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CORPORATE OBLIGATIONS UNDER
THE HUMAN RIGHT TO WATER

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Abstract

Almost a billion people do not have access to clean and safe water. Access to safe drinking water and sanitation is increasingly being considered a fundamental human right. Corporations play an important role in the realisation of the right to water. For example, they can become violators of the right to water where their activities deny access to clean and safe water or where water prices increase without warning. Corporations can have a positive or negative impact on the human rights of individuals, wider communities and indigenous peoples. This paper argues that corporations bear a certain responsibility for the realisation of the human right to water, which can be derived from international as well as national (constitutional) law. Corporate obligations under the human right to water can potentially be based on the right to water as set in national law and in the international human rights treaties and in corporate codes of conduct. It is asserted that this responsibility is different and separate from the responsibility of state governments and should never undermine state obligations to observe the human right to water. In short, the paper argues that corporations have an obligation to respect, protect and fulfil the right to water deriving primarily from national legal orders.

Keywords

Corporations; water privatization, right to water; corporate obligations under the human right to water; corporate obligations to respect, protect and fulfil the human right to water.

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1. Introduction

The Niyamgiri Hills form a mountainous area in the Kalahandi and Rayagada districts of Orissa in the eastern part of India. They are populated by the indigenous community of the Dongria Kondh, who consider them sacred, as their daily lives have depended on them for several centuries.¹ In November 2009, the Indian government, more particularly its Ministry of Environment and Forests, approved a project to mine bauxite in the Niyamgiri Hills.² This project was proposed and will be conducted by a joint venture corporation, the South-West Orissa Bauxite Mining Corporation, involving two major corporations (Sterlite Industries India Limited (a subsidiary of Vedanta Resources Plc) and the state-owned Orissa Mining Corporation).³ The proposed project has faced a number of human rights and environmental objections, not the least important of which relates to the exercise of the right to water. Amnesty International argues in its report that: 'findings ... clearly demonstrate that the refinery expansion and mining project have serious implications for the human rights of local communities, including their rights to water, food, health, work and an adequate standard of living.'⁴ In this respect, Amnesty International further notes that 'the companies involved in the mine and refinery projects have ignored community concerns, breached state and national regulatory frameworks and failed to adhere to accepted international standards and principles in relation to the human rights impact of business.'⁵ It further describes that 'the streams which originate from the top of the Hills are the only source of water for communities who live on top of the Hills and a major source for others who live lower down the hill.'⁶ As a consequence, 'any negative impacts on the streams, ..., could have disastrous consequences for the communities, most of whom are completely dependent on this water in order to continue to live on the Hills.'⁷

The situation in the Niyamgiri Hills is illustrative and opens a number of pertinent questions relating to corporate human rights obligations under the right to water. What happens when a corporation deprives individuals of their access to water? Or when thousands of people suffer from the lack of a safe drinking water supply in water management systems operated by a corporation? Or where a corporation has rapidly increased the price of water after water privatization? Do corporations have normative obligations under the human right to water? If so, what is the nature and scope of such obligations? Nolan and Taylor aptly note that 'it is no longer a revelation that companies have some responsibility to uphold human rights. The more pertinent issues are which rights and to what extent companies should be held to account.'⁸ This paper attempts to examine the corporate responsibility that derives from the human right to water. The objective of this paper is to comprehensively demonstrate and analyze the existing scope and nature of corporate obligations deriving from the human right to water. The general research question - do corporations have human rights obligations deriving from the right to water – underpin this paper. Even though corporate responsibility for human rights may be still in the embryonic stages, this paper attempts to argue that corporations, or alternatively their officers, are already obliged to observe the human right to water. In other words, the point of this paper is to demonstrate that corporations have obligations to observe the right to water, which are part of a national and international value system.

¹ Amnesty International, Don't Mine us out of our existence, Bauxite mine and refinery devastate lives in India, Report, February 2010, □ http://www.amnesty.org.uk/uploads/documents/doc_20144.pdf□, p. 4

² *Ibid.*

³ *Ibid.* 4.

⁴ *Ibid.* 6.

⁵ *Ibid.*

⁶ *Ibid.* 21.

⁷ *Ibid.*

⁸ J. Nolan and L. Taylor, 'Corporate responsibility for economic, social and cultural rights: rights in search of a remedy?' *Journal of Business Ethics*, Vol. 87, No. 2, 2009, p. 1.

Economic, social and cultural rights include rights to housing, food, education, water and health. This set of rights complements the so-called civil and political rights. As Scheinin notes 'there is no watertight division between different categories of human rights.'⁹ However, despite claims that both sets of rights are of equal importance and interdependent, civil and political rights are more solidly established under international and national law. Economic, social and cultural rights generally have a programmatic nature and are not always directly justiciable to the same extent that civil and political rights are. Scheinin argues that 'the problem relating to the legal nature of economic and social rights does not relate to their validity but rather to their applicability.'¹⁰ The central question of economic and social rights therefore lies in their enforcement or justiciability.

Corporations play an important role in the realisation of the right to water and the rights of society as a whole. For example, they can become violators of the right to water where their activities deny access to clean and safe water or where water prices suddenly increase. Corporations can have a positive or negative impact on the human rights of individuals, wider communities and indigenous peoples. Marks and Clapham note that 'changes in the organisation of the global economy have greatly increased the role of business in generating outcomes that threaten human rights.'¹¹ The Global Compact's CEO Water Mandate 'recognizes that the business sector, through the production of goods and services, impacts water resources – both directly and through supply chains.'¹² The preamble of the CEO Water Mandate notes that 'that the private sector has an important stake in helping to address the water challenge faced by the world today. It is increasingly clear that lack of access to clean water and sanitation in many parts of the world causes great suffering in humanitarian, social, environmental and economic terms, and seriously undermines development goals.'¹³ CERES argues in its recent report that 'the vast majority of leading companies in water-intensive industries have weak management and disclosure of water-related risks and opportunities.'¹⁴ Without doubt, a number of positive human rights initiatives have so far been undertaken by several corporations and a number of them contribute to the creation of jobs, the stimulation of economic growth and the raising of living standards.¹⁵

Williams notes that 'since the 1970s, alternatives have been sought because of problems with public water systems, including low service quality and coverage, inefficiency, corruption, low rates of cost recovery, low productivity, and high debt burden.'¹⁶ Privatisation of water services has been offered as the *right* medicine to cure the problems of provision of water. However, privatisation of water services has stirred up a number of debates as to corporate responsibility to ensure availability,

⁹ M. Scheinin, 'Human Rights Committee: Not only a Committee on Civil and Political Rights' in M Langford (ed) *Social rights jurisprudence : emerging trends in international and comparative law* (Cambridge, New York: Cambridge University Press, 2008) 25.

¹⁰ M. Scheinin, 'Economic and Social Rights as Legal Rights' in A Eide, C Krause and A Rosas (eds), *Economic, social, and cultural rights : a textbook* (The Hague, Boston: M. Nijhoff, 2001), 41. See also C. Curtis, Standards to make ESC rights justiciable: a summary exploration, *Erasmus Law Review*, 2009, volume 2, Issue 4, <http://www.erasmuslawreview.nl/current_issue/STANDARDS_TO_MAKE_ESC_RIGHTS_JUSTICIABLE_A_SUMMARY_EXPLORATION>.

¹¹ S. Marks, A. Clapham, *International Human Rights Lexicon* (Oxford: Oxford University Press, 2005) 188.

¹² The CEO Water Mandate, http://www.unglobalcompact.org/Issues/Environment/CEO_Water_Mandate/, 8

¹³ The CEO water Mandate, Preamble, <http://www.unglobalcompact.org/docs/news_events/8.1/Ceo_water_mandate.pdf>. 4.

¹⁴ CERES, Murky Waters? Corporate Reporting on Water Risk, <<http://www.ceres.org/Page.aspx?pid=1041>>.

¹⁵ See *The Economist*, Business begins to stir, <<http://www.economist.com/node/16136270>>. S. C. Jain and S. Vachani, *Multinational Corporations and Global Poverty Reduction*, (London: Edward Elgar Publishing, 2006), and Business and Human Rights Centre, <<http://www.businesshumanrights.org/Documents/Update-Charts>>. See *KPMG Joins The Millennium Villages Project to Help Address Extreme Poverty in Africa*, CSR Wire, <<http://www.csrwire.com/News/13420.html>>.

¹⁶ M. Williams, 'Privatization and the human right to water: challenges for the new century', *Michigan Journal of International Law*, Vol. 28:469, 492. See generally R. Dilworth, Privatization, the World Water Crisis, and the Social Contract, *PS: Political Science & Politics* (2007), 40: 49-54.

accessibility, affordability and quality of the human right to water. In this context, Petrova observes that 'defenders of privatization point out that public utilities have largely failed to provide water access to those who most need it, namely the poor.'¹⁷ On the other hand, 'privatizing water is likely to reduce access to clean water because of rate increases.'¹⁸ In contrast, Kent argues that 'semiprivatization of water, carefully controlled by government, remains a plausible approach.'¹⁹

This paper argues that corporations bear a certain responsibility for the realisation of the human right to water, which can be derived from international as well as from national (constitutional) law. It will be argued that corporate obligations can potentially be based on the right to water as set in national law and in the international human rights treaties. This paper argues that corporations have an obligation to respect, protect and fulfil the right to water deriving primarily from national legal orders. It has been submitted that the concept of corporate responsibility primarily derives legal authority from national legal orders as one of the sources of law. It does not undermine the proposition that the concept can also derive authority from other sources. That the state is the primary source of legal authority for human rights obligations and the responsibility of corporations follows from the embryonic stage of development of binding international principles for the corporation and their human rights obligations. Corporations are under obligations to comply with those norms.

Even though legislation on corporate responsibility for the right to water, already exists in many countries at a national level, and sometimes even at the regional level, disparities in definition and scope and a piecemeal approach in implementation are problematic for an effective investigation and enforcement. As suggested above, national legal orders regulate corporate responsibility for human rights in a number of laws, which makes it difficult to have a clear and transparent landscape of the obligations of corporations in a particular legal order. This problem, though, can be met by introducing a uniform national law which would clearly identify obligations and the responsibility of corporations in relation to human rights. Primary responsibility for realising human rights lies with states and that recognizing the responsibility of corporations should never undermine this responsibility. Yet, given the powerful position that corporations increasingly possess, it is argued that corporations carry an additional responsibility under human rights law. This paper seeks to contribute to the further delineation of this responsibility, in particular when it comes to corporate human rights obligations in the area of the human right to water.

The balance of this paper is devoted to exploring corporate human rights obligations under the human right to water. First, some fundamental notions are explained in section one. The human right to water is succinctly examined in section two. In so doing, the several allegations of corporate human rights violations are mentioned. Section three analyses the legal nature and scope of corporate human rights obligations under the right to water and proposes *de lege ferenda* corporate human rights obligations. By doing so it is possible to evaluate which arguments are convincing and determine what the sources and the legal nature are of corporate obligations under the right to water. To be clear, the argument here is that corporations have normative obligations deriving from the human right to water.

1.1 Corporations

A number of private and state-owned corporations are doing business in the provision of water services. The largest private corporations doing business with water are Suez (111,479,116 customers),²⁰ Veolia Environnement (130,924,000 customers,²¹ RWE AG (38,235,000 customers),²²

¹⁷ V. Petrova, 'At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water' 31 *Brooklyn Journal of International Law*, 2006, 577,

□http://www.brooklaw.edu/~media/PDF/LawJournals/BJI_PDF/bji_vol31ii.ashx□, 587.

¹⁸ *Ibid.* 589.

¹⁹ G. Kent, *Freedom from want: the human right to adequate food*, (Washington D.C., Georgetown University Press, 2005), 191.

²⁰ Pinsent Masons Water Yearbook 2008-2009, □<http://www.pinsentmasons.com/PDF/PMWaterYearbook2008-09.pdf>□, p. 202.

Aguas de Barcelona (29,511,718 customers),²³ Saur (12,999,000 customers),²⁴ Acea (14,305,000 customers),²⁵ Buwater PLC/Cascal (8,834,000 customers)²⁶ and United Utilities (24,028,000 customers).²⁷ Generally, much of the literature on corporate responsibility and human rights concentrates on the notion of transnational corporations. This may be ascribed to work within the United Nations, which in the 1980s dealt with the protection of and against corporations investing and operating in the developing world.²⁸ The adjectives ‘transnational’ or ‘multinational’ can be employed to emphasize the different characteristics of certain corporations. International documents and other texts use the terms ‘transnational corporation’,²⁹ ‘multinational enterprise’,³⁰ and ‘national corporation or business enterprise’ in various contexts.

A corporation is a legal entity which owns and thereby carries out business activity mostly for profit, although non-profit corporations also exist.³¹ The term ‘corporation’ is not reserved for organisations comprising a large number of persons, but can be employed even for individual businessmen.³² A corporation has a separate personality, as do its owners, who have ‘limited liability’.³³ This means that a corporation has separate legal rights and obligations and that its owners can only be held liable for the corporation’s debt to the extent of their investment.³⁴ Company types vary from jurisdiction to jurisdiction, but the most common types of corporation are public limited liability corporations, corporations limited by shares, corporations limited by guarantee, corporations limited by guarantee with share capital (Aktiengesellschaft - AG, Societas Europaea – SE,³⁵ Gesellschaft mit begrenzter Haftung, société anonyme - SA, and société d’une personne à responsabilité - Sprl) and unlimited corporations. Less common nowadays are chartered corporations and statutory corporations. Other legal forms of doing business include unlimited and limited liability partnerships. This paper employs the term ‘corporation’ generically to describe all the above forms and types of corporation, and also transnational, multinational and national corporations; private or

(Contd.)

²¹ *Ibid.* At p. 223.

²² *Ibid.* At p. 247.

²³ *Ibid.* At p. 258.

²⁴ *Ibid.* At p. 195.

²⁵ *Ibid.* At p. 251.

²⁶ *Ibid.* At p. 268.

²⁷ *Ibid.* At p. 272.

²⁸ O. De Schutter, ‘Transnational Corporations and Human Rights : An Introduction’, Global Law Working Paper 01/05, Symposium - ‘Transnational Corporations and Human Rights’,

< http://www.law.nyu.edu/global/workingpapers/2005/ECM_DL_V_015787>. 1

²⁹ ECOSOC, Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003) [hereinafter *UN Norms*]. The Commission, in Dec. 2004/116, expressed the view that, while the Norms contained ‘useful elements and ideas’ for its consideration, as a draft the proposal had no legal standing.

³⁰ *The OECD Guidelines for Multinational Enterprises: Text, Guidelines, Commentary*, DAFFE/IME/WPG (2000) 15 Final (OECD: Paris, 2001).

³¹ D. French, S. W. Mason, C. L. Ryan; *Company Law*, (Oxford, Oxford University Press: 2007), 1-38. P.L. Davies: *Gower and Davies’s Principles of Modern Company Law*, (London: Sweet & Maxwell, 2003), 1-125.

³² P.L. Davies, 2003, 10.

³³ *Salomon v. Salomon & Co. Ltd* [1897] A.C. 22 (H.L.), 43, 51. It is debated whether separate legal personalities of corporations in a group of corporations may be ignored and lifted. See D. French, S. W. Mason, C. L. Ryan; *Company Law*, OUP, 2007, 116-149.

³⁴ K Iwai, ‘What is corporation? – The Corporate personality controversy and comparative governance’, University of Tokyo, January 2001.

³⁵ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

public corporations;³⁶ limited or unlimited liability corporations, and state-owned or privately-owned corporations. These terms may be used interchangeably and will be, in most cases, substituted by the term ‘corporation’, or the adjective ‘corporate’. Moreover, it appears that there is no reason to exclude purely national corporations from the plethora of human rights obligations, even though it may be true that larger corporations, such as transnationals, may have greater obligations in the human rights context. In other words, the paper employs a ‘fluid’ concept of the corporation. For the purposes of this paper, a corporation is defined as an economic entity operating in one or ‘more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively,’³⁷ including ‘transnational corporations, contractors, subcontractors, suppliers, licensees or distributors; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity.’³⁸

1.2 Corporate responsibility or corporate liability?

An ancient Roman legal principle suggests that: *culpa tenet [teneat] suos auctores*.³⁹ Legal responsibility has a variety of contrasting faces. Responsibility involves fulfilling legal obligations and also the obligation to pay compensation for any violations. Responsibility for one’s actions generally derives from the national legal order to which a person is a subject. By the term ‘responsibility,’ this paper refers to a broad understanding of legal responsibility and accountability. Duff argues that ‘the relationship between liability and responsibility can be simply stated: responsibility is a necessary but not a sufficient condition of liability.’⁴⁰ In this way, by corporate responsibility, this paper refers to corporate legal responsibility. The term ‘responsibility’ is preferred to the, perhaps, more obvious choices of liability or accountability. Responsibility is a broader concept than liability as it includes not only national liability and accountability under national legal orders (the civil, criminal and administrative liabilities of corporations under national legal orders) but also the international legal responsibility of states and the liability of corporations under investment law and company law. This paper therefore uses the concept of ‘responsibility’ as an umbrella term, also including ‘liability.’

1.3 Corporate violations or abuses?

Several commentators argue that only a state can violate human rights, and that other actors, such as corporations and individuals, can only commit human rights abuses. Scheinin, for example, argues that the ‘violation is a definitive conclusion that is established through a judicial or quasi-judicial procedure.’⁴¹ Tomuschat argues that ‘human rights violations can, in principle, be committed only by states and/or the persons acting on behalf of the state.’⁴² This paper does not necessarily disagree with the above arguments as it argues that corporate obligations under the right to water derive primarily from national legal orders.

³⁶ See, for instance, the UK Companies Act 2006, Section 4.

³⁷ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). 20.

³⁸ *Ibid.* 21. Cf. Corporate Complicity and Legal Accountability, Volume 1: Facing the Facts and Charting a Legal Path, Accountability Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Geneva, September 2008. 4.

³⁹ ‘Misconduct binds [should bind] its own authors’,

<http://www.wordinfo.info/words/index/info/view_unit/585>.

⁴⁰ R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, (Oxford: Hart Publishing, 2007) 20.

⁴¹ Martin Scheinin’s first report as Special Rapporteur to the Human Rights Council (Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (E/CN.4/2006/98)), para 67-71.

⁴² See, on the distinction between human rights violations and abuses. Similarly, C. Tomuschat, *Human Rights between Idealism and Realism* (Oxford: Oxford University Press, 2003) 309.

Further, the fact that international jurisdictions for legal persons are yet to be developed does not imply that a corporation does not have any legal obligations. On the contrary, it would be futile to argue that a substantive obligation only arises when joined with a jurisdiction that can enforce it. In this way, it appears that corporations are obliged to *pro forma* observe the human rights of individuals. This not only matters on a normative level, but also beyond the form, beyond the pure normative, when corporations are *de facto* faced with a decision as to what kind of business policy to adopt. In other words, the problem is not that corporations and their officers would not have human rights obligations. The real, and far deeper, structural problem is that individuals do not have recourse to enforce their human rights and ideals against corporations.

2. The Right to Water

2.1 Fundamental issues

A human being requires access to water for survival and a decent standard of living. Without water there would be no human beings on earth. However, water is a scarce and precious item, and access to it for all human beings is not fully ensured. A WHO/UNICEF Joint Monitoring Programme (JMP) report on Progress on Sanitation and Drinking-Water: 2010 Update Report, notes that 884 million people in the world do not have access to clean and safe water.⁴³ A further 2.6 billion people in the world lack access to basic sanitation. The United Nations General Assembly recognized its concern in its Millennium Declaration, which vowed “to halve the proportion of people who are unable to reach or to afford safe drinking water” by 2015.⁴⁴ Because of its importance, it is not far-fetched to recognize access to sufficient safe and clean drinking water and sanitation as a human right. Such characterization presupposes that access to water is a public good and not a market commodity. All individuals should have access to water and sanitation.⁴⁵

The Office of the United Nations High Commissioner for Human Rights notes that ‘international human rights law entails clear obligations in relation to access to safe drinking water.’⁴⁶ Similarly, the UN Special Rapporteur for Water noted in 2002 that, “the right to drinking water and sanitation is an integral part of officially recognized human rights and may be considered a basic requirement for the implementation of several other human rights.”⁴⁷ In this way, access to safe drinking water and sanitation is increasingly being considered a fundamental human right. Nonetheless, the description and recognition of right to water as a human right is not as straightforward as it may seem. Generally, states have not reached a consensus, at an international level, to recognize water as a human right.⁴⁸ Consequently, international and regional treaties do not impose binding obligations on states to respect, protect, and fulfil the right to water. Nonetheless, a human right to water may arise from the national legal orders of several countries, as explained in the

⁴³ WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation, Progress on Sanitation and Drinking-water: 2010 Update, http://www.unwater.org/activities_JMP2010.html, p. 7.

⁴⁴ UN Millennium Declaration, G.A. Res. 55/2, para. 19

⁴⁵ See generally S. Tully, A Human Right to Access Water, *Netherlands Quarterly of Human Rights*, Vol. 23, No. 1, March 2005, pp. 35-64, E. Filmer-Wilson, The Human Rights-Based Approach to Development: The Right to Water, in *Netherlands Quarterly of Human Rights*, Vol. 23, No. 2, June 2005, pp. 213-242.

⁴⁶ Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, 16 August 2007, <http://daccessdds.un.org/doc/UNDOC/GEN/G07/136/55/PDF/G0713655.pdf?OpenElement>, Paragraph 47.

⁴⁷ ECOSOC, Sub-Commission on the Promotion and Prot. of Human Rights, *Preliminary Report of the Special Rapporteur Mr. El Hadji Guissé, Relationship between the Enjoyment of Economic, Social, and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation*, UN Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/2002/10, para. 32.

⁴⁸ See Proceedings of World Water Forum in Istanbul 2009, http://www.worldwaterforum5.org/index.php?id=1875&L=0target%3D_blank%25%25.

next section.⁴⁹ Despite this, several international human rights treaties indirectly protect the right to water. The International Covenant on Economic, Social and Cultural Rights (ICESCR) indirectly provides for the human right to water under Articles 11(1) (right to adequate standard of living) and 12(1) of the ICESCR (the right to health).⁵⁰ Further, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) notes in Article 14 (2) that:

States parties 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 women the right: (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Similarly, Article 24 of the Convention on the Rights of the Child (CRC) states, 'shall take appropriate measures' to 'combat disease and malnutrition, including within the framework of primary health care, through, inter alia, (...) the provision of adequate nutritious foods and clean drinking water (...)' (Article 24 (2) (c)).⁵¹ Consequently, the right to water is also part of the right to health. Further, the Convention on the Rights of Persons with Disabilities provides for, in Article 28, an adequate standard of living and social protection that states parties 'must ensure equal access by persons with disabilities to clean water services, and ensure access to appropriate and affordable services, devices and other assistance for disability-related needs.' On a regional level the Committee of Ministers of the Council of Europe adopted the European Charter on Water Resources (Rec. (2001)14), which reads in Article 5 as follows 'everyone has the right to a sufficient quantity of water for his or her basic needs' and provides: 'international human rights instruments recognise the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families'. It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene.

International humanitarian law also protects access to water during armed conflict. The Third Geneva Convention on the Treatment of Prisoners of War provides that 'sufficient drinking water shall be supplied to prisoners of war'⁵² and that 'the Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention.'⁵³ Similarly, Article 46 provides that 'the Detaining Power shall supply prisoners of war during transfer with sufficient food and drinking water to keep them in good health, likewise with the necessary clothing, shelter and medical attention.'⁵⁴ Similar provisions can be found in the Fourth Geneva Convention (1949) on the protection of civilian persons in times of war⁵⁵ and Additional Protocol I⁵⁶ and Protection of Victims of International Armed Conflict and Additional Protocol II on Protection of Victims of Non-international Armed Conflict.⁵⁷

A human right to water can also be protected indirectly through provisions in international and regional human treaties, which do not expressly mention the right to water, but the wording of which

⁴⁹ See section 3.

⁵⁰ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976. Articles 11 and 12.

⁵¹ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* 2 September 1990, Article 24 (2) (c),

⁵² Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* 21 October 1950, Article 26.

⁵³ *Ibid.* Article 20.

⁵⁴ *Ibid.* Article 46.

⁵⁵ Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Articles 85, 89, 127.

⁵⁶ Additional Protocol I (1977)⁵⁶ and Protection of Victims of International Armed Conflict, Articles 54 and 55.

⁵⁷ Additional Protocol II (1977) on Protection of Victims of Non-international Armed Conflict, Article 5 and 14.

protects values, which the human right to water also seeks to protect. For instance, Article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR), which provides, that ‘every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’⁵⁸ Accordingly, the United Nations Human Rights Committee, has noted that:

the right to life has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

Such a broad interpretation of the right to life invites conclusions that even the right to water may be protected under Article 6 (1) of ICCPR. More importantly, the ESCR Committee, the treaty-monitoring body of the ICESCR, asserts in paragraph 33 of General Comment 15 on the right to water that:

steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.⁵⁹

This paragraph may indirectly imply that not only states but also corporations have obligations at least to respect the right to water of individuals and communities. Further, the African Charter on the Rights and Welfare of the Child provides in Article 14 (2) (c) that ‘State Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures: (c) to ensure the provision of adequate nutrition and safe drinking water.’⁶⁰ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa notes in Article 15 that ‘states parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to: provide women with access to clean drinking water.’⁶¹

All in all, it seems that there is substantial support at an international level for asserting that the right to water is a human right, even though the main international human rights treaties do not directly include provisions on the right to water. They include the human right to water only indirectly.⁶² However, Kok and Langford note that ‘the measure of neglect of the right to water in international and national jurisprudence stands in contrast to the severity of the plight of millions without proper access to water.’⁶³ Precisely this precarious situation of hundreds of millions around the world has given a new impetus to strive for a self-standing normative recognition of the human right to water also in international treaties.

⁵⁸ International Covenant on Civil and Political Rights G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976, Article 6 (1).

⁵⁹ CESCR, General Comment 15 on the Right to Water, UN Doc. E/12/2002/11, 20 January 2003.

⁶⁰ African Charter on the Rights and Welfare of the Child, 1990, OAU Doc. CAB/LEG/24.9/49 (1990) entry into force November 1999.

⁶¹ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," O.A.S. Treaty Series No. 69 (1988), *entered into force* 16 November 1999, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992), Article 11.1.

⁶² For an opposite view see P. Thielbörger, *The Human Right to Water Versus Investor Rights: Double Dilemma or Pseudo-Conflict?*, in P.M. Dupuy, F. Francioni and E. U. Petersmann, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009), 488-493.

⁶³ A. Kok, M. Langford, ‘*Right to Water*’, in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derk Spltz and Stuart Woolman (eds.), *Constitutional Law of South Africa* 2nd Ed. (Pretoria: Juta and Centre for Human Rights, 2005), 208.

2.2 The Nature and Scope of the Human Right to Water

This section analyses the scope and nature of the human right to water. The UN Committee on Economic, Social and Cultural Rights notes that ‘the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.’⁶⁴ The human right to water includes two constituting elements. In other words, it includes ‘both freedoms and entitlements.’⁶⁵ Freedoms include more normative obligations on the part of states as they ‘include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies.’⁶⁶ On the other hand, entitlements refer specifically to access to the infrastructure for the provision of water such as ‘the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.’⁶⁷ The UN ESCR Committee argues that ‘water must be *adequate* for human dignity, life and health.’⁶⁸ It then goes on to list four criteria for assessing the adequacy of right to water, which are availability, quality, accessibility and affordability. Availability means that ‘the water supply for each person must be sufficient and continuous for personal and domestic uses.’⁶⁹ There is no international consensus on how many liters of water per day a person needs to satisfy basic survival and health needs. Some argue that a person needs 40-50 litres of water per day and a minimum of 20 litres to satisfy basic survival and health needs.⁷⁰ Others place absolute minimum to 30 litres of water per human being per day.⁷¹ Further, the Constitutional Court of South Africa, in *Mazibuko v. City of Johannesburg*, recently upheld a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month as reasonable under section 27(1) of the Constitution (the human right to water).⁷²

As for quality, it means that ‘the water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological *hazards* that constitute a threat to a person’s health.’⁷³ Finally, accessibility means that everyone has to have access to water and water services.⁷⁴ In this way, accessibility has four main elements: physical accessibility, economic accessibility, non-discrimination and information accessibility.⁷⁵ Another aspect of the human right to water concerns affordability, which means that everyone should have access to ‘appropriate water and sanitation pricing policies, including through flexible payment schemes and

⁶⁴ CESCR, General Comment 15 on the Right to Water, UN Doc. E/12/2002/11, 20 January 2003, Para. 2.

⁶⁵ *Ibid.* Para. 10.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* Para. 11.

⁶⁹ *Ibid.* Para. 12.

⁷⁰ World Water Council, Right to Water,

<http://www.worldwatercouncil.org/fileadmin/wwc/Library/Publications_and_reports/Right_to_Water__UK_final.pdf>.

⁷¹ H. F. M. W. van Rijswijk, *Moving Water and the Law, On the Distribution of Water Rights and Water Duties Within River Basins in European and Dutch Water Law*, (Groningen: Europa Law Publishing, 2008), 10.

⁷² Constitutional Court of South Africa, Case CCT 39/09, 2009 ZACC 288, 9 October 2010 <<http://www.constitutionalcourt.org.za/uhtbin/cgiisirs/WgroBqWoMN/MAIN/23840059/9#top>>, para. 166-169. See also P. Danchin, A Human Right to Water? The South African Constitutional Court’s Decision in the Mazibuko Case, EJIL: Talk!, <<http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court’s-decision-in-the-mazibuko-case/>>. See also The Case of the Communities of the Jiguamiando and the Curbarado, Order of the Court of March 6, 2003, Inter-Am. Ct. H.R. (Ser. E) (2003).

⁷³ CESCR, General Comment nr.15. Para. 12.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

cross-subsidies from high-income users to low-income users.⁷⁶ All in all, a fully-fledged implementation of the human right to water requires that all four elements are included.

2.3 Examples of allegations of corporate violations of the right to water

As legal doctrines need to be discussed in relation to the reality of situations, this section identifies the nature and extent of the problem. Corporate responsibility for the human right to water is therefore not merely an abstract matter. Corporations have for centuries been operating beyond the borders of the country in which they are registered. A range of mechanisms makes this possible, from wholly-owned subsidiaries, joint ventures or other partnerships with foreign companies, to supply-chain relationships with contractors and suppliers of goods and services. This has raised the question of the extent to which corporations have responsibilities for the protection, promotion and realization of the human right to water, and the ways in which they can be held accountable for human rights violations connected with their activities. Additionally, a few real-life scenarios from different parts of the world will help to illustrate the impact that corporations have on the human right to water.

In recent decades there has been a growing body of evidence that the impact of corporate activities on poor communities in developing countries can result in human rights violations.⁷⁷ Even though this phenomenon is far from being new, globalization and its inherent forces have created favourable conditions for the rise of corporate actors to power. Ruggie notes that ‘the rights of transnational firms – their ability to operate and expand globally – have increased greatly over the past generation as a result of trade agreements, bilateral investment agreements and domestic liberalization.’⁷⁸ Today there are some 70,000 transnational corporations, together with roughly 700,000 subsidiaries and millions of suppliers in every corner of the globe.⁷⁹ The World Health Organization estimates that 1.7 billion people do not have access to clean water and that 2.3 billion people are subjected to water-borne diseases each year.⁸⁰ The private sector may have a responsibility for these high numbers. For instance, the NGO FIAN International reports that a private company is allegedly contaminating water in the River Chambira basin in Peru.⁸¹ It also reports that two Coca Cola bottling plants in Kerala (India) and Tamil Nadu (India) were allegedly involved in the depletion and contamination of groundwater.⁸² An oil pipeline network funded by a German state-owned bank has allegedly destroyed access to water and livelihoods in Ecuador.⁸³ On many occasions, both the public and the private sector are involved. For example, the price of water has rapidly increased after water privatization in Cochabamba (Bolivia).⁸⁴ And in 2003 the Indian government decided to divert

⁷⁶ El Hadji Guissé, Draft Guidelines for the Realization of the Right to drinking Water and Sanitation, Report of the Special Rapporteur, E/CN.4/Sub.2/2005/25, 11 July 2005, 6.1.

⁷⁷ See Human Rights Watch, *On the Margins of Profit, Rights at Risk in the Global Economy*, February 2008 Volume 20, No. 3(G). <<http://hrw.org/reports/2008/bhr0208/>>, J. Ruggie, *Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5/Add.2, 23 May 2008.- summarizing the scope and patterns of alleged corporate-related human rights abuse found in a sample of 320 cases posted on the Business and Human Rights Resource Center webpage from February 2005 – December 2007.

⁷⁸ J. Ruggie, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/2006/97 (2006) (hereinafter J. Ruggie’s 2006 report), para. 12.

⁷⁹ Research note, *World Investment Report 2005: Transnational Corporations and the Internationalization of R&D Overview*, United Nations Conference on Trade and Development, 104.

⁸⁰ Food and Water Watch, <<http://www.foodandwaterwatch.org/water/world-water/right>>.

⁸¹ FIAN International; *Identifying and Addressing Violations of Human Right to Water -Applying the*

Human Rights Approach, <http://www.menschen-recht-wasser.de/downloads/violations_human-rights-water.pdf>, at p. 10.

⁸² *Ibid.*

⁸³ *Ibid.* At p. 12.

⁸⁴ *Ibid.* At p. 11.

water, meant for 20,000 peasant families, for a water theme park in India.⁸⁵ The construction of dams has also led to the deprivation of water by communities living in the area. Several thousands of persons were allegedly deprived of their access to water in Ghana due to the damming of the river Subri. The project proceeded on the basis of an investment agreement between Newmont Mining Corporation and the government of Ghana.⁸⁶ Several thousands of people allegedly suffer from the lack of a safe drinking water supply in Jai Bheem Nagar in Meerut, Uttar Pradesh, in India.⁸⁷ Further, the Baba dam project in Ecuador may affect the right to water of more than 20,000 women and men, farming and fishing communities and indigenous people settled in this basin.⁸⁸ Further, the International Fact Finding Mission, an international non-governmental organisation, has concluded that extreme violations of the human right to water have taken place due to bauxite mining in the Rayagada and Koraput districts in Orissa, India.⁸⁹

3. Corporate human rights obligations under the Right to water: From their sources to their legal nature and scope

This section attempts to identify whether corporations have normative obligations under the human right to water in national law, international law, and in corporate codes of conduct. The Institute for Business and Human Rights suggests that ‘business has three potential responsibilities concerning water: as a user or consumer, as an enabler of access to water and as a provider or distributor of water.’⁹⁰ It further notes that ‘industrial bodies (including both private corporations and State owned enterprises) are often major consumers of water. It is predicted that in 2025, industry, rather than agriculture, will account for most of the projected increase in water use. As a result, industries may substantially affect the enjoyment of the right to water if their water use curtails access to safe-drinking water for personal and domestic uses, either through over-abstraction or pollution of water sources.’⁹¹ It must be observed as a note of caution that the obligations of corporations in relation to a right to water are not identical to those of a state. Some commentators argue that corporations cannot have obligations which pertain exclusively to the state apparatus, such as the right to a nationality, the right to asylum, or the right to have a fair hearing, but surely corporations are obliged to respect the human rights right to water.⁹² In this regard, while their obligations may be construed as an obligation to respect, protect and fulfil, some authors accept that such an obligation will also include the obligation to promote the right to water in relation to contractors and subcontractors.⁹³

This section argues that the normative thrust of corporate obligations under the human right to water derives from three levels of legal sources. First, it is submitted that corporate obligations under the human right to water derive from national legal orders. Second, the corporate obligations may derive from the international level. Third, the corporate obligations under the human right to water may derive from unilateral voluntary commitments by the corporations themselves. In other words,

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* At p. 12-13.

⁸⁷ *Ibid.* At p. 14.

⁸⁸ *Ibid.* At p. 16.

⁸⁹ FIAN International; Investigating some alleged violations of the human right to water in India, Report of the International Fact Finding Mission to India, January 2004, < http://www.menschen-recht-wasser.de/downloads/report_komplett.pdf>, p. 9-13.

⁹⁰ Institute for Business and Human Rights; Business, Human Rights & Right to Water, Challenges, Dilemmas, Opportunities, Roundtable Consultative Report, January 2009,

<<http://www.institutehrb.org/Downloads/Draft%20Report%20-%20Business,%20Human%20Rights%20and%20Water.pdf>>. At page 3.

⁹¹ *Ibid.* at page 18.

⁹² J.H. Knox, *Concept Paper on Facilitating Specification of the Duty to Protect, prepared for UN SRSG on Business and Human Rights*, 14 December 2007.

⁹³ A. Hardberger, ‘Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates’ 4 *Northwestern University Journal of International Human Rights* 331 (2005).

this paper argues that the corporate obligations under the human right to water derive primarily from national legal orders and only secondarily from the international level, whereas both draw their foundations from a national and international value system, which in turn is derived from national legal orders. In addition, the voluntary commitments of corporations are identified as a third level of sources for corporate human rights obligations under the right to water.

It has to be noted that some legal differences between the three levels are also relevant. The third level obviously presents a source of a distinct normative nature, as it cannot be equated with the normative levels of national legal orders and the international legal order. In contrast, the relevance of distinguishing between the first two situations may be less obvious, as many national rules derive their origins from the international legal order and vice versa. Nonetheless, the distinction between national and international levels can be made and is also legally and practically relevant.

3.1 Legal sources of corporate human rights obligations under the right to water

3.1.1 Sources of corporate human rights obligations in national legal orders

The tenets of every normative system are principles and rules that create the rights and obligations of the subjects/participants in that system. Validity of any positive norm derives its legal authority from its membership in a legal order, which gives it a binding force. Legal authority means a source of law wherefrom a positive law norm is derived. Legal scholarship has so far predominantly focused on the international legal obligations of corporations.⁹⁴ In contrast, this paper argues that corporate human rights obligations derive legal authority from national normative orders and only secondarily from the international level. This argument is backed by constitutional and legislative protections in national legal orders in relation to corporate human rights obligations. Finally, this section argues that the human rights obligations of corporations have arguably acquired the status of customary international law.

In the absence of a clear and coherent articulation of the positive international corporate human rights obligations relating to the human right to water, it appears necessary to first examine the sources of corporate human rights obligations in national legal orders. This section argues that national legal orders are rooted more deeply in a normative system than international law is. This is not different in relation to corporate human rights obligations. A number of international human rights contained in the various international human rights treaties, or developed through customary international law, are directly enshrined in the national legal orders of several countries. Viljoen notes that 'when states ratify human rights treaties, they undertake to domesticate and comply with their provisions.'⁹⁵ Having said that, it must be recognised that human rights protection was first developed in the domestic environment long before any international human rights treaty was adopted.⁹⁶ Domestic laws include protection for human rights that can be enforced against corporations.⁹⁷

⁹⁴ S.R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale Law Journal* 443 (2001), N. Jaegers, *Corporate Human Rights Obligations*; Declaration of C. Greenwood, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, Civil Action No. 1 CV 9882 (AGS), (7 May 2002) at 8, para. 20.

⁹⁵ F. Viljoen, 2007, 10.

⁹⁶ See Magna Carta (1215), English Bill of Rights (1689), French Declaration of the Rights of Man and of the Citizen (1789), United States Declaration of Independence (1776).

⁹⁷ For a detailed discussion on human rights obligations in domestic law, see respectively: S. Fitzgerald, 'Corporate accountability for human rights violations in Australian domestic law' (2005) *Australian Journal of Human Rights*, 2, <<http://www.austlii.edu.au/au/journals/AJHR/2005/2.html>>. S. van Bijsterveld, 'Human Rights and Private Corporations: A Dutch Legal Perspective', vol. 6.4, *Electronic Journal of Comparative Law*, December 2002; S. Joseph 'An overview of the human rights accountability of multinational enterprises' in M. Kamminga and S. Zia-Zarifi (eds) *Liability of Multinational Corporations Under International Law*, (The Hague Kluwer Law International (2000)); C. Heyns and F. Viljoen *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, (The Hague. Kluwer Law International, 2002).

The corporate human rights obligations under the right to water derive, as noted, legal authority primarily from national legal orders.⁹⁸ Domestic laws have existed in many states, which place human rights obligations on corporations, including the human right to water.⁹⁹ The most important statutes are the constitutional laws. National constitutions often play a seminal role in the protection of human rights. Most commonly, all natural and legal persons must act in compliance with the laws of a national constitution. Most national legal orders include the protection of human rights preserving the security of persons, fundamental labour rights and protection against discrimination. These rights can arguably be translated into corporate human rights obligations under the right to water. In other words, constitutional protections of human rights apply to both natural and legal persons.

A number of national constitutions of countries across the globe already include the human right to water. For example, India, South Africa, and Uganda (Anglophone common law countries), Belgium, Cambodia, and Democratic Republic of Congo (Francophone countries belonging to the civil law family), Portugal (a Lusophone country belonging to the civil law family), Uruguay, Venezuela, and Argentina (Hispanic countries also belonging to the civil law family), all include numerous human rights in their national constitutions. It must be recognised, however, that only a few constitutions contain explicit provisions that the constitutional human rights of the right to water apply to both natural and legal persons.

A few examples of national constitutions containing the corporate obligations under the human right to water are provided here. In South Africa, the provisions of the South-African Bill of Rights bind natural and juristic persons to take into account the nature of the right and the nature of any obligation imposed by the right to water.¹⁰⁰ The Article 27 (1) (b) of the Constitution of South Africa provides that 'everyone has the right to have access to ... sufficient ... water.' A further example from Uganda demonstrates that human rights obligations under the right to water derive also from constitutions. The Constitution of Uganda provides, for example, in Article XIV (b) that 'all Ugandans enjoy rights and opportunities and access to ... clean and safe water'. Similarly, section 47 of the Constitution of Uruguay provides that 'water is an essential natural resource for life. Access to water services and sanitation are essential human rights.'¹⁰¹ Further, the Constitution of the Lao People's Democratic Republic provides in Article 17 that 'All organisations and citizens must protect ... water sources', which may suggest that this provision includes also legal persons. The Constitution of Gambia provides that 'The State shall endeavour to facilitate equal access to clean and safe water.'¹⁰² Similarly, the Constitution of Ehtiopia provides that 'every Ethiopian is entitled, within the limits of the country's resources, to ... clean water.'¹⁰³ Similar provision can be found in Article 126 of the Constitution of Guatemala.¹⁰⁴

All in all, national constitutions create the right to the human right to water in the national legal orders of several countries such as Belgium, Colombia, Democratic Republic of Congo, Ecuador, Ethiopia, Gambia, Guatemala, Kenya, Panama, Philippines, South Africa, Spain, Uganda, Uruguay,

⁹⁸ See OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, 15. <<http://www.oecd.org/dataoecd/26/21/36885821.pdf>>, noting that corporations are expected to comply with their legal obligations.

⁹⁹ See similarly S. Joseph, *Corporations and Transnational Human Rights Litigation*, Hart, Oxford, 2004, 11. See also J.J. Paust; 'Human Rights Responsibilities of Private Corporations', (2002) 35 *Vanderbilt Journal of Transnational Law*, 801, 808-809; S. Joseph, 'Liability of Multinational Corporations: International and Domestic Laws and Procedures', in Malcolm Langford (ed.) *Social Economic Rights Jurisprudence: Emerging Trends in International and Comparative Law*. (Cambridge: Cambridge University Press, 2007).

¹⁰⁰ See Section 8(2) of the Bill of Rights.

¹⁰¹ Constitution of Uruguay, Section 47.

¹⁰² Constitution of Gambia (1996), Article 216(4).

¹⁰³ Constitution of Ethiopia (1998), Article 90(1).

¹⁰⁴ Consitution of Guatemala, article 27: 'Todas las aguas son bienes de dominio público, inalienables e imprescriptibles. Su aprovechamiento, uso y goce, se otorgan en la forma establecida por la ley, de acuerdo con el interés social. Una ley específica regulará esta materia.'

Venezuela and Zambia.¹⁰⁵ In this way, the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes ‘has found that in a number of countries domestic constitutional or human rights provisions do in fact provide for a direct cause of action against a non-state actor, including companies or company officials, alleging that their conduct infringed a protected right.’¹⁰⁶ It appears hence that corporations have human rights obligations in national legal orders as much as individuals and the state have them under a constitutional and normative framework.

Corporations are obliged to comply with obligations in national legal orders, which also include the protection of human rights.¹⁰⁷ In this connection, as concerns national legislation, there are numerous examples of corporate human rights obligations deriving from national legal orders. A number of corporate human rights obligations derive from ordinary legislation in a number of national legal orders. Corporate human rights obligations under the right to water derive from ordinary criminal legislation, civil law legislation, consumer protection laws, company law, and national law covering the extraterritorial operations of corporations.

A few examples of national ordinary legislation illustrate that corporate human rights obligations derive from national legal orders. A number of national corporate law principles, legislation and practices directly or indirectly create corporate human rights obligations in countries such as France, Spain, Brazil,¹⁰⁸ Belgium, the Netherlands, Kenya, Finland, Argentina, Australia, Canada, France, India, Indonesia, Japan, New Zealand, Papua New Guinea, Singapore and the UK.¹⁰⁹ In France, for example, the Water Bill provides for the right to water in the following way: ‘everyone has the right, for their alimentation and hygiene, to have access to drinking water, on the condition that it is economically affordable to everyone.’¹¹⁰ For instance, municipalities in Spain are obliged to offer access to water and sewer services.¹¹¹ Consequently, public and private corporations have obligations to provide such access. In Belgium, water is a right in all three regions. The Walloon Region provided in its decree that ‘every person has the right to make use of drinking water of a quality and in quantity appropriate for nutrition, domestic needs and health.’¹¹² The National Water Resource Management Strategy (2006 to 2008) of the Kenyan government provides that: ‘water required to meet basic human needs and to maintain environmental sustainability will be guaranteed as a right.’¹¹³ Further, the Dutch national legal order effectively recognizes water as a human right.¹¹⁴ The Finnish Water Services Act provides that ‘the objective of this Act is to ensure water services which provide a sufficient amount of impeccable household water with respect to health.’¹¹⁵ Further, the Public Utility Code of California provides that ‘access to an adequate supply of healthful water is a basic necessity of human life, and

¹⁰⁵ World Water Council, *Moving toward World Consensus?*, p. 4.

¹⁰⁶ *Corporate Complicity and Legal Accountability, Volume 3: Civil Remedies, Accountability Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes*, Geneva, September 2008, 7.

¹⁰⁷ See J. Ruggie’s 2008 report, para. 54.

¹⁰⁸ UNESCO, *Outcome of the International Experts’ meeting on the Right to Water, 7-8 July 2009*, <<http://unesdoc.unesco.org/images/0018/001854/185432e.pdf>>.

¹⁰⁹ *Reports on Corporate Law Tools, Business and Human Rights Resource Centre*, □ <http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Corporatelaw/CorporateLawTools> □. <<http://www.reports-and-materials.org/Corporate-law-tools-Toronto-meeting-report-5-6-Nov-2009.pdf>>.

¹¹⁰ Water Bill, 20. December 2006.

¹¹¹ Municipal Law 7/28, art. 26. 1.

¹¹² Decree, 15 April 1999.

¹¹³ Centre on Housing Rights and Evictions, Nairobi, Kenya, *Right to Water Programme*,

<http://www.cohre.org/store/attachments/RWP%20-%20Kenya%20-%20Brochure%20on%20the%20Right%20to%20Water%20and%20Sanitation%20in%20Kenya.pdf> □. 4.

¹¹⁴ H. F. M. W. van Rijswijk, *Moving Water and the Law, On the Distribution of Water Rights and Water Duties Within River Basins in European and Dutch Water Law*, (Groningen: Europa Law Publishing, 2008), 14.

¹¹⁵ Water Services Act (119/2001), Article 1, <<http://www.finlex.fi/pdf/saadkaan/E0010119.PDF>>.

shall be made available to all residents of California at an affordable cost.¹¹⁶ Therefore, a substantial number of countries from every continent, from Latin America to Asia, includes the right to water in their constitutional laws and national legislations.¹¹⁷ Consequently, it may be argued that corporate obligations arising from the right to water are well established and recognized within national legal orders. Further, Mali, Mauritania and Senegal signed a Senegal River Water Charter 8 (2002), which provides in Article 4: ‘les principes directeurs de toute répartition des eaux du Fleuve visent à assurer aux populations des Etats riverains, la pleine jouissance de la ressource, dans le respect de la sécurité des personnes et des ouvrages, ainsi que du droit fondamental de l’homme à une eau salubre, dans la perspective d’un développement durable.’¹¹⁸ Similarly, Indian courts have held that the right to life in Article 21 of the constitution of India includes the right to safe and sufficient water.¹¹⁹ The Kerala High Court in *Attakoya Thangal v. Union of India* (1990), Justice Sankaran Nair, noted that: ‘the right to sweet water and the right to free air, are attributes of the right to life for these are the basic elements which sustain life itself.’¹²⁰ The Argentinean courts have in several decisions upheld the human right to water.¹²¹

The Constitutional Court of South Africa held recently in *Mazibuko v. City of Johannesburg* that the state-owned corporation, Johannesburg Water, has to provide a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month as reasonable under section 27(1) of the Constitution (the human right to water).¹²² In a similar recent development, the Supreme Court of Chile confirmed the water use rights of the Aymara indigenous communities against a private corporation, Agua Mineral Chusmiza, which has been ‘seeking the rights to bottle and sell freshwater from a source used historically by Aymara indigenous residents.’¹²³

From this analysis of national legal orders, it becomes clear that a number of sources of law in national legal orders include corporate human rights obligations under the right to water. In spite of these developments, however, deriving corporate human rights from national legal orders is not

¹¹⁶ Public Utility Code (California), 739.8. (a)

¹¹⁷ A bibliography of primary and secondary sources of law on the human right to water, Unitarian Universalist Service Committee, 2008, p. 16-21.

¹¹⁸ Charte des Eaux du Fleuve Sénégal, 2002, Art.4.

¹¹⁹ The Right to Water, *Legal Redress: The Right to Water under the Right to Life: India*,

<http://www.righttowater.org.uk/code/legal_3.asp>

¹²⁰ *Attakoya Thangal v. Union of India* (1990)

<http://www.dundee.ac.uk/water/Documents/Treaties/National%20Cases/Attakoya%20Thangal%20v.%20Union%20of%20India.pdf>, *Ibid.*, para 7. The Right to Water, *Legal Redress: The Right to Water under the Right to Life: India*, <http://www.righttowater.org.uk/code/legal_3.asp>.

¹²¹ See *Menores Comunidad Paynemil s/accion de amparo*, Expte. 311-CA-1997. Sala II. Cámara de Apelaciones en lo Civil, Neuquen, 19 May 1997; *Valentina Norte Colony, Defensoría de Menores N° 3 c/Poder Ejecutivo Municipal s/acción de amparo*. Expte. 46-99. Acuerdo 5 del Tribunal Superior de Justicia. Neuquen, 2 March 1999. *Quevedo Miguel Angel y otros c/Aguas Cordobesas S.A. Amparo* Cordoba, City, Juez Sustituta de Primera Instancia y 51 Nominación en lo Civil y Comercial de la Ciudad de Córdoba (Civil and Commercial First Instance Court). 8 April 2002. Cases summarized in COHRE, Legal resources for the right to water, October 2003, 112-114, <<http://www.cohre.org/store/attachments/COHRE%20Sources%208.pdf>>.

¹²² Constitutional Court of South Africa, Case CCT 39/09, 2009 ZACC 288, 9 October 2010 <<http://www.constitutionalcourt.org.za/uhtbin/cgiirsi/WgroBqWoMN/MAIN/23840059/9#top>>, para. 166-169. See also P. Danchin, A Human Right to Water? The South African Constitutional Court’s Decision in the Mazibuko Case, EJIL: Talk!, <<http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court’s-decision-in-the-mazibuko-case/>>.

¹²³ The Santiago Times, Chile’s Supreme Court Upholds Indigenous Water Use Rights, 30 November 2009, <http://www.santiagotimes.cl/index.php?option=com_content&view=article&id=17739:chiles-supreme-court-upholds-indigenous-water-use-rights&catid=19:other&Itemid=142>, The Supreme Court of Chile, Judgment, Rol N° 2840 – 08, 25 November 2009,

<http://www.poderjudicial.cl/causas/esta402.php?rowdetalle=AAANoPAANAACuErAAC&consulta=100&glosa=&causa=2840/2008&numcua=41242&secre=UNICA>>.

entirely problem free. In sum, it appears that there is growing support for the notion that corporate human rights obligations under the right to water can be derived from constitutional protections and safeguards in ordinary legislations. In other words, it has been argued that corporations must comply with the national constitutional and legislative protections of the human right to water by way of complying with provisions of the positive law. In this light, it may be argued that corporate obligations relating to the right to water have arguably reached the status of the level of regional customary law, just as the substantive human rights obligations of corporations have arguably reached the status of regional customary law in Europe and possibly elsewhere in the world. This assertion has been backed by a number of national constitutions in Europe, Africa, the Americas, and Asia. Having gained an understanding of corporate human rights obligations deriving from national legal orders, the next part of this section turns to the development of the international human rights obligations of corporations.

3.1.2 Sources of corporate obligations under the human right to water at the international level

This section argues that corporate human rights obligations under the right to water may secondarily derive from the international level. International law standards are the minimum standards agreed by and binding on the entire international community or part of it. Arguably, international law is a much shallower normative system than national legal orders, which also apply in relation to corporate human rights obligations. Nevertheless, this section argues that the international system may offer supplementary answers in relation to the sources of corporate human rights obligations. Traditionally, sources of international law derive from international treaties, customs, general principles of law, and subsidiary sources of law (judicial decisions and academic commentaries).¹²⁴ Several international human rights treaties include state obligations to protect the right to water in relation to the activities of corporations.¹²⁵ Against this background, a number of international and regional treaties providing for the right to water have been mentioned in section 2. Further, a number of arbitration tribunals have, in their decisions, indirectly recognised corporate obligations under the right to water.¹²⁶

Here it must be noted that the scholarly debate on the potential of the direct and/or indirect international legal obligations of corporations has been on-going. Several commentators have argued that, despite the primary focus on states, corporations can have additional obligations under international human rights law.¹²⁷ In contrast, Ruggie has concluded in his 2007 report that the main

¹²⁴ Article 38(1) of the Statute of the International Court of Justice. H. Thirlway, 'The Sources of International Law', in M. Evans (ed.), *International Law*, (Oxford: Oxford University Press, 2006) 115-140. For critical analysis, cf. for example, J. Kammerhofer, 'Uncertainty in the formal Sources of international Law: customary international Law and some of its Problems', (2004) 15 *European Journal of International Law* 523-553; A.E. Roberts, 'Traditional and modern approaches to customary international law: a reconciliation' (2001) 95 *American Journal of International Law* 757-791; P. Alston, 'The Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in *Non-State Actors and Human Rights* (P. Alston, ed.), OUP (2005).

¹²⁵ J.H. Knox, *Concept Paper on Facilitating Specification of the Duty to Protect, prepared for UN SRSG on Business and Human Rights*, 14 December 2007.

¹²⁶ See, for example, International Centre for Settlement of Investment Disputes, *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*,

http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC770_En&caseId=C67>. See also BP lawsuit re Colombia.

<http://www.businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/BPlawsuitreColombia>>.

¹²⁷ A. Clapham, *Human Rights Obligations of Non-State Actors*, (Oxford: Oxford University Press, 2006) 266-270. N. Jägers, *Corporate Human Rights Obligations. In Search of Accountability*, (Antwerp: Intersentia, 2002), Chapter IV, 75-95; D. Weissbrodt & M. Kruger, 'Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 *American Journal of International Law*, 913-5, 921; D. Kinley and J. Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', *Virginia Journal of International Law*, 931-1024, Vol. 44:4 (2004), 962-992; P. T. Muchlinski, *Multinational enterprises and the Law*, OUP, 2007, 519-524; N. Stinnet, 'Note: Regulating the Privatization of War:

international human rights instruments do not seem to impose direct legal responsibilities on corporations.¹²⁸ In a similar vein, Greenwood argues that ‘there is no basis in existing international law for the liability of corporations and, consequently, no rules of international law regarding the questions which necessarily arise when a corporation is accused of wrongdoing.’¹²⁹ For Vasquez an international norm has applicability to corporations if ‘an international mechanism is established for enforcing an international norm against a non-state actor, then it may clearly be said that the international norm applies directly to non-state actors,’¹³⁰ or if the ‘language is indicating an intent to subject (the actors) to international enforcement mechanisms in the future.’¹³¹ In other words, international obligations cannot be directed towards corporations if they leave its enforcement to national legal orders of states.¹³² However, it appears that such an approach confuses apples with oranges. The nature of an obligation cannot be equated with the way it is implemented. As Ratner has observed, such an approach ‘confuses the existence of responsibility with the mode of implementing it.’¹³³ Articulating the direct human rights obligations of private actors, including corporations, should not depend on establishing a jurisdiction of implementing them. The recognition of the international human rights obligations of corporations cannot be subject to the (non-)existence of a potential international jurisdiction. Reading these international treaties together, Kamminga correctly notes that ‘there are no reasons of principle why companies cannot have direct obligations under international law.’¹³⁴

As noted, international treaties, however, bind only states. Yet Clapham notes that it ‘makes sense to talk about the parties to a human rights treaty rather than use the expression states parties, which indicates that states are exclusive members of every human rights regime.’¹³⁵ Ratner has suggested a method for translating obligations under current international human rights law to the corporate context by employing four criteria: the corporation’s ‘relationship with the government, its nexus to affected populations, the particular human right at issue, and the place of individuals violating human rights within the corporate structure.’¹³⁶ He submits that such a theory ‘offers a starting point for global actors to develop a corpus of law that would recognize obligations on businesses to protect human rights.’¹³⁷ In sum, the state of the art seems to be that – for now – ‘international law, as it exists today, includes norms that address the conduct of corporations and other non-state actors but, with very few exceptions, the norms do so by imposing an obligation on states to

(Contd.)

How to Stop Private Military Firms from Committing Human Rights Abuses’, 28 *Boston College International and Comparative Law Review* 211 (2005).

¹²⁸ J. Ruggie. UN Human Rights Council, “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts” Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, *UN Doc. A/HRC/4/035*, 9 February 2007 (prepared by John Ruggie), para. 44 <<http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf>>, further referred to as Ruggie report 2007.

¹²⁹ Declaration of C. Greenwood, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, Civil Action No. 1 CV 9882 (AGS), (7 May 2002) 8, para. 20 (on file with the authors). See similarly C. Tomuschat: *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2008), 107-109.

¹³⁰ C. M. Vasquez, ‘Direct vs. Indirect Obligations of Corporations under International Law’, 43 *Columbia Journal of Transnational Law* (2005) 927-959, at 940.

¹³¹ *Ibid.* at 941.

¹³² *Ibid.* at 934.

¹³³ S. Ratner, 2002, at 481.

¹³⁴ M. T. Kamminga, ‘Corporate Obligations under International Law’. Paper presented at the 71st Conference of the International Law Association, plenary session on Corporate Social Responsibility and International Law, Berlin, 17 August 2004. 4.

¹³⁵ A. Clapham, 2006, 91.

¹³⁶ S. Ratner, 2001, 496-497.

¹³⁷ *Ibid.* 530.

regulate non-state actors.¹³⁸ What remains clear is that international norms may have applicability to corporations if there is no international mechanism established for enforcing this norm.

Previous section on the right to water listed and briefly analyzed international treaties, which may include the human right to water. However, the commitment of corporations to observe the human right to water may also arise from soft law international documents. The preambular paragraph of the Universal Declaration of Human Rights (UDHR) stipulates: ‘that the General Assembly proclaimed the Declaration as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society ... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance [...]’.¹³⁹ The preambular provision is implemented in Articles 29 and 30 of the Universal Declaration. Article 29(2) articulates the correlative private duty that everyone has to respect the rights of others. Similarly, Article 30 provides that a ‘group or person do not have any rights to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.’ Reading the preamble, Henkin notes that: ‘every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, and no cyberspace. The Universal Declaration applies to them all.’¹⁴⁰ Undoubtedly, the language of the preambular provision includes the role of corporations in the promotion and the protection of human rights.

The 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Corporations and Other Business Enterprises with Regard to Human Rights state that corporations are required to promote, respect, and protect ‘human rights recognized in international as well as national law.’¹⁴¹

The OECD 1976 Guidelines for Multinational Enterprises (revised in 2000) requires multinational enterprises to ‘respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.’¹⁴² The ILO Tripartite Declaration notes that ‘all parties (including corporations) should contribute to the realization of the ILO Declaration on Fundamental Principles and Rights at Work and follow-up adopted in 1998.’¹⁴³ The UN Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms notes that private actors have an ‘important role and responsibility ... in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.’¹⁴⁴

¹³⁸ C. M. Vasquez, ‘Direct vs. Indirect Obligations of Corporations under International Law’, 43 *Columbia Journal of Transnational Law* (2005) 927-959, at 930.

¹³⁹ Universal Declaration of Human Rights (UDHR), Adopted and proclaimed by UN General Assembly Res. 217 A (III) of 10 December 1948.

¹⁴⁰ L. Henkin, ‘The Universal Declaration at 50 and the Challenge of Global Markets’, 25 *Brooklyn Journal of International Law* (1999) 17-25.

¹⁴¹ UN Norms, Section 1.

¹⁴² The OECD Guidelines for Multinational Enterprises: Text, Guidelines, Commentary, DAFFE/IME/WPG (2000) 15 Final (Paris: OECD, 2001).

¹⁴³ ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 204th Sess., 83 ILO. Official Bulletin (2000), para. 8. For a critical discussion see J. Letnar Čeranič, Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, *Miskolc Journal of International Law*, Vol. 6, No. 1. pp. 24-34, 2009.

¹⁴⁴ See Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN GA General Assembly Resolution 53/144, Art 18.

3.1.3 Voluntary recognition of corporate obligations under the human right to water

This section identifies a third potential layer of sources of corporate human rights obligations deriving from the right to water. It can be argued that these human rights obligations under the right to water may derive from unilateral voluntary commitments by corporations themselves. The voluntary commitments of corporations in human rights and the business field can most often be found in internal human rights policies or codes of conduct. The Organisation for Economic Cooperation and Development (OECD) defines codes of conduct as ‘commitments voluntarily made by companies, associations or other entities, which put forth standards and principles for the conduct of business activities in the marketplace.’¹⁴⁵ Similarly, the ILO defines a code of conduct as:

a written policy, or statement of principles, intended to serve as the basis for a commitment to particular enterprise conduct. By their very nature, voluntary codes contain commitments often made in response to market incentives with no legal or regulatory compulsion. However, as public statements, codes usually are considered to have legal implications under laws generally regulating enterprise representations, advertising and, in cases of joint enterprise action, anti-competition. (footnote omitted)¹⁴⁶

Codes of conduct are voluntary initiatives adopted by companies in order to improve their public reputations and to answer to the demand that they take more responsibility for their activities. They include the normatively non-binding obligations/commitments of corporations. In other words, codes of conduct do not create legal, but at most moral, obligations.¹⁴⁷ They are drafted by corporations themselves because it is in their interests to adopt them. The codes of conduct include principles, standards or guidelines.¹⁴⁸ De Schutter notes that ‘they differ in their content by the monitoring mechanisms that they may or may not include, and by the level (the individual company, the sector, the country or group of countries) at which they are drafted and proposed for adoption.’¹⁴⁹ They may be specific and broad in their nature. The codes of conduct usually take principles and norms from the principles and rules of international human rights law.

A number of corporations have formally and publicly acknowledged responsibility for ensuring that their actions are consistent with the human right to water. For the purposes of this paper, the human rights policies relating to the right to water of some corporations are examined. For instance, Pepsi Corporation notes in its Pepsi Guidelines in Support of the Human Right to Water where it ‘agrees ... to ensure that our business engagement across the globe, first and foremost,

¹⁴⁵ OECD Directorate for Financial, Fiscal and Enterprise Affairs, *Codes of Corporate Conduct: Expanded Review of their Contents*, May 2001, Working Papers on International Investment November 2001/6, <http://www.oecd.org/dataoecd/57/24/1922656.pdf>, 3. See F. MacLeay, ‘Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: a Small Piece of a Larger Puzzle’, *Global Law Working Paper 2005/1*, http://www.law.nyu.edu/global/workingpapers/2005/ECM_DLW_015787.

¹⁴⁶ International Labour Organisation Governing Body, Working Party on the Social Dimensions of the Liberalization of International Trade, *Overview of global developments and Office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labour issues*, Executive Summary, GB 273/WP/SDL/1, 273d session Geneva, November 1998, http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/sdl-1.htm#N_23, para. 26.

¹⁴⁷ N. Bernaz et P.-F. Morin, ‘L’Onu et sociétés transnationales: La nécessité d’une collaboration opérationnelle en matière de droits sociaux internationaux’, in L. Boisson de Chazournes et R. Mehdî, *Une Société internationale en mutation: Quels acteurs pour une nouvelle gouvernance?* (Bruxelles: Bruylant, 2006) 75.

¹⁴⁸ See, for example, S.D. Murphy, ‘Taking Multinational Corporate Codes of Conduct to the Next Level’, *Columbia Journal of Transnational Law*; vol. 43, afl. 2, pages 389-433, 2005; M.B. Baker, ‘Promises and Platitudes: Toward a New 21st Century Paradigm for Corporate Codes of Conduct?’, *Connecticut Journal of International Law*; vol. 23, 123-163, 2007.

¹⁴⁹ O. De Schutter, *Transnational Corporations and Human Rights: An introduction*, Global Law Working Paper 01/05, http://www.nyulawglobal.org/workingpapers/GLWP0105DeSchutter_000.rtf. 11. See also ‘Codes of corporate conduct: An Inventory’ (TD/TC/WP (98)74/FINAL, 99 pages).

respects the Human Right to Water.¹⁵⁰ More specifically, it notes that Pepsi 'will ensure that (its) operations preserve the quality of the water resources in the communities in which we do business;¹⁵¹ and that 'its use of water will not diminish the availability of community water resources to the individuals or the communities in the areas in which we operate;¹⁵² and Pepsi 'will involve communities in our plans to develop water resources.'¹⁵³ Pepsi Corporation's Guidelines also ensure that Pepsi 'operations will not adversely impact physical accessibility of community members to community water resources and will address community concerns in a cooperative manner;¹⁵⁴ and that Pepsi will 'advocate to applicable government bodies that safe water supplies should be available in a fair and equitable manner to members of the community. Such water should be safe and of consistent and adequate supply and affordable within local practices.'¹⁵⁵

Similarly, the Coca-Cola Company emphasizes that: 'just as water is vital to our business, it the essential building block for good health and economic growth. We recognize the need to engage with stakeholders to understand the issues that are the most important to them and to work jointly with communities and governments in water-stressed areas.'¹⁵⁶ Moreover, the Coca Cola Company recognizes 'a special responsibility with regard to water stewardship at plants located in areas of water stress, such as drought.'¹⁵⁷ The Suez-Environment corporation, which provides drinking water to 76 million people, established the Water for All Foundations, which aims to provide 'support for any philanthropy project, whether initiated in France or abroad, in favour of access to water, sanitation and health for the inhabitants of developing countries, particularly in urban environments' and promotes and expands 'knowledge and know-how in this issue.'¹⁵⁸ Further, Nestlé notes that it 'engages in a number of projects that help overcome the barriers faced by many communities in accessing safe and clean water.'¹⁵⁹ The International Federation of Private Water Operators in its Code of Ethics 'encourages its Members to carry out their business while promoting integrity and ethical practices in every aspect of water services: in particular supporting and respecting international human rights and labour rights within their sphere of influence; and banning any kind of corrupt trading practices.'¹⁶⁰

Additionally, the UN Global Compact has established the CEO Water Mandate, which 'is a unique public-private initiative designed to assist companies in the development, implementation and disclosure of water sustainability policies and practices.'¹⁶¹ CEO Water Mandate ... 'recognizes that the businesses have a responsibility to make water-resources management a priority, and to work with governments, UN agencies, non-governmental organizations, and other stakeholders to address this global water challenge. The CEO Water Mandate covers six areas: Direct Operations; Supply Chain and Watershed Management; Collective Action; Public Policy; Community Engagement; and

¹⁵⁰ Pepsi Guidelines in Support of the Human Right to Water,
<http://www.pepsico.com/Purpose/Environment/Water.html>.

¹⁵¹ *Ibid.* 1.

¹⁵² *Ibid.* 2.

¹⁵³ *Ibid.* 3.

¹⁵⁴ *Ibid.* 4.

¹⁵⁵ *Ibid.* 5.

¹⁵⁶ The Coca-Cola Company, Sustainability, http://www.thecoca-colacompany.com/citizenship/water_more.html.

¹⁵⁷ *Ibid.*

¹⁵⁸ Suez Environment Corporation, <http://www.suez-environnement.com/en/sustainable-development/foundation/meaning-and-mission/meaning-and-mission/>.

¹⁵⁹ Nestlé Water Management Report.

<http://www.unglobalcompact.org/docs/issues_doc/Environment/ceo_water_mandate/water_mandate_cops/Nestle_CEO_Water.pdf>.

¹⁶⁰ International Federation of Private Water Operators, Code of Ethics, 1.

¹⁶¹ The UN CEO Water Mandate, http://www.unglobalcompact.org/Issues/Environment/CEO_Water_Mandate/.

Transparency.¹⁶² In this way, 63 companies have endorsed the CEO Water Mandate and adopted the Mandate into their corporate policies and operations.¹⁶³ The problem with all these references is that they are not specific and do not articulate clear guidelines as to the extent and limits of corporate human rights responsibility.

While it is correct that voluntary initiative codes of conduct have never worked to alter corporate behaviour, they can nonetheless contribute to some extent to the corporate observance of human rights.¹⁶⁴ This paper therefore argues that the voluntary commitments represent the third and additional layer of corporate obligations. Codes of conduct of corporations are essential in promoting compliance with human rights obligations amongst corporations and they offer the often required balance between normative protections and voluntary corporate social responsibility. MacLeay observes that 'a well drafted and implemented code can be used to bring about real improvements in employee rights, particularly where the host State has little commitment to such rights and where independent civil society and unions are weak or non-existent.'¹⁶⁵ In other words, corporations may encourage local authorities to develop an effective protection of human rights.¹⁶⁶ In contrast, it appears, however, that they cannot be used as a camouflage against attempts to strengthen the normative responsibility and accountability of corporations for their activities as they affect the human rights of individuals and communities.

Corporate codes of conduct also have a number of weaknesses. They are often vaguely defined and include only some human rights, whereas other human rights are omitted. In addition, most of them do not support the mechanisms and independent monitoring of their implementation. It may appear that they can be described as *lex imperfecta*. Marks and Clapham note that 'careful consideration ... is needed, to ensure that various voluntary codes, solemn declarations and multistakeholder initiatives do not serve simply as 'window dressing', or worse, co-opt the language of human rights in ways that further entrench the economic relationship they purport to modify.'¹⁶⁷

It is clear, however, that codes of conduct do not have the same normative value as the first two levels of sources of human rights obligations under the right to water. They nonetheless provide an additional layer from which derives the corporate commitment to observe the human right to water. Identifying corporate human rights obligations under the right to water is a large exercise, of which the voluntary commitments of corporations are only a small but important part.

3.1.4 Interim conclusion

International law and national legal orders are two autonomous legal orders joined in a coherent pluralistic whole. This section has argued that corporate obligations under the human right to water derive primarily from national legal orders, and alternatively from an international law level. It appears *non sequitur* to expect that only a normatively shallower system of international law could break the conundrum of human rights obligations that normatively fully-fledged national legal orders

¹⁶² *Ibid.* □ http://www.unglobalcompact.org/docs/news_events/8.1/Ceo_water_mandate.pdf □, Preamble.

¹⁶³ *Ibid.* Endorsing CEOs,

http://www.unglobalcompact.org/Issues/Environment/CEO_Water_Mandate/endorsingCEOs.html □.

¹⁶⁴ See, for example, Patricia Rinwigati Waagstein, 'From 'Commitment' to 'Compliance': The Analysis of Corporate Self-Regulation in the BP Tangguh Project, Indonesia', *Jurnal hukum internasional UNPAD*, vol. 5, issue 2, page 100-117. She concludes that 'the discussion on corporate self-regulation in the Tangguh Project reveals that corporate self-regulation is not merely a corporate commitment. It can inspire, highlight, sharpen, modify, and even supersede existing regulation. In this case, commitment can actually act as a co-regulation and reaffirm existing standard or lay new standards or precedent.' 117.

¹⁶⁵ F. MacLeay, 'Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: a Small Piece of a Larger Puzzle', *Global Law Working Paper 2005/1*, 19.

¹⁶⁶ See S. D. Murphy, 'Taking Multinational Corporate Codes of Conduct to the Next Level', 43 *Columbia Journal of Transnational Law*, 389 (2004-2005), 398-399 and Ilias Bantekas, 'Corporate Social Responsibility in International Law', 22 *Boston University International Law Journal* 309 (2004), 314, suggesting that multinational corporations often have the capability to influence government policies and practices.

¹⁶⁷ S. Marks, A. Clapham, 2005, 192.

have difficulties with. Taken together, national legal orders and international systems impose human rights obligations on corporations. In addition, voluntary commitments may offer further evidence of such obligations. In this light, sources of corporate human rights obligations under the right to water should be treated as mutually complementary and not as mutually exclusive.

A number of commentators agree that corporations can be held responsible for human rights violations. Other commentators argue that only states can violate international human rights.¹⁶⁸ Even though the precise content of the human rights obligations of corporations is somewhat unclear, it may appear self-evident that corporations are asked to at least comply with fundamental human rights standards, including the human right to water. Some practitioners and commentators argue that corporations do not have any obligations and responsibilities even for the human right to water.¹⁶⁹ No matter how plausible this conclusion might sound, it is unfortunately not persuasive, as national legal orders, international treaties and declarations now already include the human rights obligations of corporations relating to the human right to water. It is true, however, that the scope of substantive obligations, and whether they are direct or indirect, remains contested. In a similar vein, Ruggie notes that 'there are legitimate arguments in support of the proposition that it may be desirable in some circumstances for corporations to become direct bearers of international human rights obligations.'¹⁷⁰ This is even more so 'where host governments cannot or will not enforce their obligations and where the classical international human rights regime, therefore, cannot possibly be expected to function as intended.'¹⁷¹ Therefore, the development of substantive human rights obligations under the right to water may require a translation of already existing national human rights standards into a corporate context.

3.2 The Horizontal application of human rights law

National (constitutional) and international protections of human rights have not only a vertical, but also a horizontal effect. In other words, national constitutional frameworks impose obligations on private actors, who are obliged to observe fundamental rights in their relationships with third parties. Traditionally, human rights law has protected individuals from excessive action by state governments. In other words, human rights have been formulated within the relationship between the individual and the state. A person, for example, beaten by a state organ would, in such a context, suffer a human rights violation, whereas the same beating by a non-state actor would amount only to an ordinary crime. To this end, two categories of human rights obligations can be distinguished.

The first category relates to the obligations of states towards individuals and, vice-versa, the obligations of individuals towards the state. These are vertical human rights obligations. Van der Walt observes that 'a vertical application of fundamental rights refers to the application of these rights to the vertical relationship between the state and the individual.'¹⁷² This reflects the traditional understanding of the nature of human rights, which has been developed over decades.

The second category of private obligations involves horizontal obligations. Horizontal obligations include the private obligations of private actors to respect the human rights of one another. These obligations are horizontal as they apply on the same level between corporations, individuals or

¹⁶⁸ International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002); A. Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights', 6 *Minnesota Journal of Global Trade* (1997); J. Paust, 'Human Rights Responsibilities of Private Corporations', 35 *Vanderbilt Journal of Transnational Law* 801 (2002).

¹⁶⁹ Andrej Logar, speaking on behalf of the European Union, regarding Action on Resolution on Mandate of Special Representative of the Secretary-General on Human Rights and Transnational Corporations, United Nations Human Rights Council, <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/F862D09328BA5EACC125746C006CB1DF?opendocument>.

¹⁷⁰ J. Ruggie, 2006 Interim report, para. 65.

¹⁷¹ *Ibid.*

¹⁷² J van der Walt, 'Blixen's Difference: Horizontal Application of Fundamental Rights and the Resistance to Neo-colonialism', 2003 (1) *Law, Social Justice & Global Development Journal*, <<http://elj.warwick.ac.uk/global/03-1/vanderwalt.html>>, 3.

any other private actors. In other words, the horizontal application of fundamental rights includes ‘the horizontal relationship between private law subjects or private individuals.’¹⁷³ Some commentators argue that one would dilute and distort the concept of human rights by applying human rights obligations horizontally between private subjects.¹⁷⁴ This statement plainly describes one of the most common arguments against the horizontal effect of human rights obligations, namely between private actors. However, this presents a very outdated approach and does not reflect developments in recent decades. By insisting that one of the parties to a human rights dispute should always be a state, one would leave aside one of the most important characteristics of human rights law.¹⁷⁵ Challenging the historical understanding of the application of human rights law is central for invoking a horizontal application of fundamental rights as a method of resistance against the traditional understanding of human rights law.¹⁷⁶

This section argues that human rights obligations apply also within a horizontal relationship between private parties. The category of corporate human rights obligations includes binary or correlative obligations – i.e. corporate obligations to protect the enjoyment of the human rights of an individual, local communities and indigenous peoples. These are the obligations of corporations towards other private actors. They cannot be set out within a traditional vertical matrix of human rights law. To the contrary, these obligations are inherently horizontal. While such horizontal obligations strengthen the promotion and protection of human rights, human rights law leaves the identification of human rights obligations and its enforcement to national legal orders.¹⁷⁷ A number of jurisdictions already provide for a direct horizontal application of human rights obligations.¹⁷⁸ Section 8(2) of its Bill of Rights of the South African Constitution provides that ‘a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right.’¹⁷⁹ Further, Section 9(4) places an obligation on private actors not to discriminate against others.¹⁸⁰ The Constitutional Court of South Africa confirmed this horizontal application of human rights in relationships between private individuals in cases such as *Foes v Minister of Safety and Security*¹⁸¹, *Soobramoney v Minister of Health*¹⁸² and *Minister of Health v Treatment Action Campaign*.¹⁸³ Additional evidence for a horizontal application of human rights can be found in the jurisprudence under the Irish

¹⁷³ *Ibid.*

¹⁷⁴ See the *Examination question at Academy of European Law*, EUI, Florence, Italy, 2.7.2004, on file with author.

¹⁷⁵ See A. Clapham, *Human Rights in the Private Sphere*, OUP, 1993; B. Dickson: ‘The horizontal application of human rights law’, in: Angela Hegarty and Siobhan Leonard, (London; Sydney: Cavendish Publishing Company Ltd., 1999); J. Van der Walt, 2003.

¹⁷⁶ J. van der Walt, 2003, 3.

¹⁷⁷ See M. Tushnet, ‘The issue of state action/horizontal effect in comparative constitutional law’, *International Journal of Constitutional Law*, 2003, Nr. 1, 9 – arguing that systems with greater commitments to social democratic norms will find the issue of horizontal effect easier than systems with weaker social democratic commitments.

¹⁷⁸ S. Gardbaum, ‘The horizontal effect of constitutional rights’, UCLA School of Law *Public Law & Legal Theory Research Paper Series Research Paper No. 03-14*, 2003.

¹⁷⁹ The Constitution of the Republic of South Africa, 1996, was approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997, chapter 2, section 9(3).

¹⁸⁰ *Ibid.* chapter 2, section 9(4): ‘No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).’

¹⁸¹ 1997 (3) SA 786 (CC).

¹⁸² Judgment in case CCT 32/97, Constitutional Court of South Africa, 27 November 1997.

¹⁸³ Judgment in case 8/02, Constitutional Court of South Africa, 5 July 2002. On horizontal application of international human rights law see also, Inter-American Court of Human Rights, Advisory Opinion OC-18/03 on Juridical Condition and Rights of the Undocumented Migrants, 17 September 2003, para. 74-85.

Constitution.¹⁸⁴ Equally important, the German Constitutional Court (*Bundesverfassungsgericht*) confirmed the horizontal nature of rights in the Basic Law (*Grundgesetz*) of the Federal Republic of Germany in the well-known *Lüth* decision.¹⁸⁵ The States have obligations to implement their human rights obligations, also in relations between private parties.

Read together, these developments confirm that constitutional human rights in national legal orders impose obligations on private actors, who are obliged to observe fundamental rights in their relationships. To be sure, one would not dilute or distort the concept of human rights by applying human rights obligations horizontally between private subjects, since it would only recognise the obligations in international human rights law which have been drafted and developed by a state, but which nowadays also apply to private parties. On the contrary, it may appear that one would dilute and distort the whole concept of human rights by denying their application in horizontal relationships between private parties.¹⁸⁶

3.3 The nature and the scope of corporate obligations under the right to water

The aim of this part of the paper is to examine the nature and the scope of corporate human rights obligations under the right to water. This section argues that corporations have obligations to respect, protect and fulfil the human right to water.¹⁸⁷ This section first examines a tripartite typology of human rights obligations.¹⁸⁸ The former UN Special Rapporteur on the Right to Food, Asbjørn Eide, introduced the tripartite typology, and distinguished state obligations for economic, social and cultural human rights at three levels: the obligations to respect, protect and fulfil human rights.¹⁸⁹ He built his doctrine upon the earlier writings of Henry Shue, who first developed the typology of obligations in his book *Basic Rights – Subsistence, Affluence and U.S. Foreign Policy*, where he distinguishes three types of duties: ‘duties to avoid *depriving*, duties to *protect* from deprivations and duties to *aid* the deprived.’¹⁹⁰ This paper attempts to argue that the tripartite typology could also be employed in relation to corporate human rights obligations under the right to water.

The tripartite typology of human rights obligations refers, under traditional human rights doctrines, to state obligations.¹⁹¹ The tripartite obligations to respect, protect and fulfil human rights

¹⁸⁴ [1973] IR 121. 132-133, [1987] IR 621 (High Court). Quoted in S. Gardbaum, ‘The horizontal effect of constitutional rights’, UCLA School of Law, *Public Law & Legal Theory Research Paper Series Research Paper No. 03-14*, 2003, 12-13.

¹⁸⁵ BVerfGE 7, 198.

¹⁸⁶ The concept of *Drittwirkung* implies that certain provisions of the European Convention of Human Rights are understood to contemplate the ‘horizontal effect,’ meaning that they apply as between private parties.

¹⁸⁷ See, for example, Hakeem O. Yusuf. ‘Oil on Troubled Waters - Multinational Corporations and Realising Human Rights in the Developing World with Particular Reference to Nigeria’ *African Human Rights Law Journal* 8.1 (2008): 79-107, arguing that corporations should be similarly obligated to respect, promote and protect human rights.

¹⁸⁸ For a detailed discussion on tripartite human rights typology, see: M Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2003). A Eide, *Right to Adequate Food as a Human Right*, Human Rights Study Series No 1, United Nations publication (Sales No. E.89.XIV.2) (United Nations, New York, 1989); Eide, *The right to adequate food and to be free from hunger -- Updated study on the right to food, submitted by Mr. Asbjørn Eide in accordance with Sub-Commission decision 1998/106*, UN Doc E/CN.4/Sub.2/1999/12; See also Ida Elisabeth Koch, ‘Dichotomies, Trichotomies or Waves of Duties?’, *Human Rights Law Review* 2005 5(1):81-103.

¹⁸⁹ A. Eide published two interim reports (UN Docs E/CN.4/Sub.2/1983/25 and E/CN.4/Sub.2/1984/22). In 1987 he submitted his final report (UN Docs E/CN.4/Sub.2/1987/23), 7 July 1987. C. Scott (ed.); *Comparative Perspectives on the Development of Transnational Human Rights Litigation*, (Oxford: Hart Publishing, 2001). Eide’s approach was first introduced in A. Eide, B.W Eide, S. Goontailke, J Gussow and Omawale (eds): *Food as a human right*, United Nations University, 1984, 154.

¹⁹⁰ See H. Shue, *Basic Rights. Subsistence, Affluence, and U.S. Foreign Policy*, (Princeton, Princeton University Press, 1980).

¹⁹¹ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997. See also General Comment 12 of the UN Committee on Economic, Social and Cultural Rights, 12 May 1999, 15.

apply universally to all rights and entail a combination of negative and positive duties.¹⁹² However, the fact that the state is the bearer of human rights obligations does not imply that only the state has such obligations. Shue noted in this regard that ‘for every basic right – and many other rights as well – there are three types of duties, all of which must be performed if the basic right is to be fully honoured but not all of which must necessarily be performed by the same individuals or institutions.’¹⁹³ Eide noted that:

The obligation to respect requires the State, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available to that individual in the way she or he finds to satisfy basic need. The obligation to protect requires from the State and its agents the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action or other human rights of the individual—including the prevention of infringements of his or her material resources. The obligation to fulfil requires the State to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognized in the human rights instruments, which cannot be secured by personal efforts.¹⁹⁴

Tripartite obligations to respect, protect and fulfil the human right to water can apply also to corporations.¹⁹⁵ Eide confirms this point by writing ‘it should be kept in mind that all members of society share responsibility for the realization of human rights.’¹⁹⁶ The UN Norms for Corporations suggest that corporations are obliged to respect, protect and fulfil human rights norms within their spheres of activity and influence.¹⁹⁷ They cover a wide area where corporations exercise their influence.¹⁹⁸ Therefore, the tripartite typology can also be used as an analytical tool to examine and investigate the nature and the scope of the human rights obligations of corporations. Having briefly described the tripartite typology of human rights obligations and the general nature of the human rights obligations of corporations, attention will now be turned to an analysis of each limb of the tripartite human rights obligations of corporations: obligations to respect, protect and fulfil the human right to water.

3.3.1 The corporate obligation to respect

The obligation of corporations to respect the right to water means that corporations are obliged to refrain from interfering with the enjoyment of the human rights of the others. In other words, it is an obligation to do no harm to the enjoyment of water resources of others. This rule derives from the ancient Roman law principle *sic utere tuo ut alterum non laedes*. According to Eide, the obligation to respect ‘requires the State, and thereby all its organs and agents, to abstain from doing anything that

¹⁹² African Commission on Human and Peoples Rights when interpreting African Charter for Human and Peoples’ Rights developed four-fold typology of human rights obligations in the case of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (Communication 155/96, 27 May 2002). It held that ‘internationally accepted ideas of the various obligations engendered by human rights indicate that all rights - both civil and political rights and social and economic - generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfill these rights.’ Para. 44.

¹⁹³ H. Shue, 1980, 52.

¹⁹⁴ A. Eide, ‘Realization of Social and Economic Rights and the Minimum Threshold Approach’, (1989) 10 *Human Rights Law Journal* 35.

¹⁹⁵ For detailed discussion, see N. Jägers, chapter 4; A. Clapham, 2006, 230-233.

¹⁹⁶ A. Eide, UN Doc. E/CN4/Sub.2/1987/23, 7 July 1987, para 65.

¹⁹⁷ UN Norms, Section 1.

¹⁹⁸ D. Kinley and J. Tadaki, 2004, 962-966; D. Weissbrodt and M. Kruger, ‘Human Rights Responsibilities of Businesses as Non-State Actors’, in P. Alston (ed.): *Non-state actors and Human Rights* (Oxford: Oxford University Press, 2005) 335-338, United Nations, Economic and Social Council, Commission on Human Rights, Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, 15 February 2005,

<<http://ods-dds-ny.un.org/doc/UNDOC/GEN/G05/110/27/PDF/G0511027.pdf?OpenElement>>, paras. 37-39.

violates the integrity of the individual or infringes on his or her freedom, including the freedom to use the material resources available to that individual in the ways she or he finds best to satisfy basic needs.¹⁹⁹ For corporations, the obligation to respect human rights implies that its corporate activities refrain from interfering with or violating the rights of people.²⁰⁰ Ruggie notes that ‘the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere.’²⁰¹ In his 2009 report, Ruggie notes that corporate responsibility to *respect* human rights ‘has acquired near-universal recognition by all stakeholders.’²⁰² Going beyond the previous report, the 2009 Report recognizes that ‘there may be situations in which companies have additional responsibilities. But the responsibility to respect is the baseline norm for all companies in all situations.’²⁰³ Tripathi and Morrison argue that ‘independently of states’ duties, the baseline responsibility of companies is to ensure that their activities do not infringe on the enjoyment of the right of access to water.’²⁰⁴ The Joint Committee of the House of Commons correctly noted that ‘the responsibility on businesses to respect human rights is not merely voluntary.’²⁰⁵ In short, corporations are obliged to respect fundamental human rights.

The obligation to respect may appear to suggest that companies have to undertake due diligence ensuring not only that they comply with human rights obligations under the right to water, but also that they do everything possible to avoid causing harm.²⁰⁶ In this regard, one commentator has suggested that a company’s obligation to respect and protect the human right of water of its employees implies taking reasonable steps to protect workers from violations committed by the State, or to seek legal redress for their employees if violations have been committed.²⁰⁷ Corporate obligations to respect human rights to the right to water extend beyond the sphere of employees to all individuals affected by corporate activities.²⁰⁸ Corporate responsibility and corporate obligations to respect human rights have been recognised in a number of international documents and also within the United Nations.²⁰⁹

The Institute for Business and Human Rights notes that ‘private water providers should abide by all laws, regulations, targets and benchmarks applicable to them in this regard. Several private

¹⁹⁹ A. Eide, UN Doc. E/CN.4/Sub.2/1987/23, 7 July 1987, para. 67; N. Jägers, *Corporate Human rights Obligations*, 2002, 79-83.

²⁰⁰ B. A. Frey, ‘The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights’, 6 *Minnesota Journal of Global Trade*, 153, 163.

²⁰¹ J. Ruggie, U.N. Human Rights Council [HRC], Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5, 7 April 2008, <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>>, para. 55.

²⁰² J. Ruggie, U.N. Human Rights Council [HRC], Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/11/13/, 22 April 2009. Para. 46.

²⁰³ *Ibid.* Para. 48.

²⁰⁴ Salil Tripathi and Jason Morrison, DISCUSSION PAPER, Water and Human Rights: Exploring the Roles and Responsibilities of Business, The CEO Water Mandate, *March 2009*, <http://www.unglobalcompact.org/docs/issues_doc/Environment/ceo_water_mandate/Business_Water_and_Human_Rights_Discussion_Paper.pdf>

²⁰⁵ Joint Committee on Human Rights, *Any of our business? Human rights and the UK private sector* (London: House of Commons, 2009),

<<http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf>>, p. 36, para. 110.

²⁰⁶ J. Ruggie’s 2008 report, para. 25.

²⁰⁷ A. Clapham, 2006, 230-231.

²⁰⁸ N. Jägers, 2002, 80.

²⁰⁹ J. Ruggie’s 2008 report, paras. 54-55.

water providers have recognized the right to water.²¹⁰ They can ‘contribute to respect for the enjoyment of the right to water by integrating considerations related to the ability to pay into disconnection policies and ensuring that where disconnections are carried out, they do not lead to the denial of the minimum amount of water considered essential for personal and domestic uses.’²¹¹

The measures that corporations could adopt to ensure respect for the human right to water in their activities include: acknowledging the human right to water in their policies, constantly and consistently examining human rights situations in countries where a corporation operates, or intends to do so; effectively monitoring supply chains by drafting explicit policies that protect the human rights of the corporation’s employees and workers throughout its supply chain; implementing a monitoring system to ensure that human rights policies relating to the right to water are being implemented; and adopting explicit policies to ensure that the corporation’s security arrangements do not contribute to human rights violations of the right to water.²¹² The next section discusses the corporate obligation to protect the human right to water. It must be noted, however, that the obligations to respect and to protect function simultaneously and are complementary.

3.3.2 The corporate obligation to protect

The obligation to protect the right to water includes the obligations of corporations to protect the individual's enjoyment of the right to water and to support the protection of water by employing its expertise and resources to protect the human rights to water of individuals and local communities.

Corporate obligations to protect the human right to water have both an *internal* and an *external* dimension. Protection must be offered against the activities of a parent corporation, subsidiary corporations and its business partners. Corporations have obligations to protect the human right to water of persons internally in relation to their own activities. On the other hand, the obligation to protect the human right to water includes also an external obligation, which requires a corporation to take necessary measures to protect the integrity and human rights of individuals in relation to its business partners.²¹³ For instance, the UK OECD National Contact Point noted in *Global Witness v Afrimex* that ‘the UK Government expects British companies to exercise the highest levels of due diligence in situations of widespread violence and systematic human rights abuse, such as that which prevails in Eastern DRC.’²¹⁴ In this way, it urged ‘UK companies to use their influence over contracting parties and business partners, when trading in natural resources from this region, to ensure that due diligence is applied to the supply chain.’²¹⁵ In other words, an obligation to protect the human right to water would denote that corporations are obliged to adopt internal regulations and take other measures to prohibit and prevent human rights violations *internally*, in their own activities, but also *externally*, in business relationships with third parties (subsidiaries, contractors, sub-contractors and business partners) throughout their supply chains.²¹⁶ Similarly, Clapham suggests that corporations have the ‘duty to ensure that the contractors with which they do business are complying with the Norms’.²¹⁷ He argues that the obligation to protect exists ‘even if...threats do not derive from the

²¹⁰ Institute for Business and Human Rights; Business, Human Rights & Right to Water, Challenges, Dilemmas, Opportunities, Roundtable Consultative Report, January 2009, <<http://www.institutehrb.org/Downloads/Draft%20Report%20%20Business,%20Human%20Rights%20and%20Water.pdf>>. At page 19.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ A. Clapham, 2006, 231.

²¹⁴ Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd., 28 August 2008. 76.

²¹⁵ *Ibid.* 77.

²¹⁶ Corporate Complicity and Legal Accountability, Volume 1: Facing the Facts and Charting a Legal Path, Accountability Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Geneva, September 2008, 29-30.

²¹⁷ A. Clapham, 2006, 231.

corporation itself.²¹⁸ It appears, therefore, that the corporate obligation to protect the right to water extends much further than the obligation to respect. The obligation to protect is relevant particularly in the relationship of a corporation with third parties.²¹⁹ In his 2010 report, Ruggie argues that the scope of corporate responsibility to protect human rights is ‘defined by the actual and potential human rights impacts generated through a company’s own business activities and through its relationships with other parties, such as business partners, entities in its value chain, other non-State actors and State agents.’²²⁰ He further notes that ‘the corporate responsibility to respect human rights exists independently of States’ duties or capacity. It constitutes a universally applicable human rights responsibility for all companies, in all situations.’²²¹

As to the corporate obligation to protect the human right to water, Tripathi and Morrison argue that private corporations should: ‘abide by the national regulatory framework for the provision of safe-drinking water; extend services to marginalized and vulnerable areas and groups; ensure affordability of water services; prevent arbitrary disconnections from water services, and ensure communities’ access to information and participation in decision-making processes.’²²² Corporations can ensure the affordability of water services in the following way: ‘Regularly monitoring the price of water services and ensuring their affordability and accessibility for the poorest and most vulnerable sectors of society; ensuring that no community, ethnic group, constituencies supporting opposition parties, religious, linguistic, or any other group, or any other section of the population (such as disabled, or those distinct because of gender or sexuality) is excluded from access to the essential services. Establishing flexible payment terms, such as phased connection charges, removal of requirements for deposits or grace periods.’²²³ The World Health Organization notes in its Report on the Right to Water that companies may, ‘depending on their nature’, make the following obligations:

- ‘advance the provision of services so that the number of people served should always increase;
- establish sustainable policies towards water conservation for its own activities;
- use differential cost-recovery/progressive pricing to contribute to increasing coverage;
- ensure equity in reliability of services;
- give priority to supplies for the most marginalized communities;
- establish a responsible disconnection policy;
- ensure the participation of citizens in decision-making;
- provide clear and accurate information to all users’.²²⁴

It appears that corporations are under an obligation to ensure that their business partners comply with basic standards in relation to the human right to water. Even more so, corporations can assist the state government in effectively respecting, promoting and fulfilling human rights. If corporations contribute to the protection of human rights, this will also strengthen regulatory mechanisms for the protection of human rights.²²⁵ In this light runs the Commentary of the UN Norms that corporations

²¹⁸ *Ibid.*

²¹⁹ N. Jägers, 2002, 83.

²²⁰ J. Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework, A/HRC/14/27, 9 April 2010, <<http://www.reports-and-materials.org/Ruggie-report-2010.pdf>>, Para. 58.

²²¹ *Ibid.* Para. 65.

²²² Salil Tripathi and Jason Morrison, DISCUSSION PAPER, Water and Human Rights: Exploring the Roles and Responsibilities of Business, The CEO Water Mandate, March 2009
<http://www.unglobalcompact.org/docs/issues_doc/Environment/ceo_water_mandate/Business_Water_and_Human_Rights_Discussion_Paper.pdf>, p. 6.

²²³ *Ibid.*

²²⁴ World Health Organisation, The Right to Water, <http://www.who.int/water_sanitation_health/rtwrev.pdf>, 32.

²²⁵ *Ibid.*

should 'initially work with perpetrators to reform or decrease violations.'²²⁶ In this respect, the Institute for Business and Human Rights notes that 'private water providers can contribute to the respect and promotion of the right to water by ensuring that prioritization in the extension of water and sanitation networks is given to those who do not have access, including within informal settlements and to other marginalized, excluded and vulnerable areas or groups.'²²⁷

The obligation to protect the human right to water requires that measures taken by corporations, and passive commitments 'not to do any harm', do not suffice. Corporations must adopt internal monitoring mechanisms aimed at monitoring and regulating the behaviour of the actors with whom they have business relationships. Several corporations recognise the obligation to protect human rights within their activities. Shell, for example, notes that 'operating companies have a responsibility to identify existing and potential human rights issues which may arise in their area of operations'.²²⁸ Similar provisions can be found in the codes of conduct and internal human rights policies of British Petroleum,²²⁹ Chevron²³⁰, Citigroup²³¹, Coca-Cola,²³² Exxon Mobil,²³³ Total,²³⁴ General Motors,²³⁵ Wal-Mart,²³⁶ Conoco-Philips,²³⁷ Daimler-Chrysler²³⁸ and De Beers.²³⁹

3.3.3 The Corporate obligation to fulfil

The third category of corporate human rights obligations under the right to water includes the obligation to fulfil, which requires that the corporations take active measures to ensure the availability, accessibility and affordability of the right to water in their internal and external activities. The Commentary of the UN Norms suggests that corporations 'shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights.'²⁴⁰ It may appear that the corporate obligation to fulfil requires corporations to formulate, implement and periodically review a coherent human rights policy to lessen the risk of human rights violations throughout the entire corporate structure. The Institute for Business and

²²⁶ UN Norms, Commentary, para. 15.

²²⁷ Institute for Business and Human Rights; Business, Human Rights & Right to Water, Challenges, Dilemmas, Opportunities, Roundtable Consultative Report, January 2009, <<http://www.institutehrb.org/Downloads/Draft%20Report%20%20Business,%20Human%20Rights%20and%20Water.pdf>>. At page 19.

²²⁸ Shell, Business and Human Rights, A Management Primer, 23.

²²⁹ British Petroleum, Human rights: A guidance note, 2005, 12.

²³⁰ Chevron Corporation, Human Rights Statement, <<http://www.chevron.com/globalissues/humanrights/>>.

²³¹ Citigroup, Statement on Human rights, January 2007.

<<http://www.citigroup.com/citigroup/citizen/humanrights/data/index.htm>>

²³² Coca-Cola Human Rights Statement,

<http://www.thecoca-colacompany.com/citizenship/human_rights_statement.html>.

²³³ Exxon Mobil, <http://www.exxonmobil.com/Corporate/community_local_rights.aspx>.

²³⁴ Total Corporation, Code of Conduct, 10.

²³⁵ General Motors, <<http://www.gm.com/corporate/responsibility/reports/00/vision/social/human.html>>.

²³⁶ Wal-Mart, requirements for suppliers,

<<http://walmartstores.com/Suppliers/248.aspx>>, See Equal Opportunity Practices.

²³⁷ Conoco-Philips Corporation, Human Rights Position,

<http://www.conocophilips.com/social/values_policies/humanrights/index.htm>.

²³⁸ Daimler-Chrysler,

<<http://www.daimler.com/dccom/0-5-880434-1-881989-1-0-0-0-0-8-876574-0-0-0-0-1.html>>.

²³⁹ De Beers Corporation Community Policy, 4-8.

²⁴⁰ UN Norms, Commentary, Article 1.

Human Rights notes that ‘providers can contribute to the enjoyment of the right to water by ensuring the affordability of their water services (connection and delivery costs) and by guaranteeing that cost-recovery objectives do not become a barrier to access to safe drinking water by poor people.’²⁴¹

A corporation may become the primary holder of an obligation to fulfil the human right to water foremost in failed states, where there is no efficient governmental control or authority. Another situation may occur when corporations operate in the territory where the state is unable to fulfil the rights of the people living there. However, states are and should be primarily responsible for their obligation to fulfil. It is true, though, that corporations may have a secondary responsibility towards society that reinforces their obligation to respect and protect human rights. The size of and available resources of a corporation will play a large role in meeting the standards of the obligations to fulfil.²⁴² While the resources available for fulfilling human rights obligations may not be as plentiful in small corporations as in large corporations, corporations may adopt such policies to the maximum of their available resources.

3.4 Corporate obligation under the human right to water *de lege ferenda*

Returning to the illustration at the start of this paper, this section attempts to identify the obligation relating to the human right to water a corporation such as the South-West Orissa Bauxite Mining Corporation would have in the Niyamgiri Hills. Assuming that corporations have some obligations to observe the right to water, the following tri-partite obligations of corporations to ‘respect, protect and fulfil’ the right to water can be identified:

Obligations to respect: corporations are to refrain from:

Internal obligations:

- taking measures that negatively affect the right to water,

External obligations:

taking measures that negatively effect the right to water environment and health of communities;

- the production and marketing of products that are detrimental to the clean and safe water.
- direct involvement in any violation of the right to water in relation to its employees, other individuals and a wider community;
- complicity in violations of the right to water;
- supporting corrupt regimes and giving bribes in exchange for access to water services and other natural resources, goods and services.

Obligations to protect: corporations are to adopt regulations and other measures in order to:

Internal obligations:

- adopt, disseminate and implement international human rights law standards in their business policies and codes of conduct, and to adopt internal guidelines for the public and private corporation in weak governance zones, emphasising the need to respect the right to water;
- prevent violations of the right to water internally in their own activities
- introduce ‘human rights impact assessments as part of investment and procurement decisions, including selection of suppliers and contractors’;²⁴³
- institute effective monitoring to ensure that the above-mentioned policies are being followed, and to initiate disciplinary proceedings when they are violated;²⁴⁴

²⁴¹ Institute for Business and Human Rights; Business, Human Rights & Right to Water, Challenges, Dilemmas, Opportunities, Roundtable Consultative Report, January 2009,

<http://www.institutehrb.org/Downloads/Draft%20Report%20%20Business,%20Human%20Rights%20and%20Water.pdf>
>. At page 19.

²⁴² N. Jägers, 2002, 85.

²⁴³ GRI (Global Reporting Initiative) Guidelines (G2), HR 2,

http://www.unic.or.jp/globalcomp/pdf/glo_compro_an6.pdf

See also: <http://www.globalreporting.org/ReportingFramework/>.

- protect individuals from abusive conduct by third-parties and to adopt internal complaints procedures where victims can submit allegations of violations of the right to water;
- protect the health and safety of workers in their corporations and in the corporations of their contractors and business partners.

External obligations:

- introduce policies and procedures to evaluate and address compliance with the right to water within the supply chain and with contractors;
- prevent violations of the right to water also externally in their supply chains and in business relationship with contractors, sub-contractors and business partners.
- to apply human rights law and the framework of the right to water in their contracts and in relation to others dealing with contractors, subcontractors and any other business partners;
- to condemn public and private human rights violations of the right to water by all parties in the respective country, and possibly to address the inappropriate use of facilities by government forces, and to establish procedures to ensure that the activities of the corporations, their company members, and their subcontractors do not result in, benefit from, or contribute to human rights abuses.
- protect the environment in the area in which they operate;
- ensure the safety and quality of the products that they and their business partners as well as sub-contractors produce;

Obligations to fulfil: corporations are to take active measures to ensure the availability of:

Internal obligations:

- a safe working environment not endangering right to water;
- a human rights policy and strategy and internal codes of conduct that address human rights challenges and that includes measures to prevent and to respond to human rights violations of the right to water.

External obligations: where government services are not available (eg in remote areas):

- to co-operate in creating an environment where human rights, including the right to water, are understood and respected, and not to operate or consider operating in countries where there is a 'high level of human rights violations or where legislation, governmental practice or other constraints make it imperative to address specific abuses and devise ways of promoting respect for human rights.'²⁴⁵
- to introduce the necessary reforms to existing corporate structures or business policies. It may appear that part of the strategy can be the adoption of internal supervisory mechanism and control;
- to promote best practices and professionalism among employees;
- to promote and protect fundamental human rights, including the framework of the right to water, in the wider local community.
- to develop a pro-active strategy for the protection of the water in the area in which they operate;
- to provide water services for the family of the workers and/or the public as a whole in the area in which they operate.

4. Conclusion

Referring back to the introduction of this paper, it seems that a plausible argument can be made that corporations operating in the area of the Niyamgiri in the Kalahandi and Rayagada districts of Orissa

(Contd.) _____

²⁴⁴ GRI (Global Reporting Initiative) Guidelines (G2), HR 1,

<http://www.unic.or.jp/globalcomp/pdf/glo_compro_an6.pdf>, See also:

<<http://www.globalreporting.org/ReportingFramework/>>.

²⁴⁵ Amnesty International Human Rights Principles for Companies: an Introduction,

<<http://www1.umn.edu/humanrts/links/aihrprinc.html>>.

in the eastern part of India have normative obligations to respect, protect and fulfil the human right to water of individuals and the indigenous community of the Dongria Kond as a whole. In this way, corporations should seriously consider the implications of their business activities on the daily lives of the local communities. This paper has attempted to conceptualise a normative approach towards corporate responsibility for the human right to water. It has argued that the corporate human rights obligations under the right to water derive primarily from national legal orders, second from the international level and third from unilateral voluntary commitments by the corporations themselves. Further, this paper has attempted to show that states and corporations have a responsibility to respect, protect and fulfil the human right to water. It has argued that corporate obligations under the right to water are best enforced in national legal orders. All in all, these inherently interconnected sections have attempted to explain the concept of corporate responsibility for the human right to water.

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