371

<sup>68</sup> DA Heald “Privatisation: Analysing its Appeal and Limitations” (1984) 5 *Fiscal Studies* 36 46

<sup>69</sup> K Bakker “From State to Market? Water Mercantilism in Spain” (2002) 34 *Environment & Planning A* 767 770

<sup>70</sup> 770

Although non-State actor involvement in the provision of water services has a long history, the defining point for the most recent privatisation wave in developed countries can be traced to the 1980s. This was embraced by many developing countries during the 1990s.<sup>71</sup> Privatisation of water services in developing countries should be understood in the context of policies of international financial institutions (“IFIs”) and donor agencies. IFIs have particularly promoted a neo-liberal paradigm advocating for States to reduce public spending, including in the provision of water services. Some of the reforms leading to widespread privatisation have been imposed through loan or aid conditions conditionalities, debt reprogramming or loan forgiveness.<sup>72</sup>

The 1992 International Conference on Water and the Environment adopted what became known as the “Dublin Statement”.<sup>73</sup> The Dublin Statement argued that water needed to be construed as an economic good in order to realise its optimal value. Although not legally binding, it became an extremely important tool in the conceptualisation of water as an economic good. Principle 4 in particular provides:

“Water has an economic value in all its competing uses and should be recognised as an economic good ... Managing water as an economic good is an important way of achieving efficient and equitable use.”<sup>74</sup>

The World Bank adopted the economic good model of the Dublin Statement as its guiding principle.<sup>75</sup> It introduced the principle of full cost recovery – a corollary of applying the economic good model – as pre-conditions conditionality for loans in the water sector, especially in the developing world.<sup>76</sup> For instance, in 1997, the IMF, the World Bank and the Inter-American Development Bank demanded the privatisation of Bolivia’s water utility, the Municipal Drinking Water and Sewage Service of Cochabamba (“SEMAPA”) as a condition for debt renegotiation and forgiveness.<sup>77</sup> Bolivia complied with these structural adjustment conditions conditionalities by forging ahead

<sup>71</sup> See C de Albuquerque *Report of the UN Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation* (2010) UN Doc A/HRC/15/31 para 6 <<http://daccess-dds-ny.un.org/doc/UNDOC/GE/pdf>> (accessed 04-04-2010)

<sup>72</sup> Para 9

<sup>73</sup> In 1992, the World Meteorological Organisation held an International Conference on Water and Environment in Dublin and the result was the Dublin Statement articulating various principles on water resources management which was commended to the world leaders participating at the UN Conference on Environment and Development in Rio de Janeiro See Conference Participants of the International Conference of Water and the Environment *The Dublin Statement on Water and Sustainable Development* (1992) <<http://www.gdrc.org/uem/water/dublin-statement.html>> (accessed 03-04-2010)

<sup>74</sup> Principle 4

<sup>75</sup> S Grusky & M Fiil-Flynn *Will the World Bank Back Down? Water Privatisation in a Climate of Global Protest* (2004) 7

<sup>76</sup> See P Bond “Water Commodification and De-commodification Narratives: Pricing and Policy Debates from Johannesburg to Kyoto to Cancun and Back” (2004) 15 *Capitalism Nature Socialism* 7 8

<sup>77</sup> T Kruse & C Ramos “Water and Privatisation: Doubtful Benefits, Concrete Threats” *Social Watch Report: The Poor and the Market* (2003) 98 <<http://www.socialwatch.org/node/10835>> (accessed 17-06-2011)

with the privatisation of SEMAPA.<sup>78</sup> In Tanzania, the country obtained funding for US\$140 million from the World Bank, African Development Bank and European Investment Bank for a comprehensive programme to repair and extend Dar es Salaam's water and sewerage infrastructure. The funding was conditional on having a private operator replacing the public water provider.<sup>79</sup>

The principle of full cost recovery meant that the State or non-State supplier of water services should be able to recover the full costs of supplying water to all users.<sup>80</sup> The proposal to treat water as an economic good was predicated on the belief that treating it as such would, firstly, ensure access to water resources for all. Secondly, it would minimise inefficiencies through pricing techniques.<sup>81</sup> This entailed introducing the cost recovery principle within the tariff system and opening up the water sector for private sector involvement and foreign investment.<sup>82</sup>

The privatisation movement in the water sector has generated immense debate, linked to the status of water as a human right on one hand, and the characterisation of water as an economic good on the other.<sup>83</sup> Opponents of privatisation argue that water is a human right, a public good and not a commodity that can be bought and sold for profit<sup>84</sup> and incompatible with guaranteeing the right to water.<sup>85</sup> They also point out that privatisation's focus on full cost recovery ignores the need to protect the poor and enhance universality of access to water.<sup>86</sup> On the other hand, proponents of water privatisation argue that water is an economic good and a price should be charged for treating and supplying it.<sup>87</sup> They argue that the private sector

<sup>78</sup> E Peredo Beltrán *Water, Privatisation and Conflict: Women from the Cochabamba Valley* (2004) iv <[www.funsolon.org/publicaciones/peredowaterwomenboliviaeng.pdf](http://www.funsolon.org/publicaciones/peredowaterwomenboliviaeng.pdf)> (accessed 16-06-2011) In 1997, the World Bank provided Bolivia with US\$ 20 million in technical assistance for regulatory reform and privatisation, including preparation of laws and regulations for the financial, infrastructure and business sectors. Some of this funding was earmarked for the Major Cities Water and Sewerage Rehabilitation Project which aimed to provide full coverage to Santa Cruz, Cochabamba and La Paz in the most efficient and sustainable manner. One of the bank's conditions for the extension of the loan was the privatisation of the La Paz and Cochabamba water and sewerage utilities.

<sup>79</sup> See a discussion paper by J Perez, M Gistelinc & D Karbala *Sleeping Lions: International Investment Treaties, State-Investor Disputes and Access to Food, Land and Water* Oxfam Discussion Paper (2011) 19-20 <<http://www.oxfam.org/sites/www.oxfam.org/files/dp-sleeping-lions-260511-en.pdf>> (accessed 08-06-2011)

<sup>80</sup> EB Bluemel "Implications of Formulating Human Right to Water" (2004) 31 *Ecology Law Quarterly* 957-964

<sup>81</sup> 962

<sup>82</sup> See Bond (2004) *Capitalism Nature Socialism* 8. For further discussion on the principle of cost recovery within the water delivery and management sector, see also V Petrova "At the Frontiers of the Rush for Blue Gold: Water Privatisation and the Human Right to Water" (2006) 31 *Brook J Int'l L* 557-578-580; K Bakker "The 'Commons' Versus the 'Commodity': Alter-Globalization, Anti-Privatisation and the Human Right to Water in the Global South" (2007) 39 *Antipode* 430-431

<sup>83</sup> JW de Visser "Comparing Water Delivery in South Africa and the Netherlands" in JW de Visser & C Mbazira (eds) *Water Delivery: Public or Private?* (2006) 29-29

<sup>84</sup> Grusky & Fiil-Flynn *Will the World Bank Back Down?* 3

<sup>85</sup> For an overview of the water anti-privatisation debate see Petrova (2006) *Brook J Int'l L* 578-580

<sup>86</sup> Grusky & Fiil-Flynn *Will World Bank Back Down?* 3

<sup>87</sup> WL Megginson *The Financial Economics of Privatisation* (2005) 6 notes that the water industry is one industry where privatisation, as well as increasing welfare, has been very ambiguous

constitutes an obvious alternative for the delivery of services in the face of State failure to ensure universal access to safe water.<sup>88</sup>

Another position in the contestation argues for the recognition of water's economic good status as well as recognising its status as a basic human right. It advocates for the guarantee of universal access to safe water despite the involvement of non-State actors.<sup>89</sup> This group envisages private sector participation with the State having regulatory oversight in order to protect the water's public nature.<sup>90</sup>

This group further points out that human rights do not envisage the State as the sole provider of basic services.<sup>91</sup> Rather, it is permissible within the human rights framework for private actors to be involved in the provision of human rights sensitive services such as water.<sup>92</sup> Reference is made to the pronouncements by treaty bodies on this issue. In General Comment 3, the CESCR has asserted that human rights law does not require a particular political or economic system within which human rights can best be realised.<sup>93</sup> Consequently, it is argued that private sector involvement in the provision of basic goods and services is not in conflict with human rights.<sup>94</sup>

The thrust of the argument is that privatisation of human rights sensitive services does not absolve the State of its human rights obligations in respect of the privatised services. This implies that, by privatising the provision of basic services and goods, the State remains responsible for ensuring the enjoyment by all people of the rights relevant to the privatised service.<sup>95</sup> Agreements with private service providers must therefore be structured by the relevant human rights norms.<sup>96</sup> The State has a duty to regulate and monitor the activities of private actors. Williams has pointed out that the State has a duty to monitor and regulate the activities of the private actor during the duration of the privatisation arrangement so that human rights are not imperilled.<sup>97</sup> The State's duty to protect is of utmost significance in the context of privatisation.<sup>98</sup> The CESCR, for instance, has elaborated this obligation to include the duty to prevent violations of these rights by private actors as well as to control and regulate them. In respect of the right to water, for example, the CESCR has stated that the State has an obligation to prevent third parties from "compromising equal, affordable, and physical access to sufficient, safe and acceptable water".<sup>99</sup> It appears that both proponents and opponents of water privatisation agree on the importance of monitoring and regulation in the

<sup>88</sup> PD Lopes *Water Privatisation and the Human Right to Water* (2006) 6

<sup>89</sup> 21

<sup>90</sup> 22

<sup>91</sup> DM Chirwa "Privatisation of Water in Southern Africa: A Human Rights Perspective" (2004) 4 *AHRLJ* 218 230

<sup>92</sup> 230

<sup>93</sup> UN Committee on Economic, Social and Cultural Rights *General Comment No 3* para 8

<sup>94</sup> Chirwa (2004) *AHRLJ* 231

<sup>95</sup> 231

<sup>96</sup> 233

<sup>97</sup> Williams (2007) *Mich J Int'l L* 501

<sup>98</sup> Chirwa (2004) *AHRLJ* 235

<sup>99</sup> UN Committee on Economic, Social and Cultural Rights *General Comment No 15* para 24

event of privatisation.<sup>100</sup> It is argued that the State's obligation to protect and fulfil the right to water survives the privatisation arrangement. Consequently, a duty is imposed on the State to monitor and regulate the activities of private enterprises involved in the management and distribution of water services.<sup>101</sup> The following section discusses some of the regulatory challenges engendered by water privatisation.

## 5 Regulatory challenges

Water provision normally enjoys monopoly status because of the high costs involved in transporting bulky water products.<sup>102</sup> In other utilities such as telecommunications and electricity, monopoly power is gradually being eroded by technological innovation and the development of competitive substitutes.<sup>103</sup> Such a development is unlikely to occur to any significant extent in the water sector in the foreseeable future. Naturally, monopoly in the water services sector is likely to remain a long-term feature.<sup>104</sup> It is pertinent to note that the difficulties involved in protecting the public from private monopoly power abuses was one of the significant historical factors which led to the development of public water utilities in many countries.<sup>105</sup> This clearly calls for regulation of these private enterprises involved in the provision and management of water services. Opponents of privatisation have also pointed out the often weak regulatory institutions associated with privatisation. This is because private corporations often prefer regulatory discretion to be minimised and for the contract to be the major regulatory mechanism.<sup>106</sup>

Privatisation by States of their traditional domestic functions such as water provision has in some cases weakened regulation at national level, because of investor pressure and new international free trade rules and bilateral investment treaties.<sup>107</sup> This is further compounded by the sheer size and scale of some non-State actors involved in the human rights sensitive services such as the provision of water. Globalisation has led to the emergence of powerful non-State actors who have resources greater than those of many States.<sup>108</sup> Consequently, most of the private entities have outgrown the ability of individual States to regulate them effectively.<sup>109</sup> The sheer size and influence of some corporations is such that they are capable of determining national policies and priorities.<sup>110</sup>

<sup>100</sup> Williams (2007) *Mich J Int'l L* 501 See also UN Committee on Economic, Social and Cultural Rights *General Comment No 15* para 24, which envisages an effective regulatory system to be established, providing for independent monitoring, genuine public participation and imposition of penalties for non-compliance with set rules where water services have been privatised

<sup>101</sup> Williams (2007) *Mich J Int'l L* 501-502

<sup>102</sup> JA Rees "Regulation and Private Participation in the Water and Sanitation Sector" (1998) 22 *Nat Resource Forum* 96 96

<sup>103</sup> 96

<sup>104</sup> 96-97

<sup>105</sup> 97

<sup>106</sup> 104

<sup>107</sup> International Council on Human Rights Policy *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002) 10

<sup>108</sup> D Shelton "Protecting Human Rights in a Globalised World" (2002) 2 *BC Int'l & Comp LR* 273 273

<sup>109</sup> International Council on Human Rights Policy *Beyond Voluntarism* 11

<sup>110</sup> Shelton (2002) *BC Int'l & Comp LR* 273

In some cases, weak States, especially in the developing world, are unable or unwilling to control their activities. Opponents of water privatisation particularly emphasise that the nature of multinational corporations in today's global economy also makes it more difficult for individual governments, especially those from developing countries, to regulate them and hold them to account. For instance, a recent study revealed that in the water sector, the largest private multinational corporations in the water sector are Suez (111 479 116 customers), Veolia Environment (130 924 000 customers), RWE AG (38 235 000 customers), Aguas de Barcelona (29 511 718 customers), Saur (12 999 000 customers), Acea (14 305 000 customers), Biwater PLC/Cascal (8 834 000 customers) and United Utilities (24 028 000 customers).<sup>111</sup> Such a development poses challenges to the international human rights movement, because for the most part, that law was designed to foreclose violations by States and State actors, and has not adequately developed to regulate the conduct of non-State actors.<sup>112</sup>

Of particular note is the lack of independence and expertise of regulatory bodies. This was buttressed by Nils Roseman's study of the Manila water privatisation in the Philippines. Roseman's study concluded that it was mainly the erroneous design of the privatisation process and the lack of political will to create a powerful regulatory agency that led to the partial failure of that privatisation scheme.<sup>113</sup> In South Africa, the local authority in Nelspruit did not have the capacity to effectively regulate the water concession contract, hence its failure.<sup>114</sup> McDonald and Ruiters further pointed out that in the Lukhanji, Amahlati and Nkokobe municipalities in the Eastern Cape, most of the councillors mandated to monitor and regulate the privatisation contracts lacked the requisite expertise to do so.<sup>115</sup> In the following section, I carry out a human rights analysis of water privatisation.

## 6 International human rights law and privatisation

International human rights instruments are neutral as regards the economic models of service provision. Consequently, it is permissible within the human rights framework for private entities to be involved in the provision of human rights sensitive services such as water, health and education. The CESCR clearly stated that the realisation of human rights obligations enshrined in the ICESCR prescribes no particular form of government or economic system "provided that it is democratic and all human rights are thereby respected".<sup>116</sup>

<sup>111</sup> See Pinsent Masons "Pinsent Masons Water Yearbook 2009-2010" (2009) *Pinsent Masons* 222-223 <<http://www.pinsentmasons.com/PDF/PMWaterYearbook2008-09.pdf>> (accessed 20-08-2011)

<sup>112</sup> Shelton (2002) *BC Int'l & Comp LR* 279

<sup>113</sup> N Rosemann (Friederich Ebert Foundation) *The Human Right to Water under the Conditions of Trade Liberalisation and Privatisation: A Study on the Privatisation of Water Supply and Wastewater Disposal in Manila* (2003) 6 <<http://library.fes.de/pdf-files/iez/01949.pdf>> (accessed 27-06-2011)

<sup>114</sup> DA McDonald & G Ruiters "Theorising Water Privatisation in Southern Africa" in DA McDonald & G Ruiters (eds) *The Age of Commodity: Water Privatisation in Southern Africa* (2005) 13 28

<sup>115</sup> 160

<sup>116</sup> UN Committee on Economic, Social and Cultural Rights *General Comment No 3* para 8

Privatisation *per se* does not relieve the State of its legal responsibility under international human rights law.<sup>117</sup> States are the primary duty bearers under the international human rights system. It necessarily follows that States do not relinquish their international human rights obligations by privatising the delivery of water services. A State should ensure that it continues to exercise adequate oversight in order to meet its obligation to realise the right to water when it engages non-State actors to manage and supply water services. The State's duty towards beneficiaries of the right from the breach of their right by such private entities becomes crucial. Should a water privatisation scheme lead to the violation of any of the constituent elements of a right to water discussed above, the State may be liable for failing to discharge its duty to protect.<sup>118</sup> For a State to effectively discharge its protective mandate particularly where water services have been privatised, it is important for it to put in place a regulatory and monitoring mechanism to monitor the performance of water services providers.<sup>119</sup>

Privatisation of water services necessarily raises the issue of accountability of both policy-makers and private entities involved in the management or provision of water services. It is of utmost importance that privatisation policies entrench legal and administrative measures to guarantee democratic accountability, particularly by those affected by the privatisation of a particular service. Of great significance also, is the principle of participation.<sup>120</sup> International human rights law emphasises the need for policies to be conceived and implemented in a manner that enables popular participation.<sup>121</sup> All those affected by a privatisation policy, particularly the poor and the marginalised sections of the community, must be given the opportunity to participate and give input in key decisions directly or indirectly affecting their socio-economic rights. This consequently entails a right of access to sufficient, adequate and timely information pertaining to any proposed water privatisation process.<sup>122</sup> The following section discusses the importance of effective monitoring and evaluation in the context of water privatisation.

## 6 1 Towards effective monitoring and regulation of water services providers

One of the key issues raised in the cases of water privatisation in Tanzania, Bolivia and South Africa highlighted above was the paucity of effective monitoring and regulatory mechanisms to exercise oversight over the private providers. Chirwa has pointed out that the duty to regulate and monitor enjoins the State to take appropriate positive action to protect its citizens from

<sup>117</sup> W Vandenhoe & T Wilders "Water as a Human Right – Water as an Essential Service: Does it Matter?" (2008) *NQHR* 391 409-410

<sup>118</sup> See A Kok "Privatisation and the Right to Access to Water" in K Feyter & FG Isa (eds) *Privatisation and Human Rights in the Age of Globalisation* (2005) 259 268

<sup>119</sup> 268

<sup>120</sup> DM Chirwa "Water Privatisation and Socio-Economic Rights in South Africa" (2004) 8 *LDD* 185 185-186 See also, generally, S Tsemo "Privatisation of Basic Services, Democracy and Human Rights" (2003) 4 *ESR Review* 2.

<sup>121</sup> Chirwa (2004) *LDD* 185-186

<sup>122</sup> 185-186

potentially deleterious acts of private actors.<sup>123</sup> The CESCR has stated in General Comment 15 that the State has an obligation to prevent third parties from threatening access to equal, affordable, sufficient, safe and acceptable water.<sup>124</sup> The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Guidelines) enshrine a similar approach, providing that in the interpretation of economic, social and cultural rights, the State has a duty to ensure that private providers over which they exercise jurisdiction do not deprive individuals of their economic, social and cultural rights.<sup>125</sup> The Maastricht Guidelines further provide for the responsibility of States for any violations of economic, social and cultural rights that result from their neglect to exercise the necessary control on the behaviour of such non-State actors.<sup>126</sup> The State will only fulfil this duty to protect through the establishment of an effective regulatory system which provides for independent monitoring, genuine public participation and provision of appropriate relief to those negatively impacted by the acts of such non-State actors.<sup>127</sup> This means that States should establish regulation and control mechanisms, which include independent monitoring, genuine public participation and the provision of remedies for non-compliance.<sup>128</sup>

General Comment 15 makes it clear that in the event of privatisation, States must prevent such entities from “compromising equal, affordable, and physical access to sufficient, safe and acceptable water”.<sup>129</sup> Furthermore, “arbitrary or unjustified disconnection from water services or facilities” and “discriminatory or unaffordable increases in the price of water” constitutes *prima facie* violations of the States’ obligation in respect of the realisation of the right to water.<sup>130</sup> Such safeguards are very significant for the protection of the human right to water in the event of involvement of non-State actors in the provision of water services. These independent monitoring mechanisms should ensure that the minimum international standards with regard to the right to water are maintained. The monitoring mechanism should also have the mandate to scrutinise privatisation contracts to ensure that their provisions and implementation do not encroach on the right to water by specifying that the private or public operator of water services will meet the minimum quantitative or qualitative levels of water provision.<sup>131</sup> Significantly, the monitoring mechanism should have in place a strict water tariff control to prevent the private entity from charging exorbitant water tariffs thereby impeding the economic accessibility of water.<sup>132</sup> It is also important that water services should be immune from disconnections where a water user

<sup>123</sup> Chirwa (2004) *AHRLJ* 235

<sup>124</sup> UN Committee on Economic, Social and Cultural Rights *General Comment No 15* para 24

<sup>125</sup> TC van Boven, C Flinterman & I Westendorp *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1998) UN Doc E/C 12/2000/13 para 18

<sup>126</sup> Para 16

<sup>127</sup> UN Committee on Economic, Social and Cultural Rights *General Comment No 15* para 24

<sup>128</sup> Paras 23-24

<sup>129</sup> Para 24

<sup>130</sup> Para 44(a)

<sup>131</sup> Kok “Privatisation” in *Privatisation and Human Rights* 271

<sup>132</sup> 286

is unable to pay for the service. Kok has suggested that rather, the supplier should only be allowed to adopt measures necessary to limit an indigent beneficiary's supplier to the minimum levels provided for under international law – or national law, if the national minimum standards are higher than the international minimum standards.<sup>133</sup> Another additional tier towards ensuring the realisation of the right to water in the event of privatisation is to explore the possibility of extending direct negative and positive human rights obligations on non-State actors involved in the provision of water services. This is discussed in the next section.

## 6.2 Direct human rights obligations on corporations?

Privatisation of hitherto publicly provided services also puts into question the public/private dichotomy. Liebenberg has critiqued the public/private dichotomy in the context of adjudicating socio-economic rights, noting that “both methodological and ideological considerations constrain the potentially transformative effect of socio-economic rights on private law rules and doctrines”.<sup>134</sup> The weakening of the public/private partition is particularly necessary in the context of privatisation of water services which has led to the involvement of non-State entities in the functions usually exercised by State organs.<sup>135</sup> Despite the fact that the development of other branches of international law such as international criminal law have focused attention on individual criminal responsibilities of non-State actors, the question of direct human rights obligations for non-State actors, particularly corporations, is still a nascent area – especially at the international level. The orthodox position is to omit private actors from the purview of international human rights law and holding States as constituting the proper addressees of international law. Private actors are deemed to fall within the rubric of domestic law. There is a growing concern that the enforcement of human rights imperatives set out in international human rights law is hindered by the lack of direct human rights obligations placed on non-State actors. This is more so when public functions are delegated to them by the State.<sup>136</sup>

John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, recently proposed a new framework for dealing with non-State actors such as businesses, namely the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (“UN Guiding Principles”).<sup>137</sup> The UN Guiding Principles are based on three

<sup>133</sup> 286-287

<sup>134</sup> S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 375

<sup>135</sup> See G van Harten “The Public-Private Distinction in the International Arbitration of Individual Claims against the State” (2007) 56 *Int'l & Comp LQ* 371 394

<sup>136</sup> A Mahinney *Harmonising Good Governance* (2002) 3

<sup>137</sup> See J Ruggie *Report of the UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises – Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (2011) UN Doc A/HRC/17/31 <[http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV)> (accessed 05-04-2011) The UN Guiding Principles were officially endorsed by the UN Human Rights Council on 21-06-2011

main principles, namely the State's duty to protect against human rights abuses by third parties, the corporate responsibility to respect human rights and the need for more effective access to remedies.<sup>138</sup> Although the UN Guiding Principles provide that international law firmly establishes that States have the duty to protect against human rights abuses by non-State actors within their jurisdiction, they seem to suggest that international law does not impose any direct duties on such entities to observe human rights norms. Instead corporations need only engage in "due diligence" to consider whether their business activities might contribute to the abuse of human rights.<sup>139</sup> The UN Guiding Principles thus use the term "responsibility" instead of "duty" or "obligation" in respect of non-State actors.

The above marks a significant departure from the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ("Norms"), adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003.<sup>140</sup> The Norms assert that even though States have the primary responsibility to promote, protect, ensure the respect of, and ultimately fulfill human rights, transnational corporations and other business enterprises, as organs of society "within their respective spheres of activity and influence ... have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognised in international as well as national law".<sup>141</sup>

The distinction between State and non-State bodies for the purposes of determining the reach, or applicability, of human rights law becomes questionable and, it is suggested, requires adjustment in light of changing modes of governance.<sup>142</sup> The impact non-State actors have on the realisation of human rights through their business activities makes many of the underlying assumptions of the arguments against imposing human rights obligations on them hard to sustain. This is because arguments against extending human rights obligations to non-State actors are based on a "remarkably resilient model of a liberal market society characterised by a clear distinction between the public and private spheres".<sup>143</sup> In the case of water privatisation, this will provide another layer of protection in ensuring that water privatisation does not impede the realisation of the right to water.

## 7 Conclusion

Water is far too important to the well-being of humans to be treated solely as an economic good. Privatisation of water services to non-State actors has the potential to assist in the realisation of the right to water. The experience from the 1990s saw the acceleration in the privatisation of water services,

<sup>138</sup> Paras 11-14

<sup>139</sup> Para 12

<sup>140</sup> UN Sub-Commission on the Promotion and Protection of Human Rights *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2

<sup>141</sup> Para 1

<sup>142</sup> Mahinney *Harmonising Good Governance* 3

<sup>143</sup> PT Muchlinski "Human Rights and Multinationals: Is There a Problem?" (2001) 77 *Int'l Affairs* 31 36

with both successful and dramatic failures. Less effort has been made to understand the risks and limitations of water privatisation, and to put in place safeguards to protect the marginalised from violation of their right to access water. Water is a human right and cannot be equitably protected by purely treating it as an economic good through the utilisation of markets for its distribution. Ownership of the water delivery systems, be it through public or private entities, should not compromise accessibility, availability, quality and acceptability of basic services.<sup>144</sup> Privatisation of water services should also not result in denial of access to vulnerable and poor people to socio-economic rights hence independent monitoring and regulatory mechanisms must be put in place. There is also an imperative need for further research and development of an international process with the necessary normative force to directly impose binding human rights obligations on non-State actors, especially those involved in the provision of human rights sensitive services such as water. This is particularly relevant where States are unable or unwilling to protect human rights.

### SUMMARY

This contribution seeks to propose an accountability framework for States and non-State actors involved in the provision and management of water services. The article contends that States have a legal obligation under international human rights law to fulfill, respect, protect and promote the human right to safe and sufficient water for personal and domestic uses. While acknowledging both the potentially deleterious and beneficial implications of privatisation of water services, this article suggests two mutually reinforcing approaches to foreclose any breaches of the right. The first approach advocates for the strengthening of the State's duty to protect, in particular the putting in place of independent monitoring and regulatory mechanisms to ensure that the minimum conditions imposed by the right to water are not abridged. The difficulty of enforcing positive human rights obligations against non-State actors is now extant in literature. The second approach argues for a doctrinal progression towards the imposition of direct obligations on non-State actors engaged in the provision of water services, not only to impede the realisation of the right to water but also a positive obligation to provide minimum amounts of water for personal and domestic uses particularly in respect of poor and marginalised members of society.

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<sup>144</sup> United Nations Office of the High Commissioner for Human Rights *Liberalisation and Human Rights* (2003) 197