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The Human Right to Water

Malgosia Fitzmaurice*

*Queen Mary, University of London

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THE HUMAN RIGHT TO WATER

*Malgosia Fitzmaurice**

I. INTRODUCTION: THE PROBLEM OF WATER SCARCITY

In the context of the contentious issue surrounding the legal status and implementation of the general human right to a clean environment, the human right to water is probably the most disputed. Much has been written about a human right to water, but no firm conclusions have been drawn as to its existence, as the practice of States in this respect is very limited.¹

* Professor of Public International Law at Queen Mary, University of London.

1. Among the numerous publications on this subject, see Jona Razzaque, *Trading Water: The Human Factor*, 13 R.E.C.I.E.L. 15 (2004); SALMAN M.A. SALMAN & SHIOBHAN MCINNERY-LANKFORD, *THE HUMAN RIGHT TO WATER: LEGAL AND POLICY DIMENSIONS* (The World Bank, Law, Justice & Development Series) (2004); FRESH WATER AND INTERNATIONAL ECONOMIC LAW, (Edith Brown Weiss et al., eds.) (2005); JOHN SCANLON ET AL., *WATER AS A HUMAN RIGHT?* (2004), available at <http://www.iucn.org/themes/law/pdfdocuments/EPLP51EN.pdf>; THE RIGHT TO WATER, The World Health Organisation Library (2003), available at http://www.who.int/water_sanitation_health/rtwrev.pdf; ASHFAQ KHALFAN, *IMPLEMENTING GENERAL COMMENT N.15 ON THE RIGHT TO WATER IN NATIONAL AND INTERNATIONAL LAW AND POLICY*, DISCUSSION PAPER (2005), available at: http://www.menschenrechtwasser.de/downloads/Artikel_Ashfaq_zum_GC_15_03_05.pdf; VIRGINIA ROAF, ASHQAF KHALFAN & MALCOM LANGFORD, *MONITORING IMPLEMENTATION OF THE RIGHT TO WATER, A FRAMEWORK FOR DEVELOPING INDICATORS* (2005), available at <http://www.boell.de/downloads/global/righttowaterindicators.pdf>; Peter Gleick, *The Human Right to Water*, 1 WATER POL'Y 487 (1999); KEVIN CHRISTOPHER MCADAM, *THE HUMAN RIGHT TO WATER - MARKET ALLOCATIONS AND SUBSISTENCE IN A WORLD OF SCARCITY* (2004), available at <http://dissertations.bc.edu/cgi/viewcontent.cgi?article=1028&context=ashonors>; KEVIN WATKINS ET AL. *HUMAN DEVELOPMENT REPORT 2006: BEYOND SCARCITY: POWER, POVERTY AND THE GLOBAL WATER CRISIS* (2006), available at <http://hdr.undp.org/hdr2006/pdfs/report/HDR06-complete.pdf>; Stephan McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1 (1992) [hereinafter *McCaffrey I*]; Stephan McCaffrey, *The Human Right to Water*, in FRESH WATER AND INTERNATIONAL ECONOMIC LAW 93-115 (Edith Brown Weiss et al eds.) [hereinafter *McCaffrey II*]; Henri Smets, *The Right to Water as a Human Right*, 30 ENVTL. POL'Y & L. 248

This issue has become very topical due to general scarcity of water in the world. As Jona Razzaque has observed, “the truth of water scarcity sounds clichéd.”² However, it is an undisputed fact that only 10 percent of the annual world water supply is consumed by humans and that only 15 percent of people worldwide have an abundance of water.³ The World Resources Institute (WRI) has estimated that 41 percent of the world’s population, or 2.3 billion people, live under the so-called ‘water stress’, which means the per capita water supply is less than 1.700 m³/ year for these people.⁴ 1.1 billion people live without safe drinking water and 2.6 billion people do not have access to adequate sanitation, which often results in health problems.⁵ Globally, almost 6000 children under the age of five die every day from water related diseases.⁶ Water needs are estimated to increase as a result of population growth and demand may double by 2050.⁷ There are several factors that contribute to unpredictability and vulnerability of water resources such as glacial retreat, deforestation and

(2000) [hereinafter *Smets I*]; Henri Smets, *Economics of Water Services and the Right to Water*, in *FRESH WATER AND INTERNATIONAL ECONOMIC LAW* 173-77 (Brown-Weiss et al eds.) [hereinafter *Smets II*]; Nils Rosemann, *Financing the Human Right to Water as a Millennium Development Goal*, 1 *LAW, SOC. JUST. & GLOBAL DEV.*, available at http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2005_1/rosemann/ [hereinafter *Rosemann I*]; NILS ROSEMAN, *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*, available at <http://www.fes-geneva.org/reports/WaterIssues/Rosemann%20Nils%20-%202003-11-14%20-%20summary%20-%20final.pdf> [hereinafter *ROSEMAN II*]; CLARE JOY & PETER HARDSTAFF, *DIRTY AID, DIRTY WATER: THE UK GOVERNMENT’S PUSH TO PRIVATIZE WATER AND SANITATION IN POOR COUNTRIES*, (2005), available at <http://www.wdm.org.uk/resources/briefings/aid/dadwlong.pdf>.

2. Razzaque, *supra* note 1, at 15.

3. Tom Damassa, *August 2006 Monthly Update: Water Scarcity*, Sept. 1, 2006, available at <http://earthtrends.wri.org/updates/node/73> (EarthTrends Environmental Information website).

4. Carmen Revenga, *Will there be enough Water?*, available at http://earthtrends.wri.org/features/view_feature.php?theme=1&fid=17.

5. WATKINS ET AL., *supra* note 1 at 2. The number of people without access to adequate sanitation is estimated to 2.4 billion according to the World Water Council. See World Water Council FAQ, available at <http://www.worldwatercouncil.org/index.php?id=1764> (last visited 4 December 2007).

6. World Resources Institute, EarthTrends Environmental Information website, *supra* note 3.

7. *Id.*

other aspects of anthropogenic climate change.⁸ According to the International Water Management Institute (WMI), there are two main types of scarcity: physical and economic. Physical water scarcity occurs when available resources cannot meet demand, including minimum environmental flow requirements.⁹ Water is lacking in arid regions.¹⁰ However, there is an emerging trend of artificially created scarcity, even in places where water is abundant.¹¹ This phenomenon is due to over-development of hydraulic infrastructure, most frequently for irrigation. Water is overused, resulting in an insufficient quantity to meet basic human needs and environmental flow needs. Economic scarcity, however, occurs when there is a lack of investment in water or lack of human capacity to respond to growing water demand. Institutions frequently favour the needs of certain groups of people to the detriment of others (such as women).¹² Economic water scarcity also includes inequitable water distribution even where infrastructure is in place.¹³

Human rights approaches to water are thought to deal better with water scarcity than the traditional approach, which treats water as a commodity.

II. THE HUMAN RIGHT TO WATER

A. *The Initial Consideration of the Problem*

Professor McCaffrey did the pioneering work of exploring a possible human right to water in 1993.¹⁴ McCaffrey thought a human rights based approach to water would be the most appropriate one,

8. *Id.*

9. WATER FOR FOOD, WATER FOR LIFE: A COMPREHENSIVE ASSESMENT OF WATER MANAGEMENT IN AGRICULTURE 11-12 (David Molden ed.) (hereinafter WATER FOR FOOD) available at http://www.iwmi.cgiar.org/assessment/files_new/synthesis/Summary_SynthesisBook.pdf; see also WATER FOR FOOD, WATER FOR LIFE: INSIGHTS FROM THE COMPREHENSIVE ASSESMENT OF WATER MANAGEMENT IN AGRICULTURE 7 (hereinafter INSIGHTS) available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/21_08_06_world_water_week.pdf (last visited 6 December 2007).

10. *Id.*

11. WATER FOR FOOD, *supra* note 9, at 12; INSIGHTS, *supra* note 9, at 7.

12. WATER FOR FOOD, *supra* note 9, at 11-12; INSIGHTS, *supra* note 9, at 7.

13. WATER FOR FOOD, *supra* note 9, at 11; INSIGHTS, *supra* note 9, at 7.

14. *McCaffrey 1*, *supra* note 1, at 1-24.

considering water scarcity and its inequitable distribution.¹⁵ Dr. Gleick then developed this issue in 1999.¹⁶ McCaffrey rightly observed, “it is surprising that water is not mentioned at all in either of the United Nations covenants on human rights or in the 1948 Universal Declaration of Human Rights. If there is a right under the basic instruments of international human rights law, therefore, it must be inferred”.¹⁷ He was of the view that in relation to the Universal Declaration of Human Rights, Article 25 constitutes the most likely basis from which to infer human right to water, as it states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family, including food” Many of the provisions contained in the Declaration are considered binding on states, in particular the so-called “liberty rights,” including the right of freedom of expression. However, the legal status and binding force of “welfare rights,” which relate to an adequate standard of living as stated in Article 25 of the Declaration, is uncertain. Furthermore, as McCaffrey observes, even if it is assumed that these welfare rights of Article 25 were binding, it would still “have to be established that a right to water is implicit in the right to adequate standard of living to which the article explicitly refers.”¹⁸

These interpretations of both United Nations Covenants cast further doubt on the possible inference of a human right to water from their provisions. Article 6 of the International Covenant of Civil and Political Rights could give rise to a possible legal basis to a right to water. Article 6 states that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”¹⁹ The right to life as stated in this article could possibly form a basis for a human right to water. How-

15. *Id.* at 1-7.

16. Gleick, *supra* note 1.

17. *McCaffrey 1*, *supra* note 1, at 7; International Covenant on Civil and Political Rights, G.A. Res. 2200A, ¶ 21 U.N. GAOR Supp. 52, U.N. Doc. A/6316 (Dec. 16, 1966), *reprinted in* 6 I.L.M. 368 (1967), *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm; 1966 International Covenant on Economic, Social and Cultural Rights, G. A. Res. 2200, 21 U.N. GAOR Supp. 49, U. N. Doc. A/ 6316 (1967), *reprinted in* 6 I.L.M. 360 (1967), *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/64 (Dec. 10, 1948), *available at* <http://www.unhchr.ch/udhr/lang/eng.htm>.

18. *McCaffrey 1*, *supra* note 1, at 8.

19. International Covenant on Civil and Political Rights, *supra* note 17.

ever, the scope of the right to life itself is subject to various interpretations. A narrow interpretation of Article 6 is based on the premise that a State is not obliged to take positive "affirmative actions to ensure that its citizens have access to adequate sustenance, but only obliges it to refrain from practicing or tolerating arbitrary deprivations of life."²⁰ This narrow interpretation of Article 6 does not permit the judicial inference of a human right to water. A broader interpretation of Article 6 appears to be based on the premise that the protection of human right to life requires a State to take a positive action. However, as McCaffrey observes, even this interpretation does not necessarily mean that the right to life includes other rights, but rather that the safeguarding of this fundamental right is a precondition of the enjoyment of other civil, political, economic, social and cultural rights. Therefore, even a broad interpretation of Article 6 does not encompass the right to sustenance.²¹

Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights is thought to provide the possible basis for the right to water within the remit of economic, social and cultural rights. It reads as follows: "[t]he States Parties to the present Covenant recognize 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."²² It appears unquestionable that the right to an adequate standard of living also includes the right to water, "that is at least adequate to meet basic human needs".²³ However, the weak legal character of these obligations attached to the human rights encompassed in this Covenant, impact as the possible right to water. Article 2 (1) obliges States only "to take steps . . . to the maximum of its available resources, with an eye toward achieving progressively the full realisation of the rights recognised in the Covenant."²⁴ Therefore, even if such a right is inferred from Article 11, States are under no obligation to give an immediate effect to this right, as the implementation of this right is only progressive.²⁵ McCaffrey considers the possible

20. *McCaffrey I*, *supra* note 1, at 9.

21. *Id.* at 10-11.

22. International Covenant on Economic, Social and Cultural Rights, *supra* note 17.

23. *McCaffrey I*, *supra* note 1, at 11.

24. International Covenant on Economic, Social and Cultural Rights, *supra* note 17.

25. *McCaffrey I*, *supra* note 1, at 11-12.

human right to water and the correlative obligations of a State.²⁶ He takes the view that such a right, if inferred from Article 11 of the Economic, Social and Cultural Covenant, should be required to be applied immediately. However, in order to lessen the burden on States, this obligation should be of due diligence character and not absolute in character.²⁷ On the other hand, the interpretation of the Economic Social and Cultural Covenant's provisions, in relation to the right to water, has undergone a fundamental change since the adoption of General Comment No. 15 in 2002 by the Committee of the Economic, Social and Cultural Rights.²⁸ McCaffrey also includes Article 12 of the Economic Social and Cultural Covenant as potentially providing support for human right to water, as it guarantees a right to health.²⁹

Finally, McCaffrey raises the question if at the international level there is a duty of the co-riparian state to provide water supplies necessary for survival of the other country's population on the grounds that water is indispensable for economic development of the country with insufficient water supplies.³⁰ McCaffrey is of the view that such a duty exists in international law because "human life and even health should take precedence over economic development."³¹ Gleick rightly observes that a right to water cannot imply a right to an unlimited amount of water.³² Therefore, such a right applies only to "basic needs," such as drinking, cooking and fundamental domestic uses, a concept that was endorsed at the 1992 Earth Summit in Rio de Janeiro.³³

26. *Id.*, at 12 *et seq.*

27. *McCaffrey I*, *supra* note 1, at 12-17.

28. United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 15, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2002/11 (Nov. 26, 2002), (hereinafter General Comment No. 15) available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/a5458d1d1bbd713fc1256cc400389e94?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/a5458d1d1bbd713fc1256cc400389e94?Opendocument).

29. *Id.*; *McCaffrey II*, *supra* note 1, at 98.

30. *McCaffrey I*, *supra* note 1.

31. *McCaffrey I*, *supra* note 1, at 24.

32. Gleick, *supra* note 1, at 494-495.

33. *Id.*

III. HUMAN RIGHT TO WATER

A. *Binding Instruments*

This part of the essay will explore the existence of a human right to water at the international level, both in binding and non-binding instruments. Currently, there are numerous international instruments containing the explicit right to water. Article 14 (2 h) of the 1979 Convention on the Elimination of All Forms Discrimination against Women (CEDAW) states that:

[p]arties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right . . . To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.³⁴

It must be noted that within the context of the CEDAW this right applies to rural women. Article 24 (2 c) of the 1989 Convention on the Right of the Child (hereinafter the CRC Convention) states that:

[p]arties shall pursue full implementation of this right and, in particular, shall take appropriate measures: [t]o combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.³⁵

34. United Nations Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979), available at <http://www.un.org/womenwatch/daw/cedaw>.

35. United Nations Convention on the Right of the Child (1989), <http://www.unhcr.ch/html/menu3/b/k2crc.htm> (The Convention entered into force on Sept. 2, 1981).

Mention also must be made of the 1949 Geneva Convention relative to the Treatment of Prisoners of War, which includes the provision of adequate drinking water.³⁶ However, as McCaffrey observes, “none of these agreements casts the corresponding entitlement in human rights terms. Instead, they place a duty on governments to ensure that water, among other things necessary to life and good health, is provided to members of groups that have been identified as requiring a special protection.”³⁷ McCaffrey believes that the premise that governments have the duty to provide safe drinking water is supported in case law pertaining to certain regional treaties, such as the 1995 African Charter on Human Rights and Peoples Rights³⁸ and the 1969 American Convention on Human Rights,³⁹ in which articles relating to right to life were found to provide a legal ground for the provision of drinking water.⁴⁰

Razzaque observes that not only the human rights treaties, but also the 1997 United Nations Convention on Non-Navigational Uses of International Watercourses contain the explicit right to water.⁴¹ Article 10 (2) states: “In the event of a conflict between uses of an international watercourse, it shall be resolved ... with special regard being given to the requirements of vital human needs.”⁴² She also notes that the Statement of Understanding attached to the Convention declared that in determining vital human needs in the event of a conflict between the uses of watercourses, “special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation.”⁴³ Similar approaches were adopted by

36. Geneva Convention Relative to the Treatment of Prisoners of War arts. 20, 26, 29 and 46, Aug. 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135, available at <http://www.ohchr.org/english/law/prisonerwar.htm>.

37. *McCaffrey II*, *supra* note 1, at 98.

38. See generally the 1995 African Charter on Human Rights and Peoples Rights, available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm>.

39. American Convention on Human Rights, art. 5, Nov. 22, 1969, 1144 U.N.T.S. 144.

40. *McCaffrey II*, *supra* note 1, at 99.

41. Razzaque, *supra* note 1, at 16.

42. G.A. Res. 51/229, annex (May 21 1997), 36 ILM 700 (1997).

43. Razzaque, *supra* note 1, at 16. See also Statement of Understanding Pertaining to Certain Articles of the Convention Report of the Sixth Committee convening as the Working Group as a Whole, *Convention on the Law of the Non-Navigational Uses of International Watercourses*, (UN Doc. A/51/869, New York, 11 April 1997), para. 8, <http://www.un.org/lawcod/watere.htm>. (site doesn't work) Ask author See also *McCaffrey II*, *supra* note 1, at 100-101.

a regional treaty, the 1999 Protocol on Water and Health to the 1992 ECE Convention on the Protection and Use of Transboundary Watercourses and Lakes.⁴⁴ This Protocol provides that the Parties adopt all appropriate measures for the purpose of ensuring "...adequate supplies of wholesome drinking water" for everyone... and that parties "shall pursue the aims of access to drinking water for everyone..."⁴⁵ McCaffrey gives the example of a unique regional treaty, the 2002 Water Charter of the Senegal River,⁴⁶ which provides an express human right to water and that any distribution of the River's water will be directed at guaranteeing to the population of the riparian States its full enjoyment, respecting the safety of persons and works as well as 'the fundamental human right to healthy water' in respect of sustainable development.⁴⁷ McCaffrey observes that: "[n]ot only does this provision characterize the right as 'fundamental', it also specifies that it is not only water, but 'healthy' water to which humans have a right...[a]t present, the Water Charter's reference to a fundamental human right to water remains in the vanguard".⁴⁸

B. Non-Binding Instruments

Unlike other areas of international law, with respect to human right to water, non-binding instruments have played a more prominent role than binding ones.⁴⁹ There are several non-binding documents, which refer to the right to water. The first important document was the 1992 Dublin Statement on Water and Sustainable Development (Dublin Statement), which resulted from the First International Conference on Water and the Environment.⁵⁰ Dublin Statement, was based on four Principles, which, as Razzaque stated, express a holis-

44. U.N. ESCOR, *Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, London, Eng., (June 17, 1999), available at <http://unece.org/env/documents/2000/wat/mp.wat.2000.1.e.pdf>

45. *Id.*

46. *McCaffrey II*, *supra* note 1, at 101.

47. *Id.*

48. *Id.*

49. Razzaque, *supra* note 1, at 19, 25.

50. International Conference on Water and the Environment, Dublin, Ir., 1992, *Dublin Statement on Water and Sustainable Development* [hereinafter *Dublin Statement*], available at: <http://www.wmo.ch/pages/prog/hwrrp/documents/english/icwedece.html>.

tic attitude to water, with a comprehensive and multi-disciplinary approach to water. Its Principles cover environmental, social, political and economic issues.⁵¹ These Principles are as follows: (1) Fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment; (2) Water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels; (3) Women play a central role in the provision, management and safeguarding of water; and (4) Water has an economic value in all its competing uses and should be recognised as an economic good.⁵² Principle Four recognised water as an economic good, which, as it will be explained further below, is considered to conflict with the human right approach to water. It may be noted as well that Agenda 21, adopted at the 1992 Rio Conference on Human Environment and Development, also approached water as a “good” in Chapter 18, which deals with sustainable use of water resources, as it said as follows: “The role of water as a social, economic and life-sustaining good should be reflected in demand management mechanisms and implemented through water conservation and reuse, resource assessment and financial instruments.”⁵³

The next important document is the 2000 Ministerial Declaration of the Second Water Conference.⁵⁴ This Declaration stated, *inter alia*, that “every person has access to enough safe water at an affordable cost to lead a healthy and productive life and that the vulnerable are protected from the risks of water-related hazards.”⁵⁵ This Declaration stopped short of the acknowledgment of a human right to water, as it refers to the right of access to water.

The access to water was one of the main issues on the agenda of the 2002 Johannesburg World Summit on Sustainable Development (hereinafter the WSSD),⁵⁶ which was reflected in the Plan of Imple-

51. Razzaque, *supra*, note 1, at n.34.

52. *Dublin Statement*, *supra* note 51.

53. United Nations Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992, *Agenda 21*, A/CONF.151/23.

54. Second World Water Forum, The Hague, March 22, 2000, *Ministerial Declaration of The Hague on Water Security in the Twenty-First Century*, available at <http://www.waternunc.com/gb/secwwf12.htm>.

55. *Id.*

56. World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26-Sept. 2, 2000, U.N. Doc. A/CONF.199/20.

mentation adopted at the WSSD.⁵⁷ However, similarly to the above-mentioned Declaration, it did not explicitly refer to a human right to water. The problem of access to water is one of the concerns of the Commission on Sustainable Development (hereinafter the CSD).⁵⁸ The 12th Session of the CSD, convened in 2003, in the aftermath of the Johannesburg Summit, concentrated on water problems.⁵⁹ The 2003 Third Water Forum in Kyoto was a disappointment, as it did not acknowledge the explicit right to water.⁶⁰ It adopted a similar approach to that of the WSSD Plan of Implementation and focused on combating the scarcity of water and poverty.⁶¹

One of the most important soft law documents is the 2005 Millennium Project, commissioned by the Secretary General of the United Nations.⁶² One of the Millennium Development Goals (hereinafter MDG) of this Project is to ensure that the proportion of people without access to safe drinking water and basic sanitation is halved by 2015.⁶³ As shown below, this goal is currently being implemented by the United Nations and forms the basis of the United Nations pol-

57. World Summit on Sustainable Development, Johannesburg, S. Afr., Aug.26-Sept.2, 2000, ¶25, *available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf.

58. The United Nations Commission on Sustainable Development (CSD) was established in December 1992 by UNGA Resolution A/Res/47/191/ as a functional commission of the UN Economic and Social Council, implementing a recommendation in Chapter 38 of Agenda 21 adopted at the 1992 Rio Conference on Environment and Development.

59. "The session's focus was on the need to provide 1.6 billion people with safe drinking water and ensure 2 billion people have access to basic sanitation by 2015; as well as to sustainably improve the living conditions of 100 million slum dwellers by 2020". The Twelfth Session of the Commission on Sustainable Development (CSD 12), New York 12-30 April 2003, *available at* http://www.bond.org.uk/pubs/groups/environment/deg_csd12.pdf (last visited 11 January 2007).

60. The Third World Water Forum, *available at* <http://210.169.251.146/html/index.html>.

61. The Ministerial Declaration states: "(16). Achieving the target established in the MDGs to halve the proportion of people without access to safe drinking water by 2015 and that established in the Plan of Implementation of the WSSD to halve the proportion of people without access to basic sanitation by 2015 requires an enormous amount of investment in water supply and sanitation. We call on each country to develop strategies to achieve these objectives. We will redouble our collective efforts to mobilize financial and technical resources, both public and private".

62. Millennium Project, *available at* http://www.unmillenniumproject.org/reports/country_proc3.htm

63. G.A. Res. 55/2, ¶19, U.N. Doc. A/RES/55/2 (Sept.18, 2000).

icy towards water availability. It was observed, however, that “[p]rogress in access to safe drinking water . . . is still too slow to achieve the MDG targets.”⁶⁴

It may be noted that the approach to water in the Millennium Project is also based on water accessibility rather than on the human right to water. It may also be mentioned that in 2003 the European Parliament stated that access to drinking water is a basic human right.⁶⁵

The most fundamental policy, however, was General Comment No. 15, adopted by the United Nations Committee on Economic, Social and Cultural Rights (hereinafter the E.S.C. Committee), in 2002 on “The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights).”⁶⁶ General Comment 15 is a bulky document, comprised of six parts: I- Introduction; II. Normative Content of the Right to Water; III. States Parties’ Obligations; IV. Violations; V. Implementation at the National Level; and VI. Obligations of Actors Other than States.

The General Comment No. 15 infers a human right to water from Articles 11 and 12 of the E.S.C. Covenant.⁶⁷ The General Com-

64. U.N. Millennium Project 2005, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals*, available at <http://www.unmillenniumproject.org/documents/MainReportChapter2-lowres.pdf>.

65. See also the 2004 Resolution of the European Council on Environmental Law on the Recognition of the Right to Drinking Water in the Member States of the European Union. (This is wrong. So is the source in the source box (i.e. it’s a page out of a report from the world conservation union, not the EU Council on Environmental Law).)

66. U.N. ESCOR, Comm. On Econ., Soc. And Cultural Rights, 29th. Sess., U.N. Doc.E/C.12/2002/11 (Nov. 26, 2002) [hereinafter General Comment No.15]. See also, *McCaffrey II*, *supra* note 1, at 102-103 (on the background of the E.S.C. Committee).

67. General Comment No. 15, *supra* note 55, at ¶ 3. “Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realisation of the right to an adequate standard of living ‘including adequate food, clothing and housing’. The use of the word ‘including’ indicates 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, particularly since it is one of the most fundamental conditions for survival. Moreover, the Committee has previously recognised that water is a human right contained in Article 11, paragraph 1 . . . The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing and adequate food (art. 11, para. 1). The right should be also seen in conjunction with other rights enshrined in the

ment No. 15 noted an importance of ensuring access to water resources for agriculture in order to implement the right to food.⁶⁸ Furthermore, it specified the categories of people especially dependent on water supplies, such as farmers (including women farmers), and indigenous peoples.⁶⁹ The General Comment No. 15 stresses environmental hygiene, which derives from the right to health (Article 12, paragraph. 2 of the Covenant and which is based upon taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water.⁷⁰ The General Comment No. 15 further states, in paragraph 12(a), that each individual should have access to a quantity of water corresponding to the guidelines of the World Health Organisation, and that "priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of then Covenant rights."⁷¹ The so-called "core obligations" have been defined before in the 1990 General Comment No 3: (The Nature of States Parties Obligations, Article 2[1] of the International Covenant on Economic, Social and Cultural Rights): On the basis of the extensive experience gained by the "Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, essential primary health care, basic shelter and housing, or the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure

International Bill of Human Rights, foremost amongst them the right to life and human dignity." (doesn't seem to be referring to the correct note) Ask author

68. *Id.* at ¶ 7.

69. *Id.* at ¶ 7.

70. *Id.* at ¶ 8.

71. *Id.* at ¶ 6.

to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”⁷²

The General Comment No 15 referred to this concept and identified a number of States’ obligations in relation to water, which must be implemented immediately, regardless of the fact that parties to the Covenant have a general duty to realise only progressively.⁷³ These core obligations are as follows:

- a. to ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;
- b. to ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged and marginalized groups;
- c. to ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
- d. to ensure personal security is not threatened when having to physically access to water;
- e. to ensure equitable distribution of all available water facilities and services;
- f. to adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;
- g. to monitor the extent of the realisation, or the non-realisation, of the right to water;

72. United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 3, ¶ 10, *available at* <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/generalcomment3.htm>.

73. General Comment No. 15, *supra* note 28, at ¶ 37.

- h. to adopt relatively low-cost targeted water programmes to protect vulnerable and marginal groups;
- i. to take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.⁷⁴

McCaffrey makes a pertinent comment that some of these core obligations will be very difficult to implement immediately at the minimum level (such as the one included in “c”).⁷⁵ Paragraph 38 stresses the special position of developing countries in relation to the fulfilment of core obligations contained in paragraph 37, in that State parties have the duty to provide international assistance and cooperation, especially economic and technical.⁷⁶

In its Introduction, the General Comment 15 states that: “[w]ater is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other human rights.”⁷⁷

McCaffrey poses a pertinent question as to the meaning of the statement that “water is . . . public good,” i.e. whether water is treated by the E.S.C. Committee as an economic good, thus subject to privatisation (see below); or perhaps approached in a more general manner a common good (a concept, which is based in the Roman Law).⁷⁸ The General Comment 15 addresses the link between a human right to water and privatisation of water systems. It imposes general obligations on States in implementation of a human right to water: “obligations to *respect*, obligations to *protect* and obligations to *fulfil*.”⁷⁹ The obligation “to protect” includes the duty by State parties, in a situation where water services are operated or controlled by third parties to “prevent them for compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, genuine public participation

74. *Id.* at ¶ 38.

75. *McCaffrey II*, *supra* note 1, at 110.

76. General Comment No. 15, *supra* note 28, at ¶ 38.

77. *Id.* at ¶ 1.

78. *McCaffrey II*, *supra* note 1, at 104-105.

79. General Comment 15, *supra* note 28, at ¶ 20.

and imposition of penalties for non-compliance.”⁸⁰ Paragraph 27 of the General Comment 15 obliges the Parties to ensure that water is affordable. In order to achieve this:

States parties must adopt the necessary measures that may include, inter alia: (a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low-cost water; and (c) income supplements. Any payment for water services has to 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.⁸¹

From the above-quoted paragraph, it is obvious:

that the ESC Committee does not regard privatisation of water services as constituting a *per se* violation of the human right to water. This position seems realistic in view of global trends in the direction of privatisation, as well as enormous investment that will be required to meet the Millennium Development Goal, and that of the Johannesburg Summit, of halving the number of people without safe access to clean water and basic sanitation by 2015. Nor does the Committee exclude charging for water supplied to households; it requires only that water be affordable- i.e., that the user in question be able to afford to pay for it.⁸²

McCaffrey postulates that this can be achieved through subsidies, income supplements, or a sliding tariff scale for water users.⁸³

The content of a human right to water is defined in the following way: “[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal

80. *Id.* at ¶ 24; *See also, McCaffrey II, supra* note 1, at 105.

81. General Comment 15, *supra* note 28, at ¶ 27.

82. *McCaffrey II, supra* note 1, at 105-106.

83. *Id.* at 106.

and domestic uses.”⁸⁴ McCaffrey, raises the important question of what are the consequences attached to such a right, in other words whether, all the elements of this right had to be implemented immediately by concerned Governments.⁸⁵ According to the same author, the compliance with such a right, cannot include the duty of providing sufficient amount of water per day (around 50 liters per day), as a requirement often impossible to comply with by many countries, in particular that the lack of the provision of the minimum of water, is often due to the management failures, rather than the water scarcity.⁸⁶ Part IV of the General Comment No. 15 contains a number of provisions relating to violations of the right to water. Paragraph 39 has the general rule that “[w]hen the normative content of the right to water . . . is applied to the obligations of States parties . . . , a process is set in motion, which facilitates identification of violations of the right to water.”⁸⁷ The General Comment No. 15, states that “[i]t should be stressed that a State party cannot justify its non-compliance with core obligations set out in paragraph 37 above, which are non-derogable.”⁸⁸

As, it was observed above, the rights contained in the E.S.C. Covenant, are meant to be implemented progressively, according to available resources. McCaffrey made the following comments:

[i]t could therefore be argued that even if a human right to water were explicitly enshrined in the ESC Covenant, it would be largely of symbolic value. Such a right that is only implicitly recognised -as it is the case with the right to water-would even have less impact. Symbols are important, however, and in this case the ESC Committee’s finding will help to call attention to the global freshwater crisis and the need for governments to address it. Moreover, the Committee will expect States parties to the ESC Covenant to report on their implementation of the right to water, as articulated in General Comment 15. This will inevitably provide further impetus to efforts to improve the availability of freshwater and sanitation services.”⁸⁹

84. General Comment 15, *supra* note 28, at ¶ 2.

85. *McCaffrey II*, *supra* note 1, at 107.

86. *Id.* at 108.

87. General Comment 15, *supra* note 28, at ¶ 39.

88. *Id.* at ¶ 40.

89. *McCaffrey II*, *supra* note 1, at 108.

Regional practice does not recognise the direct human right to water, but supports the view that the failure to meet the basic needs constituted a contributory element to the violation of other human rights.⁹⁰

In conclusion of this section, it may be said that the General Comment No. 15 is a very important step in the process of the recognition of the human right to water and generally in turning the world's attention to the challenges of water as a resource. However, it will be a simplification to assume that such a right has already emerged as there is no uniform practice of States, parties and non-parties to the ESC Covenant, which would corroborate such a view. Even if we assumed that such a right existed, its implementation is to be done in a progressive manner, not immediately.⁹¹ At any rate, it should be noted that the E.S.C. Committee's General Comment have no binding effect on States-Parties to the Covenant. In relation to identification of some of the so-called "core obligations," which are to be implemented immediately, McCaffrey notes that they "may do more harm than good," because they set unrealistic goals and create expectations that they will be carried out instantly.⁹² This may result in depreciation of values set by the General Comment No. 15. Therefore, we may agree with this author that "[t]he human right to water is crucial to the welfare of people around the world. Regard-

90. See, e.g., *McCaffrey II*, *supra* note 1. In 1995 the African Commission on Human and People's Rights established that Zaire had breached the right to health under Article 16 of the African Charter by failure to provide basic services such as safe drinking water and electricity (African Human and Peoples' Rights Commission, No. 25/89, 47/90, 56/91, 100.93. Decision adopted in 1995, available at http://www1.umn.edu/humanrts/africa/comcases/25-89_47-90_56-91_100-93.html (cited by *McCaffrey II*, *supra* note 1, at 99); Inter-Am. C.H.R. Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1. 24 April 1997, available at <http://www.cidh.org/countryrep/ecuador-eng/chaper-8.htm>, recognised a link between potable water and human well-being. In analysing the right to life and the duty to protect the physical integrity of the individual under the 1969 American Convention on Human Rights, referred to considerable risk posed to human life and health due to oil exploitation activities...through, *inter alia*, contamination of water supplies (cited by *McCaffrey II*, *supra* note 1, at 99). Within the European context, the European Court of Human Rights in 1993 *Zander v. Sweden* found a violation of Article 6 (1) of the 1950 European Convention on Human Rights and Political Freedoms in relation to potential pollution of drinking water well from a nearby dump. *Zander v Sweden* (1993), Series A, No. 279B.

91. *McCaffrey II*, *supra* note 1, at 115.

92. *Id.*

less of its precise source and content, it should be treated by the international community as living and growing, but still somewhat fragile, newborn thing, in need of nurture and careful development.”⁹³

The interesting issue, which was raised as regards the General Comment No. 15 is the role of users in the management of water resources, as to which the General Comment is silent. The General Comment does not place any corresponding duties on those who are to be bestowed with the right to water. The rights of users in general terms are, as well as not specified, such as the duty to conserve water, use it in a sustainable manner, or protect and pay for it.⁹⁴

Although there is no precise and uniform definition of the right to water, it may be said that at the very least it should mean that “[a]ll individuals, without discrimination and independent of their income, should be able to obtain a limited quantity of safe drinking water for their essential needs.”⁹⁵ This right in industrialised countries imposes an obligation of public authorities to provide the supply of water and sanitation at affordable prices, as well monitor and control it.⁹⁶ Public authorities have special obligations regarding the provision of water to the poor for setting up a system to obtain drinking water without too much cost. In such circumstances, the costs are borne either by a taxpayer or the user.⁹⁷

93. *Id.*

94. SALMAN & MCINERNEY-LANKFORD, *supra* note 1, at 74.

95. *Smets II*, *supra* note 1, at 183.

96. *Id.*

97. *Smets II*, *supra* note 1, at 184. The same author lists the following four components of the right to water: 1. Any person living near a source of water must have an access to water without discrimination as to nationality, race, religion, etc. 2. A person who had an access to drinking water may not be deprived of it. In case of non-payment by a poor person, the utility or municipality has to provide a minimum quantity of water, or access to nearby standposts. 3. Emergency measures must be taken if water becomes unavailable due to natural disaster, flood, etc. 4. Persons supported by authorities (very poor, homeless, etc.) must receive water necessary for their life in dignity. *See also*, ROSEMANN II, *supra* note 1, at 2-3. Stating an interesting view on the issue of water supply as seen from the point of view of duties of a government and non-state actors that correspond to the right to water: the duty of a State to respect, protect and implement the human right to water; the duty of a State to respect the human right to water in other countries, that is not to interfere with the implementation of other governments' duties to respect the right to water; the duty of a State to contribute to the implementation of the human right to water in other countries by means of international cooperation; the duty of a State to prevent and stop violations of human right to water and to make no decisions that threaten the implementation of the human right to water in

However, notwithstanding the great support the human right to water has received, there are reasons given against it. According to Smets they are as follows: "1. it creates international liability; 2. it prevents commodification of water; 3. it implies free access to water; 4. it hinders liberalisation or privatisation of water utilities; 5. it creates obstacles to free trade; and 6. it facilitates legal harassment of water utilities or public authorities."⁹⁸ Smets is of the view that the above-mentioned arguments are the result of the misconception as to the character of economic, social and cultural rights, which are progressive rights, unlike civil and political rights, which require an immediate implementation. The progressive implementation by States of the right to food, clothing, housing and health did not result in international liability of States.⁹⁹ There are also several misunderstandings as to the character of the right to water itself. According to Smets, there are views expressed that the recognition of the human right to water would conflict with water as a commodity, i.e. it would result in the prohibition of water utilities to set water tariffs freely. Smets, however, is of the view that water "can be a right and a commodity at the same time"¹⁰⁰ and despite being a right in some countries, the supply of water can be disconnected (such as in South Africa, see below). In contrast, in the United Kingdom, where water has been privatised, it is illegal to disconnect it.¹⁰¹ The situation in which the poor cannot pay for water but are entitled to water may be resolved the way it is done in France and the UK, where the supply of water to public places (such as fountains) or to the poor is specified and paid by subsidies to water utilities.¹⁰²

one's own country and in other countries (possibly done within the framework of international organisations); the duty of international organisations to respect the human right to water and to contribute to its implementation by means of international organisations; the duty of non-state actors (companies, individual persons), to respect the human right to water to support its implementation within their own scope of action.

98. *Smets II*, *supra* note 1, at 177.

99. *Id.* at 178.

100. *Id.* at 179.

101. *Id.*

102. *Id.*

IV. WATER FROM THE PERSPECTIVE OF LIBERALISATION/PRIVATISATION

A. *Water as Commodity*

This section of the essay consists of two parts: one deals with water privatisation from the point of domestic regulation and part two is devoted to the related issue of water within the World Trade Organisation (the WTO) and the General Agreement on Trade in Services (the GATS).

1. Privatisation of Water

At present, the water market is estimated to be worth more than \$400 billion U.S. per year, and only 50% of all water is in the private sector.¹⁰³

Poor people living in slums often pay 5-10 times more per litre of water than wealthy people in the same place, since water passes through intermediaries and each adds transport and marketing fees.¹⁰⁴ Prices are hiked up by intermediaries buying water in bulk at the highest price to sell it to the poor.¹⁰⁵ Often the poor cannot afford the connection fee as it can exceed \$100.¹⁰⁶

As Rosemann observes, the human right to water requires guaranteeing non-discriminatory, fair, sufficient and affordable access to drinking water to all people, in order to satisfy their personal needs (such a preparation of food, the use of water for sanitary facilities and for domestic consumption): all of these aims require considerable funding.¹⁰⁷ Traditional public funding of water supply is not sufficient. There is a plethora of possible private/public sector partnerships in water services. The UNDP noted that “[t]he diversity in public-private partnerships cautions against lumping off all private sector involvement under the general heading of privatisation.”¹⁰⁸ The system adopted in the UK - full State divestiture - is rare. Unre-

103. MCADAM, *supra* note 1, at 37 (citing Barlow & Clarke, BLUE GOLD 104 (New York, 2002)).

104. WATKINS ET AL., *supra* note 1, at 10.

105. *Id.* In Dakar, poor households using standpipes pay more than three times the price paid by households connected to the utility.

106. *Id.* In Manila, the cost of connection to the utility for the poorest households is about 3 months income, and in urban Kenya, 6 months.

107. ROSEMAN II, *supra* note 1, at 2.

108. WATKINS ET AL., *supra* note 1, at 91.

solved problems, such as the absence of any explicit mechanism for sharing the benefits of performance gains between shareholders and consumers and what were seen as excessive profit margins, make the system difficult to implement. It must be mentioned that the concepts of privatization and commercialisation, and the relationship between the two, are sources of confusion.¹⁰⁹

There are two main systems of the involvement of private sector in water supply services: complete privatisation and Public-Private-Partnerships (the PPP). In the PPP system a public body remains a stakeholder with some control in this sector. In other words, most water services (such as the actual provision of water) remain in the hands of a monopoly provider, with some of them outsourced to private companies.

The participation of private sector varies from “management, concessions to build, operate or transfer a certain infrastructure to long lasting concession agreements.”¹¹⁰ PPP most frequently appear in the form of concession agreements in water and sanitation sector.¹¹¹ As Rosemann noted: “since PPP focuses on the micro-level it should be contested as the appropriate form to meet the objectives of development cooperation which necessarily needs to focus on both the macro- and micro-level”.¹¹²

Under the leasing contract, the Government delegates the management of public utility to a company for a fee, while the ownership of assets remains with a holding company operating for the government (such as Burkina Faso’s National Office for Water and Sanitation). Mention also must be made of so-called build-operate-transfer (the BOT) contracts, which combine both financing and outsourcing contracts. Similar to the lease contract is a French system, so-called *affermage* contract, under which the operator is paid an agreed-upon fee for each unit of water produced and distributed. Under the lease contract, however, the operator’s fee is conditioned upon the tariff collected in relation to the standard fee payable to the public sector. Similarly to the lease contract, it is concluded for the period of 10-15 years (*affermage* contracts are concluded e.g., in Côte d’Ivoire).¹¹³

109. *Id.* at 92; see also O.A. K’Akumu, *Privatisation Model for Water Enterprise in Kenya*, 8 *WATER POL’Y* 539, 542-546 (2006).

110. *Rosemann I*, *supra* note 1, at 3.

111. *Id.*

112. *Id.*

113. O.A. K’Akumu, *supra* note 109, at 545.

Concession agreements have a mixed record. As the crisis in Cochabamaba evidenced, (see below) the lack of transparency was one of the reasons for the failure of the concession.¹¹⁴ No attempt was made to gather the views of the poor, and customary rights of indigenous population were not taken into account.¹¹⁵ A second reason for the failure was the tension between commercial and social imperatives – companies undertook the task of generating the profit for shareholders by raising tariffs, thus damaging water security for poor households.¹¹⁶ The third reason for failure is the most important: the complexity of increasing access by the poor was greatly underestimated.¹¹⁷ “If the problem had properly assessed, public finance and subsidized connections would have figured more prominently.”¹¹⁸

The same author critically analyses the participation of foreign direct investments (FDIs) in partnerships. FDIs are a very important supplement to national and international developmental activities. However, bearing in mind that their main aim is to generate a profit, doubt remains whether FDIs in fact contribute to developmental goals, as set by the Millennium Goals. Furthermore, privatising water services may have a negative effect on States’ ability to meet their human rights obligations. There are also other concerns regarding FDIs and privatisation. Privatisation shifts responsibility for investment in essential services from the public to private sector. That responsibility can thereafter be transferred from water service providers to the consumer. Furthermore, since FDIs are commonly denoted in foreign currency, the consumer bears the burden of fluctuations in foreign exchange rates, and water supply becomes less affordable.¹¹⁹

Deregulation constitutes yet another problem relating to privatisation. Deregulation may lead to a rise in prices for water, for example, which would interfere with States’ obligations to regulate private sector in such a manner, as to discharge their duty to respect human rights. As Rosemann postulates, “[t]he normative demand of the human right to water should be considered as the precondition for PPP and involving FDI. This would mean, that decision making

114. *Rosemann I, supra* note 1, at Part 4.1.

115. *WATKINS ET AL., supra* note 1, at 93

116. *Id.*

117. *Id.*

118. *Id.*

119. *Rosemann I, supra* note 1, at Part 4.1.

processes about private sector involvement should be taken in an open and transparent way with the involvement of affected stakeholders, such as actual and potential customers.”¹²⁰ The same author is of the view that different forms of privatisation should be considered, full or partial privatisation of public enterprises to PPP, including concessionary contracts, build-operate-and-transfer contracts and outsourcing.¹²¹ Finally, the human right to water should be included in any international investment agreement.¹²²

In countries with low coverage rates, the UNDP cautions against undue use of the private sector to manage water supplies.¹²³ First, the water sector has many of the characteristics of a natural monopoly, thus in the absence of a strong regulatory technique to protect the public interest through the medium of pricing and investment, there is a threat of monopolistic abuse.¹²⁴ Second, in countries with high levels of poverty among unserved strata of population, public finance is a condition for extended access, notwithstanding whether the provider is public or private.¹²⁵ Public provision of water accounts for 90 percent of water supplied in developing countries.¹²⁶ However, public utilities are often inefficient and fail the poor.¹²⁷

As McAdam observes, although privatisation is often blamed for the neglect of human rights and the promotion of profit oriented strategies, other policies are frequently responsible for the lack of economic growth. Singapore, Hong Kong, Taiwan and South Korea, for example, have relied on privatisation and experienced positive economic growth. However, there are other countries that have not been so successful including Kyrgyzstan, Kenya, and San Salvador.¹²⁸ In some developing countries, private businesses lack compe-

120. *Id.* at Part 4.2.

121. *Id.*

122. *Id.* This author, however, noted that there are several considerations to be taken into account when considering international investment agreements (the ILAs) as a procedure to remedy the lack of funds: ILAs are only one determinant in the investor’s decision to invest on then country. Considerations are also given to economic and local determinants, such as infrastructure, human resources, internal and export market conditions, political stability and country’s policies on FDIs.

123. WATKINS ET AL., *supra* note 1, at 1.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. MCADAM, *supra* note 1, at 34.

tition and therefore provide poor services. Black markets contribute to the market failures by “protecting monopolized industries of black market goods and perpetuating their power at the same time. By doing so, they give a bad name to industries not run by the state and contributed to the stigma surrounding privatisation.”¹²⁹

A good example of problems arising from privatisation of utilities can be found in South America, where several illegal private enterprises that provide services of very poor quality are neither regulated by a State nor competed against.¹³⁰ In instances where state water services cannot reach all households, competition would be beneficial for the provision of more adequate private water services.¹³¹

In 1989, all utilities in the U.K. were floated on the market and their assets privatised. Between 1989 and 1995, while the profit margins of private companies increased 692%, the rates for water charges were hiked 106%.¹³² Although it may show the privatisation of water in a negative light, the Economist stated that in terms of quality, service, delivery, and efficiency, the record of private companies is excellent; however, as it regards the market performance, this is less so.¹³³ The Scottish experience is less positive than the English one. In 1989, water service, which was comparable to English utilities, remained in public hands when the English privatisation programme was introduced.¹³⁴ However, in 2003, when the Economist’s survey of water was conducted, “Scottish Water [was] less efficient than its southern peers, its service delivery [was] poorer and its water quality [was] worse; it [was], in short, ten years behind. To catch up, it is having to raise water tariffs above English levels.”¹³⁵ Therefore, it is seen that public ownership of water services is not always the best solution.

The general assessment of the privatisation of British water services is rather positive:

One lesson the British utilities have learnt is that privatisation cannot mean they are free to conduct their business

129. *Id.* at 35.

130. *Id.*

131. *Id.* at 36.

132. *Id.* at 37.

133. *Private Passions*, ECONOMIST, Jul. 19, 2003, at 6 [hereinafter ECONOMIST].

134. *Id.*

135. *Id.*

as they wish. Because water supply is a natural local monopoly, any privatisation requires a strong and permanent public regulator. In a sense privatisation is a misnomer. The water remains under government control; tariffs and services remain tightly regulated; and even if assets such as sewers and pumping stations are transferred to a private company, their use is circumscribed, and the companies are licensed to operate only for 25 years.¹³⁶

The French model is different than the British model: assets are kept in public hands but investment, operations and maintenance are contracted out.¹³⁷ According to Smets, France has consistently supported the human right to water, and all stakeholders agree that there is a human right to water even without specific domestic law to this effect.¹³⁸ Three-quarters of the population are supplied by three French multinationals. Municipalities can select a water system under private-public water system or purely public. Laws are being enacted to enhance competition but around 10 percent of costs are still covered by subsidies. Despite great efforts to provide water for all, there are still groups of people who do not benefit from full water supply. It is still legal to cut off water supply for the non-payment of bills.¹³⁹ It may be observed that under the British system, which privatised water services, it is an illegal practice. By comparison, however, in France, a nation that only partly privatised water services and recognises the human right to water, it is legal.

As it was observed in *The Economist*, “[t]he real test bed, however, has been Latin America . . . the World Bank encouraged cash-strapped governments to let water concessions to the big private companies, especially Suez and Vivendi . . .”¹⁴⁰ For a time the model adopted was that of Buenos Aires, where concessions were awarded to a subsidiary of Suez, which managed to cut water tariffs and extend 24-hour service.¹⁴¹ However, the 2002 economic devaluation in Argentina destroyed this operation (the Government did not allow to raise water prices and Suez withdrew, see below).

136. *Id.*

137. *Id.*

138. *Smets II, supra* note 1, at 185.

139. *Id.* at 187-88.

140. *ECONOMIST, supra* note 133, at 7.

141. *Id.*

The world financial institutions (such as the World Bank and the International Monetary Fund-IMF) often made loans conditioned upon privatisation of water utilities.¹⁴² Such a requirement was contained in the Structural Adjustment Programme attached to the loan.¹⁴³ Multinational water companies were the main beneficiaries of such requirements.¹⁴⁴ The International Bank for Reconstruction and Development (the IBRD) and the International Finance Corporation (the IFC), both the part of the World Bank, are involved in many of these schemes. For example, in Mozambique, a US \$117 million loan, the provision of which was helped by the IBRD, had privatisation of water services as a condition attached to it.¹⁴⁵ The French multinational, with operations in over 80 countries received the contract to provide water. In Argentina, the IFC provided the French water multinational Suez with upwards of US \$500 million to privatise the water industry in Buenos Aires. The IMF, through its Poverty Reduction and Growth Facility programme, increased the requirement of water privatisation for debt relief even in the poorest and most unstable countries such as Niger and Rwanda.¹⁴⁶ In Nicaragua, the IMF conditioned debt relief upon the Government increasing its water and sewage tariff by 1.5 percent a month on a continuous basis for the purpose of full-cost recovery, which amounts to consumers bearing the full-cost of operation, maintenance and capital expenditures.¹⁴⁷ As McAdam, observes, "These countries not only lack the infrastructure necessary to ease the structural transition to privatization, but also, they are not consolidated democracies and, thus, decisions to privatize are almost certainly not in the interest of the general public."¹⁴⁸ In 2001, the World Bank granted a US \$110 million loan to Ghana, which was conditioned on the performance of several actions, *inter alia*, and the increase of electricity and water

142. MCADAM, *supra* note 1, at 45.

143. *Id.*

144. *Id.*

145. *Id.* at 45-46..

146. *Id.* at 46.

147. *Id.* at 46-47.

148. *Id.* at 47. See generally *IMF and World Bank Push Water Privatization and Full Cost Recovery on Poor Countries*, 2 NEWS AND NOTICES FOR IMF AND WORLD BANK WATCHERS §5, available at <http://www.citizen.org/documents/IMF-WB%20promote%20privatization.pdf> (providing a breakdown of the IMF loans containing water privatisation and cost recovery conditions, including a survey of the following states: Angola; Benin; Guinea-Bissau; Honduras; Nicaragua; Niger; Panama; Rwanda; Sao Tome and Principe; Senegal; Tanzania; and Yemen).

tariffs by 96% and 95%, respectively, to cover operating costs.¹⁴⁹ The price of water greatly exceeded the possibility of the average person in Ghana and the real beneficiaries of this scheme were the new water company, World Bank lenders and the political elite in Ghana, which are all on good terms with international lending institutions.¹⁵⁰ McAdam notes another problem:

The close relationship between the IMF/World Bank lending institutions and corporate water providers has spilled over into political bodies other than just domestic governments and is a cause of great concern. The problem with the extremely close relationship between politics and business is that the prospects for stability and growth in the developing world, which the IMF, World Bank, and developed country governments claim they are promoting, have become increasingly tainted by the profit-driven incentives of water MNCs. Such corporations are very effective lobbying machines.¹⁵¹

In Bolivia, three big cities, La Paz, Santa Cruz and Cochabamba, established schemes to improve water supplies.¹⁵² La Paz awarded a contract to a Suez subsidiary, and Santa Cruz improved water utility with the help of the World Bank loans. In Cochabamba, plans were greater and envisaged building a large dam and a tunnel to tap another watershed. In 1999, the IMF approved a loan of US \$138 million to help the country control inflation and assist economic growth. The structural plan drafted by the IMF provided for a sale of public enterprises, including national oil refineries and the Cochabamba water agency the SEMPA. The Bolivian Government concluded a US \$2.5 billion, 40-year contract to hand over the municipi-

149. MCADAM, *supra* note 1, at 47 (citing Sara Grusky, *Privatization Tidal Wave – IMF/World Bank Water Policies and the Price Paid by the Poor*, 22 THE MULTINATIONAL MONITOR No.9, (2002), available at <http://multinationalmonitor.org/mm2001/01september/sep01corp2.html>).

150. See MCADAM, *supra* note 1, at 47.

151. *Id.* at 47-48. This author gives an example of a French Suez corporation, whose CEO and Director have had numerous positions with the French Government, and whose Board of Directors includes current and former executives from three large banks in France, Nestle, and Shell. Through its US subsidiaries Suez donated money for congressional campaigns and gave unrequested donations during the 1999-2000 election cycle. *Id.* at 48.

152. ECONOMIST, *supra* note 133, at 7.

pal water system to Aquas del Tunari, a multinational consortium of private investors, including a subsidiary of the UK-based company Water Limited, which in itself is a subsidiary of the Bechtel Corporation, the biggest U.S.-based water multinational. Aquas del Tunari was granted the right to supply water to the municipalities network for industrial uses in the Cochabamba province. Upon the takeover of water services by Aquas del Tunari, water in lakes and rivers ceased to be a collectively owned resource and became a privately owned commodity, thereby depriving people of its use (up to 45 percent of the population in Cochabamba used a water supply from such sources, not piped water). Tariffs for water increased between 30 and 300 percent. The minimum wage in Bolivia is US \$100 per month and the new tariff amounted to a quarter of the monthly wages for working classes. Protests led by the Coalition for the Defence of Water ensued, which led to the imposition of martial law, civil unrest and the death of a 17-year old boy. In the view of some authors, protestations were fundamentally directed against the commodification of water, which was proclaimed by the demonstrators as being the collective heritage of mankind and a basic human right. Therefore, the conflict was not only about the unequal distribution of water, which could be solved by redistributing purchasing power, but focused on cultural perceptions of the nature of water, which according to demonstrators could not be owned privately. In 2005, the people of El Alto in Bolivia demonstrated against their water system, which was privatised in 1997, hoping to return it to private (public?) hands. Three days later, water concession with the French company Suez was cancelled.¹⁵³

The Government rescinded the deal after four months, and the Aquas del Tunari filed a petition for US \$25 million before the International Centre for Investment Disputes (the ICSID), which was part of the World Bank Group, in response to the alleged violation of the Bilateral Investment Agreement (the BIT) between the Netherlands and Bolivia.¹⁵⁴ The dispute was settled in 2006, without any com-

153. Terra Lawson-Remer, *Values Under Siege: NAFTA, GATS, and the Privatization of Resources*, 14 N.Y.U. ENVTL. L. J. 481, 493-494 (2006).

154. World Water Council, *Proceedings of the Workshop on Water and Politics: Understanding the Role of Politics in Water Management*, n.7, Sept 26-27, 2004, available at http://www.worldwatercouncil.org/fileadmin/wwc/Library/Publications_and_reports/Proceedings_Water_Politics/proceedings_waterpol_full_document.pdf.

pensation paid out to the company.¹⁵⁵ This case also shows that concession agreements are often protected and vindicated through the medium of the BIT, which aims:

to promote foreign investments and improve the legal protection offered to foreign investors. Many of these instruments therefore share common provisions concerning, *inter alia*: the definition of investments; corporate nationality and protection of shareholders; the treatment of foreign investment; the repatriation of profits; expropriation and compensation; and the settlement of disputes.¹⁵⁶

The most important role of the BITs is in the settlement of disputes.

According to the World Development Movement, “Although the “name ha[d] changed, the much discredited structural adjustment-style policies that benefit western companies rather than the poor still predominate.”¹⁵⁷

The UNDP observes, however, that the debate on public/private aspects of water provision:

has been curiously out of step with reality. While the number of people served by private water companies has grown - from about 51 million in 1990 to nearly 300 million in 2002 - public water companies account for more than 70% of total investment globally, and fewer than 3%

155. Damon Vis-Dunbar & Luke Eric Peterson, *Bolivian Water Dispute Settled, Bechtel Forgoes Compensation*, INVESTMENT TREATY NEWS, Jan. 20, 2006, available at http://www.iisd.org/pdf/2006/itn_jan20_2006.pdf (citing Bechtel’s announcement that “the Government of Bolivia and the international shareholders of Aguas del Tunari declare that the concession was terminated only because of the civil unrest and the state of emergency and not because of any act done or not done by the international shareholders of Aguas del Tunari (Bechtel, Befesa, Abengoa and Edison)”).

156. Serge Pannatier & Olivier Ducry, *Water Concessions, and Protection of Foreign Investment Under International Law*, in FRESH WATER AND INTERNATIONAL ECONOMIC LAW 289, 292 (Edith Brown Weiss, Laurence Boissonde Chazournes & Nathalie Bernasconi-Osterwalder eds., 2005); see also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 (France/Argentina BIT) -Award, Aug. 20, 2007, available at <http://ita.law.uvic.ca/documents/VivendiAwardEnglish.pdf>.

157. JOY & HARDSTAFF, *supra* note 1, at 10.

of people in developing countries receive water or sanitation services that are fully or partially private.¹⁵⁸

The record of publicly supplied water in developing countries is mixed. In many countries, failure is caused by poor governance, such as a top-down service provision model that lacks transparency and is unresponsive to the needs of users and the lack of democratic accountability. However, public utilities in Singapore lose less water than private utilities in England. In Porto Alegre in Brazil, utility reform produced gains in efficiency and democratic accountability.¹⁵⁹

It would be a simplification to blame privatisation entirely for failing to provide affordable water supply. The question is how privatisation is conducted and the relationship between public (governmental) and private sectors. A good example of a mostly successful privatisation of water utilities is England, where after an initial period of the rise of prices, privatisation made water more affordable and lowered its prices.¹⁶⁰ Privatisation was effected gradually, whilst in Bolivia it proceeded too quickly and the rise of prices in the process of the transition period resulted in an unsustainable situation for the poor.¹⁶¹ Other factors of a successful privatisation are the inclusion of everyone in the market for water and the belief by people that their governments will protect them if the negative effects cannot be sustained on an individual or household level (such as in England but not in Bolivia).¹⁶² The crucial factor of successful privatisation is good governance and the right institutional framework (i.e. an effective regulation).¹⁶³ This is also a view expressed in the 2006 UNDP Human Development Report, which states that:

[r]egulation is critical to the progressive realisation of the human right to water and protection of public interest in water provision. In a market with limited competition,

158. WATKINS ET AL., *supra* note 1, at 89 (explaining that in Brazil, 25 of the 27 state capitals are served by public companies and only 2 by partially privatised companies); see also Razzaque, *supra* note 1, at 24-25; V.Sridhar, *Water War*, FRONTLINE, Feb. 1-14, 2003, available at <http://www.hindunet.com/fline/stories/2003214000206000.htm>.

159. WATKINS ET AL., *supra* note 1, at 89-90.

160. MCADAM, *supra* note 1, at 39

161. *Id.*

162. *See Id.* at 38-40.

163. *See* ECONOMIST, *supra* note 133, at 8.

and a product that is fundamental to human well-being, regulatory authorities need to ensure that providers are managed in a way that secures both equity and efficiency.¹⁶⁴

In conclusion of this section, it may be said that:

there are no hard and fast cross-country blueprints for success. Some publicly owned providers (Porto Alegre) are world class performers, as are some privatised companies (Chile). Many publicly owned utilities are, by reasonable criteria, failing the poor-and that failure is linked to under financing and poor governance. But the idea that public sector failures can be swiftly corrected through the presumed efficiency, accountability and financing advantages of the private concessions is flawed, as witnessed in Cochabamba, Buenos Aires and West Manila. Without a coherent national plan and financing strategy for achieving water for all, neither the public sector nor the private sector will break out of the current enclave model.¹⁶⁵

B. Water and the GATS¹⁶⁶

The issues of the working and the structure of the GATS is extremely complicated, thus this short introduction will present only a very fundamental description of the GATS.¹⁶⁷ The GATS is an

164. See WATKINS ET AL., *supra* note 1, at 100.

165. *Id.* at 96.

166. See, e.g., Mireille Cosy, *Water Services at the WTO*, in *FRESH WATER AND INTERNATIONAL ECONOMIC LAW*, *supra* note 1, at 117-141; Elisabeth Tuerk, Asron Otrovsky & Robert Speed, *GATS and Its Impact on Private Participation in Water Services*, in *FRESH WATER AND INTERNATIONAL ECONOMIC LAW*, *supra* note 1, at 143-172; AARON OSTROVSKY, ROBERT SPEED & ELISABETH TUERK, *GATS, WATER AND THE ENVIRONMENT* (WWF- World Wide Fund for Nature 2003), available at http://www.ciel.org/Publications/GATS_WaterEnv_Nov03.pdf; World Trade Organization, *GATS: Facts and Fiction*, http://www.wto.org/english/tratop_e/serv_e/gats_factfiction8_e.htm (last visited Sept. 13, 2007).

167. See generally MARKUS KRAJEWSKI, *NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES- THE LEGAL IMPACT OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) ON NATIONAL REGULATORY AUTONOMY* (Kluwer Law International 2003) (hereinafter KRAJEWSKI II); Markus Krajewski, *Public*

agreement within the framework of the WTO. The objective of the GATS is to liberalise trade in services.¹⁶⁸ In order to achieve this, the GATS imposes certain limitations on measures affecting trade in services (Art. I:1).¹⁶⁹ These measures refer to regulatory measures adopted by federal, State and local administration, as well as those adopted by non-governmental bodies exercising delegated governmental authorities. Art. I:3 provides that: (a). The obligations stemming from the GATS can be divided into general and specific.¹⁷⁰ All domestic measures adopted by the WTO members must be consistent with these obligations.¹⁷¹

The GATS general obligations apply to all WTO members and include all their services sectors and sub-sectors in all modes of the provision of services.¹⁷² The general obligation under the GATS includes the most-favoured nation (the MFN) treatment (Art. I:3 (a) and transparency (Art. III). The specific obligations include market access (Art. Art. XVI) and national treatment (Art. XVII). These commitments only apply to these sectors, sub-sectors in which Parties on individual basis, and those selected to be bound (the so-called bottom-up approach). Such a system provides flexibility for the Parties, as each Party defines its own trade regime, through its specific commitments, established in its schedule of commitments.¹⁷³ However, such commitments once made, are strictly adhered to and very difficult (almost impossible) to rescind.¹⁷⁴ Art. VIII of the GATS appears not to make a distinction between private and public service providers (Art. VIII). GATS applies to trade in all services, such as financial services, health, telecommunications, water supply and sewage services. In short, an extremely broad range of activities is considered as services under the GATS.¹⁷⁵

Services and Trade Liberalization. Mapping the Legal Framework, 6(2) J. OF INT'L ECON. L. 341, (2003), available at <http://jiel.oxfordjournals.org/cgi/reprint/6/2/341> (hereinafter Krajewski I).

168. General Agreement on Trade in Services (hereinafter GATS), Preamble, available at http://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm.

169. GATS, *supra* note 168, at art. I.1.

170. GATS, *supra* note 168, at art I.3 (in connection with Part II "General Obligations and Disciplines" and Part III "Specific Commitments").

171. GATS, *supra* note 168, at srt. I.3 and srt. II.1, 2, & 3.

172. GATS, *supra* note 168, at art. I.1-3.

173. OSTROVSKY ET AL., *supra* note 166, at 16; see also World Trade Organization, *GATS: Facts and Fiction*, *supra* note 166.

174. Tuerk *et al.*, *supra* note 166, at 148.

175. Remer, *supra* note 153, at 489.

According to Art. I:3 (b) of the GATS, services supplied in “the exercise of governmental authority” are excluded from its scope.¹⁷⁶ One of the problems is the lack of a precise meaning of the term “public services,” therefore various interpretations are possible, including a narrow one, which excludes only a very limited number of governmental services.¹⁷⁷ Article 1:2 of the GATS deals with the concept of trade. It covers four modes of providing services. It includes cross-border trade of services (mode 1), movement of foreign consuming services (mode 2), the provision of services through foreign direct investment (mode 3) and the movement of natural persons providing services (mode 4). Art. XIX of the GATS stipulates that all countries’ service markers must be progressively liberalised. Furthermore, in 2001 at the WTO Ministerial Meetings at Doha, a general commitment was made to remove all barriers to trade in environmental services and agreed to start a new round of negotiations on global trade liberalisation, including services.¹⁷⁸

C. *The GATS and Water*

There are several very complicated problems relating to the GATS legal framework, which may influence the provision of water. If we assume a holistic approach to water services, the relevance of GATS is much broader than just the supply of domestic water, sewage and related services. Services, which may be subject to the GATS regulation, from an environmental perspective include: water service providers and waste water treatment providers; water infrastructure services; water-demanding services; and water polluting services. It is also important to realise that the classification document, which lists services, is not exhaustive and outdated. Art. 1 states that the GATS covers any service.¹⁷⁹

Although, GATS does not require specifically the privatisation of essential services, in several cases privatisation is connected with the elimination of public monopolies and the introduction of competition, through various sectors participating, which bears importance on the provision of water services: “[i]t is therefore important to look at how the GATS intersects with aspects related to both *changes in ownership* of services as well as issues linked to the elimination of

176. GATS, *supra* note 168, at art. I.3.b.

177. Krajewski I, *supra* note 167, at 343.

178. Razzaque, *supra* note 1, at 22-23.

179. GATS, *supra* note 168, at art. I.

public *monopolies*, i.e. those linked to the *number of services suppliers* present in a given market".¹⁸⁰ It must be noted as well that in fact some of the provisions of GATS indirectly presuppose privatisation.¹⁸¹

The market access is also one of the issues potentially influencing the supplies of water. In so far as under the GATS a water right is directly linked with market-related issues, the fact that the GATS commitments are almost impossible to rescind are of fundamental importance (the "lock in effect"), regulators have to ensure that water allocation is properly done from the beginning.¹⁸² Crucial in respect to water is also how the Parties will "carve out" what they consider public services, in order to preserve regulatory power.¹⁸³ Of great importance is the unclear relationship between market access and the provision of services in natural monopoly (as e.g. sewage services are often natural monopolies, market access is regulated by Art. XVI).

A serious problem relates to the constraints imposed by the GATS and relating to the supply of water to the poor. There are basically two main regulatory ways to achieve it: by the universal service obligations (the USOs) on private providers or directly subsidizing service providers. The USOs have to be very carefully formulated before States sign up to specific commitments, as they may not be later revoked (the "lock in effect"). Such a strict approach can have an adverse effect on the provision of water services. Subsidies, on the other hand, may constitute the breach of anti-competitive behaviour. These limitations on States' regulatory powers are the main concern voiced by civil society with respect to GATS.¹⁸⁴ General exceptions under Art. XIV of GATS, unlike Art. XX of the WTO, do not include a specific provision authorising Governments to adopt measures relating to natural resources.¹⁸⁵ "[L]ack of similar language in the GATS may result in less leeway for domestic water regulations to put in place measures to protect and preserve water resources."¹⁸⁶

180. Tuerk *et al.*, *supra* note 168, at 150.

181. R. LABONTE ET AL., HEALTH FOR SOME: DEATH, DISEASE AND DISPARITY IN A GLOBALIZING ERA 63 (Centre for Social Justice ed, 2005).

182. OSTROVSKY ET AL., *supra* note 166, at 29.

183. Tuerk *et al.*, *supra* note 168, at 152-55.

184. *Id.* at 159-71.

185. GATS, *supra* note 168, at art. XIV.

186. OSTROVSKY ET AL., *supra* note 166, at 44.

The 2001 WTO Doha Ministerial Meeting adopted a general commitment that all barriers to trade in environmental services be removed and agreed to launch a new round on global trade liberalisation, including services. Initially, the EC have submitted that water be included as an “environmental service” under the GATS, however, later it was withdrawn. The EC identified seven categories that are each related to different environmental media, such as air, water, solid and hazardous waste, noise, soil and landscape. This classification is based on the so-called pure environmental services, which would be a subject of a cluster of negotiations, in order to fall within various sections of the GATS. As Razzaque explains, although no State has yet committed itself to water supply services, commitments have been made to include other water-related services, such as wastewater and sewage treatment, construction of waterways and dams, engineering and project management services for water supply and sanitation works, etc.¹⁸⁷

One of the concerns, which are raised in connection with privatisation of water services and GATS, is the role and the influence of water corporations.¹⁸⁸ As Razzaque observes, water utilities amount to US \$72.2 billion, out of total global US \$453 billion for environmental market for goods and services.¹⁸⁹ McAdam notes that according to some authors, it would be cheaper for developing States to import water than spend a vast amount of money on pipes and pumps to obtain water from a polluted river.¹⁹⁰ There are ten major corporations at present controlling the water market services.¹⁹¹ Two French companies, Suez and Vivendi Universal (now Veolia), control more than 50 percent of the global water market. Vivendi sits on the U.S. coalition of Services Industries and the European Forum Services, which are both at present engaged in negotiations at the WTO regarding GATS. According to McAdam, large water corporations, including Vivendi, have succeeded in influencing the framers of GATS to limit quite extensively government service regulation. The same author further states that turning a multitude of water services into commercial activity and towards the private sector is done despite the wishes of people and frequently govern-

187. Razzaque, *supra* note 1, at 22.

188. Razzaque, *supra* note 1, at 23; MCADAM, *supra* note 1, at 56-62.

189. Razzaque, *supra* note 1, at 23.

190. MCADAM *supra* note 1, at 58.

191. Maude Barlow, *The 3rd World Water Forum: A Civil Society Backgrounder*, available at http://www.citizen.org/print_article.cfm?ID=9130.

ments.¹⁹² The World Development Movement notes the so-called phenomenon of “cherry-picking,” which is encouraged by privatisation, i.e., the selectiveness of private firms as to the type of investment they undertake and the type of a customer they will serve.¹⁹³

In conclusion, it appears that GATS provisions may indeed prove to be problematic for the provision of water to poor, and may disadvantage developing countries. The situation is aggravated by a very unclear character of pertinent provisions of the GATS. As Remer phrased it in strong terms: “[t]he view of water as a market-alienable commodity clashes fundamentally with the belief that water is a basic human right.”¹⁹⁴

V. A CASE -STUDY: SOUTH AFRICA¹⁹⁵

This case-study is very interesting as the right to water is provided for in the 1996 post-apartheid South African Constitution.¹⁹⁶ Section 27 1) (b) provides that “[e]veryone has the right to have access

192. MCADAM *supra* note 1, at 61.

193. JOY & HARDSTAFF, *supra* note 1, at 24-25. (“Cherry-picking” may assume three forms: the short term strategy of the multinationals is to avoid cities and countries, which are assessed as unprofitable (Vivendi/Veolia). Executives at the meeting on the reform of the water sector in Africa stressed that the requirements of the low risk and profitability, such as South sub-Saharan Africa, limited private investment to “big cities and the GDP/capita is not too low”). A second form of “cherry picking” is to select profitable customers within the city as a way to ensure that a contract will provide profits, so that shanty towns are excluded (e.g. Cartagena, Columbia or Ghana, where private firms are not responsible for rural water and small town systems). A third form of “cherry picking” is splitting the operation and giving the private sector the profitable part (in Guinea, private operators were given responsibility for billing customers for water while the government owned company bore the costs of operating and maintaining the infrastructure, as a result of which the private firms made profit and state enterprise sustained a loss)).

194. Remer, *supra* note 155, at 491.

195. See generally, SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA, (Dannie Brand & Christof Heyns eds., Pretoria University Press 2005); Anton Kok & Malcolm Langford, THE RIGHT TO WATER 191-208; Gerhard R. Backeberg, *Water Institutional Reforms in South Africa*, 7 WATER POL’Y 107 (2005); Ramin Pejan, *The Right to Water: The Road to Justiciability*, 36 GEO. WASH. INT’L L. REV. 1181 (2004); Francis Rose, *Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economies, and Political Power*, 18 GEO. INT’L ENVTL. L. REV. 149 (2005).

196. S. AFR. CONST. 1996. available at <http://www.info.gov.za/documents/constitution/index.htm>.

to . . . sufficient food and water.”¹⁹⁷ According to Section 27 (2), South Africa is obliged to take “reasonable legislative and other measures, within its available resources, to achieve the progressive realisation”¹⁹⁸ of the right to water, which is the language similar to that of the General Comment No 15 (see above).¹⁹⁹ According to Pejan, there is a cluster of other Constitutional substantive and procedural rights, relevant to the right to water, such as human dignity (Section 10); children’s social and economic rights (Section 28); the right to equality (Section 9); the right to a healthy environment (Section 24); and the right to life (Section 11).

Additionally, there are two acts dealing with water rights: the 1998 National Water Act (hereinafter the NWA)²⁰⁰ and 1997 Water Services Act (hereinafter the WSA).²⁰¹ Mention must also be made of the 2004 National Water Strategy (hereinafter the NWS),²⁰² promulgated by the Department of Water Affairs (hereinafter the DWAF). The NWA addresses water management and the WSA, water services. The WSA codified the constitutional right of access to basic water supply and sanitation, as it pledged the construction of sufficient pipes to bring water to every household within 200 hundred meters.²⁰³ Fundamental principles of both NWA and WSA constitute very progressive water legislation, in mandating access to basic water for everyone on an equitable basis without discrimination. However, they also contain a number of neo-liberal provisions, which undermine the overall aim of the legislation, such as decentralisation, cost recovery and privatisation.²⁰⁴ According to Kok and

197. *Id.* at Section 27(1)(b).

198. *Id.* at Section 27(2) (Please note that this right is limited by the phrase “within available resources” and is consistent with ¶ 18 of General Comment No 15 and ¶ 3 of General Comment No. 3 (The Nature of States’ Parties Obligations) (U.N. Doc. E/1991/23). Comment No. 15 interpreted this condition as including the resources available within the State and obtained through international community); see also Kok & Langford, *supra* note 195, at 202.

199. S. AFR. CONST. 1996, *supra* note 196, at Section 7(2); Pejan, *supra* note 195, at 1195.

200. National Water Act 36 of 1998 (hereinafter NWA), available at <http://www.info.gov.za/gazette/acts/1998/a36-98.pdf>.

201. Water Services Act 108 of 1997 (hereinafter WSA), available at <http://www.info.gov.za/gazette/acts/1997/a108-97.pdf>.

202. S. AFR. DEP’T OF WATER AFF. & FORESTRY, NATIONAL WATER RESOURCES STRATEGY 3 (2004), available at <http://www.dwaf.gov.za/Documents/Policies/NWRS/Default.htm>.

203. Rose, *supra* note 195, at 161-162.

204. *Id.*

Langford, “access” to sufficient water stipulated in water law means only that the State has to create conditions for access to sufficient water for those individuals who have the financial means to pay for it.²⁰⁵ The State has obligations to set clear goals in relation to water and provide infrastructure to progressively implement the right to water.²⁰⁶

The NWA is a very progressive act, which departed from the private ownership of water, abolished the concept of riparian rights and appointed the government as a the public trustee of water.²⁰⁷ In Section 3 it states: “[t]he National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate”. Section 3 lists all underlying main principles of the water management: sustainability; equity; and efficiency. The water is managed in nineteen Water Management Areas, administered by the Catchment Management Agency (the CMA), which must develop a Catchment Management Strategy (the CMS), involving extensive consultations with interested people (Section 9).²⁰⁸ Catchment is the basic unit for management areas. CMAs are established on the basis of a very complicated process by the Minister of Water Affairs. Their aim is to create equitable access to all water resources under their control (Section 156).²⁰⁹ The NWA as a single national water right, established a so-called Reserve, which primarily satisfies basic human needs and ecological sustainability, before it can be allocated to other uses, such as agriculture (Section 1(1) (xviii)). At present, basic human needs are set for 25 to 33 liters a day per person, depending on then size of household, for drinking food preparation and personal hygiene and to sustain functioning ecosystems.²¹⁰

205. Kok & Langford, *supra* note 195, at 200, 202.

206. *Id.*

207. Rose, *supra* note 195, at 155 (citing *South Africa: The Water Services Act*, INT’L MKT. INSIGHT TRADE OPPORTUNITY INQUIRIES, Sept. 22 1998)

208. NWA, *supra* note 200, at Section 3, 9.

209. Their other functions include community participation in the protection, use, development, conservation, management and control of water resources in its water management area (Section 80).

210. *See generally* Rose, *supra* note 195 at 196 (stating that the average American household uses 350 gallons of water a day, which is 1324.89 liters. The World Health Organisation recommends a minimum of 50 liters a day per person to ensure a healthy life. An average bath uses 200 liters of water. A toilet flush uses 10 to 15 liters.).

This is only a short term goal, in order to progressively implement the right to water.²¹¹ The NWA's fundamental aims are set forth in the Section entitled "Purpose of the Act" as "meeting of the basic human needs of present and future generations;"; "promoting equitable access to water;" and "redressing the results of past discriminations."²¹²

The NWA establishes a system of the control of the uses of water through authorizations and licensing. Domestic use and households do not require registration, however, water licenses do. In principle, DWAF administers any water use, which must be registered.²¹³ In principle, all water uses beyond those included in the Reserve, are subject to the permits, which are temporary and subject to review, readjustment and revocation. However, pre-existing users are not covered by licensing and must only be registered with the relevant permitting authority. In cases of the conflict between the application for new water use and the existing ones, the decision is made on the basis of the "beneficial use of in the public interest." It is assumed that compulsory licensing of water will be over a period of 5 to 10 years or longer.²¹⁴

The different water uses are structured in a hierarchal order: the Reserve is the top priority in the allocation; then sufficient water supplies to comply with international agreements and inter basin transfers on the national interest, and finally, remaining water may be distributed by permit, issuance of which is subject to comments from the public.²¹⁵ However, as Rose explains, the NWA has structural flaws, which are an obstacle to actual improvement in water access.²¹⁶ First, the Act delegates management to the local level, while not providing at the same time a guarantee of sufficient funds for the provision of water for infrastructural maintenance and improvements, which are indispensable for water delivery.²¹⁷ Secondly, the Act includes the policy of water recovery, which "as implemented continues to deny the most impoverished South Africans access to a basic quantity of clean water."²¹⁸ Finally, the Act en-

211. Pejan, *supra* note 195, at 1203.

212. NWA, *supra* note 200, at Section 2(a).

213. Pejan, *supra* note 195, at 1204.

214. Backeberg, *supra* note 195, at 110.

215. Rose, *supra* note 195, at 163.

216. *Id.* at 165.

217. *Id.*

218. *Id.*

ables the privatization of water services, which “in South Africa’s context geopolitical context, this threatens to reinforce apartheid-era patterns of water service provision(s).”²¹⁹

The WSA deals with the development of the structure of water services. Section of the Act, states that in principle everyone has the right to access to basic water supply.²²⁰ It was strengthened in 2001 by Policy on Free Basic Water (a minimum quantity of 25 liters of potable per person and 6 kiloliters per household per month) and by the 2003 Strategic Framework for Water Services by President Mbeki’s announcement on the policy of free provision of basic water.²²¹ In 2004, it was enacted a National Water Resources Strategy.

However, notwithstanding the implementation of the Free Water Policy, more than fifty-five percent of the poor population is deprived of water.²²² This is designed to serve the poorest population, below 800 Rand a month income. Moreover, the implementation of the Free Water Policy requires, according to DWAF, a major re-evaluation of the way water supply services are financed, especially in rural areas.²²³ This WSA deals with the functions of the Water Services Authorities (the WSAU), which according to Section 11, aim at the successive provision of affordable, economical and sustainable access to water services. This aim is conditioned by many factors, which, *inter alia* include the availability of resources, the regulation of access to water in an equitable manner and the duty of consumers to pay reasonable charges, in accordance with any norms and standards for tariffs for water services (Section 11).²²⁴ Interestingly, Section 22 permits water services privatization by authoriza-

219. *Id.*

220. *Id.*

221. WSA, *supra* note 201, Section 1

222. Water Services Strategic Framework, 2003, *available at* www.polity.org.za/attachment.php?aa_id=782 (last visited 12 December 2007); National Water Resources Strategy, 2004, *available at* <http://www.dwaf.gov.za/Documents/Policies/NWRS/Default.htm> (last visited 12 December 2007)

223. Pejan, *supra* note 195, at 1205. There is the following gradation of water services: (1) no infrastructure (drinking unsafe water), i.e., below RDP (Reconstruction and Development Programme, developed to eradicate social and economic inequities in post-apartheid South Africa); (2) Below RDP-access to water but from a standpipe, 200 meters from a household; (3) at RDP: 25 liters a day of potable water, supplied within 200 meters of a household and with minimum flow of 10 liters per minute in case of communal water points; (4) above RDP in house or in yard water supply. See <http://www.dwaf.gov.za> for more information.

224. WSA, *supra* note 201, at Section 11.

tion of WSAU. Section 4 (3) provides that no person should be deprived of basic water services for non-payment, in cases where this person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.

The NWA also introduced the policy of cost recovery, a scheme in which the distribution of water pays for itself through fees. But as Rose observed:

[c]ost recovery has had devastating effects on the majority of the populace, leading to substantially increased household debt, widespread water service cutoffs, citizen unrest, and a nationwide cholera epidemic. As implemented in South Africa, the policy of cost recovery operates on a net economic loss and continues to deny the most impoverished South Africans access to a basic quantity of clean water.²²⁵

Cost recovery is based on a concept of water as an economic good, according to the policy supported by the World Bank, and means that the water provider recovers its costs plus profit.²²⁶

Notwithstanding that the 2003 Strategic Framework for Water Services treats the cut-off of water as the last resort, when the cost recovery was introduced in 1996, more than ten million people had their water disconnected. The introduction in 2001 of the Free Basic Water has not obliterated the “user pays principle,” as the population has to pay for any excess of water above the FBW.²²⁷ In one case a

225. Rose, *supra* note 195, at 170.

226. *Id.* at 171; J.I. Sindane, Presentation to Session 3.47, Human Right to Water, 4th World Water Forum, Mexico (March 19, 2006), available at <http://www.cepis.ops-oms.org/bvsacg/e/foro4/19%20marzo/Human/Right.pdf> (stating that the “[p]rimary source of financing of local governments remains local taxes and other revenues levied and collected by municipalities themselves, including property taxes,” as well as “grants from nationally raised revenue, known as the equitable share,” to supplement local governments’ revenues (MIG-Municipal Infrastructure Grant for basic services for the poor, about US \$1 billion annually; Equitable Share-to address the O&M costs of basic services to the indigents, US \$ 2 billion annually; Capacity Building Grants (US\$ 100 million annually))).

227. Rose, *supra* note 195, at 180-81.

person who was unable to pay for additional water was cut off entirely.²²⁸

Recently, however, the South African Government seems to have the financial resources to implement the FBW throughout the country, which is in addition to already existing resources from consumer's fees.²²⁹ This means that the Government assumed overall responsibility for the whole of the country's supply of water, with prime responsibility to the poor.²³⁰ It must be said, however, that the idea of free basic water does not conform with the establishment of Private-Public-Partnerships, as private companies argue that free water is not an economically viable option.²³¹

The question arises whether the fact that the right to water is recognized in the Constitution of South Africa, contributes in any way to its implementation. The right to water is only one in the catalogue of economic, social and cultural rights enshrined in this Constitution. Other rights include: rights to access to land; adequate housing; social security; and health care.²³²

The African Constitution departs from the traditionally accepted division between the justiciable constitutional rights (civil and political) and economic, social and cultural rights. The latter are the so-called second generation of human rights, upon which justiciability was not widely acknowledged. It is observed, however, that:

[i]n its decisions adjudicating socioeconomic rights, the Court has made it extremely difficult to demonstrate the government has violated the Constitution, which reflects the reluctance to issue rulings that implicate the allocation of budgetary resources. Accordingly, persistent inequalities in access to water probably do not amount to a constitutional violation because the government had taken measures that are likely to satisfy the Court.²³³

228. *Id.* at 181-82.

229. WATKINS ET AL., *supra* note 1, at 64 (stating that so-called cross-subsidisation-stepped tariffs provide a cross-subsidy from high volume users to low volume users).

230. Rose, *supra* note 195, at 194.

231. *Id.* at 180-81.

232. *Id.* at 187; S. AFR. CONST. 1996, *supra* note 196, at Section 25-27.

233. Rose, *supra* note 195, at 187.

The Constitutional Court of South Africa, confirmed the justiciability of the obligation to progressively realize the economic, social and cultural rights, which are reviewed on the basis of the “reasonableness” test.²³⁴

Pejan is also of the view that the FBW policy in many respects conforms with the postulations contained in General Comment No. 15, such as maintaining a reserve for basic human needs and ecology, which considers long term goals including rights of future generations.²³⁵ The manner in which water is managed, i.e. leaving sufficient supply for basic human consumption, on the basis of the principle of non-discrimination, to ensure that water remains equitable for all and the participation at community level, also reflects the provisions of the General Comment. However, Pejan also expresses his doubts whether the water legislation and policy comply with the test of “reasonableness” set forth by the Constitutional Court: “Unfortunately, the reality may not correspond to written aspirations and only time will tell.”²³⁶

Both the WSA and the NWA are not as detailed in addressing violations as the General Comment. Likewise, bestowing the entire responsibility for water management on local authorities may not be the most efficient way to deal with the problem, due to their inexperience and lack of capacity. Finally, Pejan is of the view that the question of justiciability with regards to remedies for individuals to enforce their water right is not clear-cut, since the access to Water Tribunals is limited to cases relating to licensing and authorization.²³⁷

Despite certain drawbacks and challenges, such as limited water and financial resources and the lack of capacity of local government,²³⁸ South African water strategy has resulted in 10 million more people receiving access to safe water since 1994.²³⁹ Coverage

234. See, e.g., *Government of the Republic of South Africa & Ors v. Grootboom & ORS*, 2000 (11) B.C.L.R. 1169 (CC); Murray Wesson, *GROOTBOOM and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court*, 20 S.A. J. H.R. (2204) 284, 284-308.

235. Pejan, *supra* note 195, at 1206.

236. *Id.* at 1207.

237. *Id.* at 1208.

238. Sindane, *supra* note 226.

239. Africa Works, *Progress Report: Water in Africa*, available at the DATA site http://www.data.org/whyafrika/progress_water_112607.html (last visited 12 December 2007)

rose from 60 percent to 86 percent.²⁴⁰ Some 31 million people are served by Free Basic Water (75 percent, with 78 percent with access to infrastructure, 165 out 170 WSA's provide FBW).²⁴¹

In the course of implementation, the reform had been subject to an ongoing debate. The 25 litre-threshold basis is considered not to be sufficient.²⁴² Supplies in some areas are erratic, resulting in households fetching water from afar.²⁴³ The issue of cut-offs for non-payments was also raised, thus raising the question of affordability of water services.²⁴⁴ Progress in sanitation was criticized.²⁴⁵ There are still 16 million people (one in three) in this country, without access to basic sanitation.²⁴⁶

It was observed that the South African experience turns attention to three crucial policy elements for progress: a clear national plan with well defined targets, a strong regulatory framework, and constant monitoring of performance and progress.²⁴⁷

VI. CONCLUSIONS

The discussion of the issue of the human right to water clearly indicates there are no easily available conclusions or solutions. The problem of a human right to water, being a natural monopoly, raises far more emotions than any other issue relating to economic, cultural, and social human rights, such as housing and the eradication of poverty, which is the approach adopted by the South African Government. Therefore access to water is treated as a social good. Water is considered as a merit good, as access to water provides other benefits, which exceed the costs incurred by the supplying of it.²⁴⁸

240. *Id.*

241. Sindane, *supra* note 226, at 5.

242. Rose, *supra* note 195, at 180.

243. *Id.* at n.109.

244. *Id.* at 181-82.

245. *Id.* at n.5.

246. *Id.*

247. WATKINS ET AL., *supra* note 1, at 64.

248. Edina Sinanovic, Sandi Mbatsha, Stephen Gundry, Jim Wright & Clas Rehnberg, *Water and Sanitation for Improving Health in South Africa: Overcoming the Legacy of Apartheid*, 7 WATER POL'Y 627, 636 (2005) (observing that the main donors, such as the European Union, were not in favor of water and sanitation as a social good).

It also appears that there is very little scope for a compromise between the proponents of water as a human right (water in the hands of a State) and these who favour the privatization of water services.

However, as the UNEP commented, the dispute concerning the public/private aspect of water is almost as irrelevant as public water companies account for more than 70 percent of total investment globally, and fewer than 30 percent of people in developing countries receive water or sanitation services that are fully or partially private, as noted above, and worldwide only about 5 percent.²⁴⁹ Likewise, as regards the World Bank funding of water services, it is worth taking into account that it is not the main source of funding, as it amounts only to 8 percent in Africa.²⁵⁰ Overall, developing countries invest about US\$70 billion annually in water-related investments and about 90 percent of investment comes from domestic sources.²⁵¹

The human right to water, without a doubt, has an enormous importance. However, as Rose observed:

[e]stablishing of a human right to water will not, in and itself, guarantee the ultimate satisfaction of worldwide needs. Rather, the value of acknowledgement of a human right to water in international jurisprudence in that such a right will encourage both the international community and domestic governments to 1) translate that right into specific legal obligations and responsibilities, which South Africa has already done, 2) *renew* their efforts to meet basic water needs of their population, which South Africa is the process of doing, and 3) *financially prioritise* meeting basic human water requirements over other investment and management decisions, which South Africa only recently claims to be doing.²⁵²

249. WATER RESOURCES STRATEGY: STRATEGIC DIRECTIONS FOR WORLD BANK ENGAGEMENT (2004) (showing in a detailed assessment in Latin America, for example, that private investment (at 1998 levels) is sufficient to cover only 5 percent of water and sanitation and 20 percent of energy (including hydropower) investment needs), available at http://www-wds.worldbank.org/external/default/WDSContent-Server/WDSP/IB/2004/06/01/000090341_20040601150257/Rendered/PDF/28114.pdf at 47.

250. *Id.* at 32-33.

251. *Id.* at 32.

252. Rose, *supra* note 195 at 186.

It may be reminded as well that such a right is implemented progressively. Partial privatisation of water services in developing countries may be the only way to overcome, at least to a certain extent, the problems of providing water due to insufficient infrastructures and financial concerns. Therefore there are views, which rely to a lesser degree on the human right to water, but assume a more pragmatic approach based on the right to manage, or participate in the management of water resources and support the involvement of non-state actors.²⁵³

The complete privatization of water services, as in England and Wales, is very rare, and even in such situations, the State retains certain controlling powers. It must be observed that in some developing countries, privatization of water services was successful, such as in Chile.²⁵⁴ Of course, certain conditions of privatization must be implemented, such as State control, accountability of private companies, the participation of all stakeholders (the state, the private sector, civil society; and women), and the abolition of the “cherry picking” practices, which leave often a State in a disadvantaged position vis-à-vis a private company. The World Bank also emphasises the importance of institutions and *capacity building* from national and local levels, the principles of integrity (the river basin approach) and the subsidiary (actions taken at the lowest possible level).²⁵⁵ These principles reflect the so-called Dublin Principles, which were described above.

The success of the implementation of the principle of subsidiary is illustrated by the Santa Cruz water utility in Bolivia. It is a consumer cooperative, governed by a general assembly, which nominates the senior management. According to the World Bank’s Operations Evaluation Department, cooperative solutions like this one are superior to either private or public approaches to utility management.²⁵⁶

We should be mindful as well that the focus of a human right to water is only to meet basic human needs and it translates itself into

253. SALMAN AND MCINERNEY-LANKFORD, *supra* note 1, at 75.

254. *But see* JOY & HARDSTAFF, *supra* note 1, at 26-27 (where intransigent opponents of privatisation claim that in places “where privatisation worked the evidence suggests that a reformed public sector would have been capable of delivering a similar performance” as in Chile; or where the contract was redefined either by changing who is classified as poor or by refining the service provided).

255. SALMAN AND MCINERNEY-LANKFORD, *supra* note 1, at 75-76.

256. *Id.* at 75-76.

the obligation of a State to supply it when the market based economy fails. Therefore the regulation of the South African water services should serve as a blueprint, most notably in supplying free basic water to all, but relying as well on the water tariffs and privatization. Acknowledgment by a State of a human right to water does not automatically place the water management within the public domain. In 2006 the UK recognized the human right to water, while at the same time it is the only country on the world where water services are fully privatized.²⁵⁷

There are no generally applicable principles to water management, which would suit each and every State. It is a simplification to believe that the recognition of the human right to water itself would automatically improve water supplies, and likewise that all privatization is detrimental. All generalizations are unhelpful as water services are part and parcel of a whole economic and political system of a country and therefore cannot be assessed in isolation from other pertinent factors.²⁵⁸ Exclusive reliance on the right to water to provide water for all is probably still premature. As it stands at present, it is not yet fully recognized and its normative content not specified. Moreover, as is observed elsewhere in this essay, without sufficient financing a human right to water is not a magic panacea for the supply of water. Thus, a pragmatic approach is called for. Such an ap-

257. Press Release, Department for International Development, *UK recognises the right to water as Hilary Benn launches call for Global Action Plan to solve water crisis* (Nov. 9, 2006), available at <http://www.dfid.gov.uk/news/files/pressreleases/human-dev-report06.asp> (which quotes International Development Secretary Hilary Benn as stating: "Today's announcement adds Britain's voice to the call for every human being to have access to sufficient, affordable and safe water supply. In many developing countries, water companies supply the rich with subsidised water but often don't reach poor people at all. Recognising the right to water will help change this and allow all citizens to demand more of their governments. The challenge ahead is massive. Today's report rightly points out that we need to invest more money in clean water and sanitation, and that's why the UK is doubling its support in Africa to £95 million a year by 2008 and then doubling it again to £200 million a year by 2011. We also need to make sure that those countries that currently get too little support for water and sanitation, the 'donor orphans,' get more. But more money alone is not enough; it needs to be spent more effectively. All of us need to play our part in getting water to the poorest, and to women and children who have to spend their time collecting water rather than working or going to school. By putting in place the right structures, funding and political support we can make it happen.").

258. *Id.* For example, Benn called on all donors to work together to give predictable, long-term funding such as the World Bank (the funding of slums) and the African and Asian Development Banks.

proach requires cooperation of stakeholders in order to ensure the access to water for all, primarily the most vulnerable.

