

January 2011

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Jernej Letnar Cernic

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Recommended Citation

Jernej Letnar Cernic, Corporate Obligations under the Human Right to Water, 39 Denv. J. Int'l L. & Pol'y 303 (2011).

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Keywords

Obligations, Water Law, Environmental Protection, Human Rights Law, Riparian Rights

CORPORATE OBLIGATIONS UNDER THE HUMAN RIGHT TO WATER

JERNEJ LETNAR ČERNIČ*

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 realization 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 realization 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.

I. 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 the Hills sacred, as their daily lives have depended on them for several centuries.¹ In December 2008, 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

* Assistant Professor of Human Rights Law, European Faculty of Law and Faculty of State and European Studies, Slovenia, PhD in Law, University of Aberdeen, LL.M (Human Rights Law, Raoul Wallenberg Institute, University of Lund). I would like to thank Martin Scheinin, Ernst-Ulrich Petersman, Benedict Wray, Belén Olmos Giupponi, Ottavio Quirico and the editorial team of this journal for their many helpful comments on earlier drafts of this paper. The author can be reached at jernej.letnar@googlemail.com.

1. AMNESTY INT'L, DON'T MINE US OUT OF EXISTENCE, BAUXITE MINE AND REFINERY DEVASTATE LIVES IN INDIA 4 (2010), available at <http://www.amnesty.org/en/library/asset/ASA/20/001/2010/en/0a81a1bc-f50c-4426-9505-7fde6b3382ed/asa200012010en.pdf>.

2. *Id.*

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 poses 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

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. 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 as part of a national and international value system.

3. *Id.*

4. *Id.* at 6.

5. *Id.*

6. *Id.* at 21.

7. *Id.*

8. J. Nolan & L. Taylor, *Corporate Responsibility for Economic Social and Cultural Rights: Rights in Search of a Remedy?*, 87 J. BUS. ETHICS 433 (2009).

Economic, social and cultural rights include rights to housing, food, education, water and health.⁹ This set of rights complements the so-called civil and political rights.¹⁰ As Scheinin notes, “there is no water-tight division between different categories of human rights.”¹¹ 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.¹² 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.¹³ 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.”¹⁴ The central question of economic and social rights therefore lies in their enforcement or justiciability.

Corporations play an important role in the realization of the right to water and the rights of society as a whole. For example, they can become violators of the right to water when their activities deny access to clean and safe water or when 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 organization of the global economy have greatly increased the role of business in generating outcomes that threaten human rights.”¹⁵ 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.”¹⁶ The preamble of the CEO Water Mandate notes:

[T]he 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.¹⁷

9. Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 21, 22 (Asbjørn Eide et al. eds., 2001); see also Amnesty Int’l, *What are Economic, Social and Cultural Rights?*, <http://www.amnesty.org/en/economic-and-social-cultural-rights/what-are-es-cr> (last visited Nov. 15, 2010).

10. Martin Scheinin, *Human Rights Committee: Not Only a Committee on Civil and Political Rights*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 540, 540 (Malcolm Langford ed., 2008).

11. *Id.*

12. Martin Scheinin, *Economic and Social Rights as Legal Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK, *supra* note 9, at 41, 53.

13. Eide, *supra* note 9, at 22.

14. Scheinin, *supra* note 12, at 41; see also Christian Courtis, *Standards to Make ESC Rights Justiciable: A Summary Exploration*, 2 ERASMUS L. REV 379 (2009), available at http://www.erasmuslawreview.nl/files/ELR_2009-4_02_Courtis.pdf.

15. SUSAN MARKS & ANDREW CLAPHAM, INTERNATIONAL HUMAN RIGHTS LEXICON 188 (2005).

16. U.N. Global Compact, *The CEO Water Mandate*, Nov. 3, 2010, http://www.unglobalcompact.org/issues/Environment/CEO_Water_Mandate/.

17. U.N. GLOBAL COMPACT, THE CEO WATER MANDATE: AN INITIATIVE BY BUSINESS LEADERS IN PARTNERSHIP WITH THE INTERNATIONAL COMMUNITY 3, available at <http://www.unglobalcomp>

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.”¹⁸ 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.¹⁹

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.”²⁰ Privatization of water services has been offered as the *right* medicine to cure the problems of provision of water.²¹ However, privatization of water services has stirred up a number of debates as to corporate responsibility to ensure availability, 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.”²² On the other hand, “privatizing water is likely to reduce access to clean water because of rate increases.”²³ In contrast, Kent argues that “semiprivatization of water, carefully controlled by government, remains a plausible approach.”²⁴

This paper argues that corporations bear a certain responsibility for the realization 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 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 is 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

act.org/docs/news_events/ 8.1/Ceo_water_mandate.pdf

18. Press Release, Ceres, Largest Companies Fall Short in Managing, Disclosing Water Scarcity Risks (Feb. 11, 2010), available at <http://www.ceres.org/waterreport>.

19. See John Grimond, *Business Begins to Stir: But Many Water Providers Still Have a Long Way to Go*, ECONOMIST, May 20, 2010; SUBHASH JAIN & SUSHIL VACHANI, MULTINATIONAL CORPORATIONS AND GLOBAL POVERTY REDUCTION (2006); Bus. & Human Rights Res. Ctr., *Positive Human Rights Initiatives by Companies*, Nov. 12, 2010, <http://www.business-humanrights.org/Documents/Update-Charts>; See Press Release, KPMG, KPMG Joins The Millennium Villages Project to Help Address Extreme Poverty in Africa (Oct. 10, 2008), available at http://www.csrwire.com/press_releases/22828-KPMG-Joins-The-Millennium-Villages-Project-to-Help-Address-Extreme-Poverty-in-Africa.

20. Melina Williams, *Privatization and the Human Right to Water: Challenges for the New Century*, 28 MICH. J. INT'L L. 469, 492 (2007); See generally Richardson Dilworth, *Privatization, The World Water Crisis, and the Social Contract*, 40 POL. SCIENCE & POLITICS 49 (2007).

21. See V. Petrova, Note, *At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water*, 31 BROOK. J. INT'L L. 577, 581 (2006).

22. *Id.* at 587.

23. *Id.* at 589.

24. GEORGE KENT, FREEDOM FROM WANT: THE HUMAN RIGHT TO ADEQUATE FOOD 191 (2005).

authority from other sources. 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 corporations 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, however, can be addressed by introducing a uniform national law, which would clearly identify the obligations and responsibilities of corporations in relation to human rights. Primary responsibility for realizing human rights lies with states and 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 right to water.

The balance of this paper is devoted to exploring corporate human rights obligations under the right to water. First, some fundamental notions are explained in section one. The right to water is examined in section two. In so doing, several allegations of corporate human rights violations are mentioned. Section three analyzes 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 the sources and legal nature of corporate obligations under the right to water. To be clear, the argument here is that corporations have normative obligations deriving from the right to water.

A. 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),²⁵ Veolia Environnement(130,924,000 customers),²⁶ RWE AG (38,235,000 customers),²⁷ Aguas de Barcelona(29,511,718 customers),²⁸ Saur (12,999,000 customers),²⁹ Acea (14,305,000 customers) ,³⁰

25. PINSENT MASONS, PINSENT MASON WATER YEARBOOK 2009-2010 202 (2009), available at <http://www.pinsentmasons.com/PDF/PMWaterYearbook2008-09.pdf>.

26. *Id.* at 223.

27. *Id.* at 247.

28. *Id.* at 258.

29. *Id.* at 195.

30. *Id.* at 251.

Biwater PLC/Cascal (8,834,000 customers)³¹ and United Utilities (24,028,000 customers).³² 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.³³ 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',³⁴ 'multinational enterprise',³⁵ and 'national corporation or business enterprise' in various contexts.

A corporation is a legal entity that owns and thereby carries out business activity mostly for profit, although non-profit corporations also exist.³⁶ The term 'corporation' is not reserved for organizations comprising a large number of persons, but can be employed even for individual businessmen.³⁷ A corporation has a separate personality, as do its owners who have "limited liability."³⁸ 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.³⁹ 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,⁴⁰ Gesellschaft mit begrenzter Haftung, société anonyme - SA, and société d'une personne à responsabilité - Sprl) and unlimited corporations. Less common 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 corporations, and also transnational, multinational and national corporations; private or public

31. *Id.* at 268.

32. *Id.* at 272.

33. Olivier De Schutter, *Transnational Corporations and Human Rights: An Introduction* 9-10 (Hausser Global Law School Program, Global Working Paper No. 01/05, 2005), available at http://www.law.nyu.edu/global/workingpapers/2005/ECM_DLX_015787.

34. U.N. Econ. and Soc. Council, Comm'n on Human Rights, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* ¶ 7, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter *UN Norms*]. The Commission, in Dec. 2004 expressed the view that, while the norms contained "useful elements and ideas" for its consideration, as a draft the proposal had no legal standing.

35. Org. for Econ. Co-operation and Dev., *The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, at 6, DAFNE/IME/WPG(2000)15/FINAL (Oct. 31, 2001).

36. DEREK FRENCH, STEPHEN MAYSON & CHRISTOPHER RYAN, *MAYSON, FRENCH & RYAN ON COMPANY LAW* 1-38 (24th ed. 2007); PAUL L. DAVIES, *GOWER AND DAVIES PRINCIPLES OF MODERN COMPANY LAW* 1-125 (7th ed. 2003).

37. DAVIES, *supra* note 36, at 10.

38. *Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22, 30 (H.L.) (U.K.); see also FRENCH, MAYSON & RYAN, *supra* note 36, at 116-49.

39. KATSUHIITO IWAI, *WHAT IS A CORPORATION? THE CORPORATE PERSONALITY CONTROVERSY AND COMPARATIVE CORPORATE GOVERNANCE* (2001).

40. Council Regulation 2157/2001, art. 1, 2001 O.J. (294).

corporations;⁴¹ 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 excuse 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 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,”⁴² including “a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity.”⁴³

B. Corporate Responsibility or Corporate Liability?

An ancient Roman legal principle suggests: *culpa tenet* [teneat] *suos auctores*.⁴⁴ Legal responsibility has a variety of contrasting faces. Responsibility involves fulfilling legal obligations and 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 subject. By the term “responsibility,” this paper refers to a broad understanding of legal responsibility and accountability. Duff argues that “[t]he relationship between liability and responsibility can be simply stated: responsibility is a necessary but not a sufficient condition of liability.”⁴⁵ 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.

41. *See, e.g.*, Companies Act, 2006, 46 c. 4 (U.K.).

42. *UN Norms, supra* note 34. The Commission, in Dec. 2004 expressed the view that, while the norms contained “useful elements and ideas” for its consideration, as a draft the proposal had no legal standing.

43. *Id.*; INT’L COMM’N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY, VOLUME 1: FACING THE FACTS AND CHARTING A LEGAL PATH 4 (2008).

44. English Word Information, *Meaning of Culpa*, http://www.wordinfo.info/words/index/info/view_unit/585, (last visited Nov. 14, 2010).

45. R. A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 20 (Hart Publishing 2007).

C. *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.”⁴⁶ Tomuschat argues that “human rights violations can, in principle, be committed only by states and/or the persons acting on behalf of the state.”⁴⁷ 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.

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 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 do 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.

II. THE RIGHT TO WATER

A. *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 notes that 884 million people in the world do not have access to clean and safe water.⁴⁸ A further 2.6 billion people in the world lack access to basic sanitation.⁴⁹ 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 2015.⁵⁰ 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

46. Special Rapporteur to the Human Rights Council, *Report on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. E/CN.4/2006/98 (Dec. 28, 2005).

47. CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 309 (Oxford University Press 2003).

48. WORLD HEALTH ORG., *PROGRESS ON SANITATION AND DRINKING-WATER: 2010 UPDATE 7* (2010) available at http://www.unwater.org/downloads/JMP_report_2010.pdf.

49. *Id.* at 8.

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

is a public good and not a market commodity. All individuals should have access to water and sanitation.⁵¹

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.”⁵² Similarly, the UN Special Rapporteur for Water noted in 2002, “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.”⁵³ In this way, access to safe drinking water and sanitation is increasingly being considered a fundamental human right.⁵⁴ Nonetheless, the description and recognition of the 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.⁵⁵ 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 next section.⁵⁶

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).⁵⁷ Further, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) notes in Article 14 (2):

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

51. See generally S. Tully, *A Human Right to Access Water*, 23 NETH. Q. HUM. RTS. 35-64 (2005); E. Filmer-Wilson, *The Human Rights-Based Approach to Development: The Right to Water*, 23 NETH. Q. HUM. RTS., 213-242 (2005).

52. Human Rights Council, *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*, ¶ 47, U.N. Doc. A/HRC/6/3 (Aug. 16, 2007).

53. Special Rapporteur on the Right of Access of Everyone to Drinking Water Supply and Sanitation Services, *Preliminary Report on the 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*, U.N. Doc. E/CN.4/Sub.2/2002/10 (June 25, 2002) (prepared by El Hadji Guissé).

55. Human Rights Council, Human Rights and Access to Safe Drinking Water and Sanitation, U.N. Doc A/HRC/15/L.14, Sep. 24 2010, <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G10/163/09/PDF/G1016309.pdf?OpenElement> (last visited Jan. 16, 2010).

55. See 5th World Water Forum, http://www.worldwaterforum5.org/index.php?id=1875&L=0target%3D_blank%25%2 (last visited Nov. 16, 2010).

56. See section 3.

57. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 11-12, U.N. Doc. A/6316 (Dec. 16, 1966).

housing, sanitation, electricity and water supply, transport and communications.

Similarly, Article 24 of the Convention on the Rights of the Child (CRC) states, "Parties 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."⁵⁸ Consequently, the right to water is also part of the right to health. Further, the Convention on the Rights of Persons with Disabilities provides, in Article 28, for an adequate standard of living and social protection in 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."⁵⁹ On a regional level the Committee of Ministers of the Council of Europe adopted the European Charter on Water Resources, which reads in Article 5, "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."⁶⁰ 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,"⁶¹ 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."⁶² 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."⁶³ Similar provisions can be found in the Fourth Geneva Convention on the protection of civilian persons in times of war,⁶⁴ Additional Protocol I on Protection of Victims of International Armed Conflict,⁶⁵ and

58. Convention on the Rights of the Child, G.A. Res. 44/25, Art. 24(2)(c), U.N. Doc. A/44/49 (Sept. 2, 1990).

59. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 28, U.N. Doc. A/RES/61/106 (Dec. 13, 2006), *available at* <http://www.un.org/disabilities/convention/conventionfull.shtml>.

60. EUR. CONSULT. ASS. DEB. 109th Sess. 769 (Oct. 17, 2001), *available at* <https://wcd.coe.int/ViewDoc.jsp?id=231615&Site=COE>.

61. Geneva Convention Relative to the Treatment of Prisoners of War ¶ 26, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, <http://www2.ohchr.org/english/law/prisonerwar.htm>.

62. *Id.* art. 20.

63. *Id.* art. 46.

64. Geneva Convention relative to the Protocol of Civilian Persons in Time of War art. 85, 89, 127, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5>.

65. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Prot. of Victims of Int'l Armed Conflicts, art. 54-55, June 8, 1977, 1125 U.N.T.S. 3, <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079>.

Additional Protocol II on Protection of Victims of Non-international Armed Conflict.⁶⁶

A human right to water can also be protected indirectly through provisions in international and regional treaties which, although they do not expressly mention the right to water, seek to protect values that the right to water also seeks to protect. For instance, Article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR) 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.”⁶⁷ Accordingly, the United Nations Human Rights Committee has noted:

[T]he 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.⁶⁸

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

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.⁶⁹

This paragraph may indirectly imply that not only states, but also corporations, have obligations to at least respect the right to water of individuals and communities. Further, the African Charter on the Rights and Welfare of the Child provides that “State Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures... to ensure the provision of adequate nutrition and safe drinking water.”⁷⁰ The Protocol

66. *Id.* art. 5, 14.

67. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 6(2), U.N. Doc. A/6316 (Dec. 16, 1966).

68. U.N. Human Rights Comm. [UNHRC], *Compilation of Gen. Comments and Gen. Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994), available at <http://www1.umn.edu/humanrts/gencomm/hrcom6.htm>.

69. U.N. Econ. & Soc. Council [ECOSOC], *Substantive Issues Arising in the Implementation of the Int'l Covenant on Econ., Soc. and Cultural Rights: The Right to Water*, ¶ 33, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003), available at [http://www.unhcr.ch/tbs/doc.nsf/0/a5458d1d11bbd713fc1256cc400389e94/\\$FILE/G0340229.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/a5458d1d11bbd713fc1256cc400389e94/$FILE/G0340229.pdf) [hereinafter *Substantive Issues*].

70. African Charter on the Rights and Welfare of the Child, art. 14(2)(c), OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999), http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols

to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa notes in Article 15, "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."⁷¹

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.⁷² 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 the millions without proper access to water."⁷³ 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 in international treaties.

B. The Nature and Scope of the Human Right to Water

This section analyzes 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."⁷⁴ The human right to water includes two constituting elements, "both freedoms and entitlements."⁷⁵ Freedoms include more normative obligations on the part of states. Examples of such freedoms are "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."⁷⁶ 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."⁷⁷ The UN ESCR Committee argues that "water must be *adequate* for human dignity, life and health."⁷⁸ It then goes on to list four criteria for assessing the adequacy of right to water, which are availability, quality, accessibility and affordability.⁷⁹ Availability means that "the water supply for each person must be sufficient and

/a.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf.

71. 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.

72. For an opposite view see P. Thielbörger, *The Human Right to Water Versus Investor Rights: Double Dilemma or Pseudo-Conflict?*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 488-493 (2009).

73. M. Langford, *Right to Water*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 208 (Matthew Chaskalson et al. eds., 2005).

74. *Substantive Issues*, *supra* note 69.

75. *Id.* ¶ 10

76. *Id.*

77. *Id.*

78. *Id.* ¶11.

79. *Id.* ¶12.

continuous for personal and domestic uses.”⁸⁰ There is no international consensus on how many litres 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.⁸¹ Others place the absolute minimum at 30 litres of water per human being per day.⁸² 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.⁸³

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.”⁸⁴ Accessibility means that everyone has to have access to water and water services.⁸⁵ In this way, accessibility has four main elements: physical accessibility, economic accessibility, non-discrimination and information accessibility.⁸⁶ 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 cross-subsidies from high-income users to low-income users.”⁸⁷ All in all, a fully-fledged implementation of the human right to water requires that all four elements be included.

C. 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 not merely an abstract matter. For centuries, corporations have 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

80. *Id.*

81. *The Right to Water: From Concept to Implementation*, WORLD WATER COUNCIL, http://www.worldwatercouncil.org/fileadmin/wwc/Library/RightToWater_FinalText_Cover.pdf (last visited Nov. 9, 2010).

82. H.R.M.W. VAN RIJSWICK, MOVING WATER AND THE LAW: ON THE DISTRIBUTION OF WATER RIGHTS AND WATER DUTIES WITHIN RIVER BASINS IN EUROPEAN AND DUTCH WATER LAW 10 (2008).

83. See *Mazibuko v. City of Johannesburg*, 2010 (4) SA 1(CC) at 85-87, ¶ 166, 169 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2009/28.pdf>; see also Peter Danchin, *A Human Right to Water? The South African Constitutional Court's Decision in the Mazibuko Case*, EJILTALK.ORG (Jan. 13, 2010), <http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court%E2%80%99s-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), available at <http://www1.umn.edu/humanrts/iachr/E/curbarado3-6-03.html>.

84. *Substantive Issues*, *supra* note 69.

85. *Id.*

86. *Id.*

87. Special Rapporteur on the Right to Drinking Water and Sanitation, *Realization of the Right to Drinking Water and Sanitation*, U.N. ECOSOC, Comm’n on Human Rights, § 6.1, U.N. Doc. E/CN.4/Sub.2/2005/25 (July 11, 2005) (by El Hadji Guissé), available at http://www2.ohchr.org/english/issues/water/docs/SUB_Com_Guisse_guidelines.pdf.

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 showing that the impact of corporate activities on poor communities in developing countries can result in human rights violations.⁸⁸ 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 treaties and domestic liberalization.”⁸⁹ Today there are some 70,000 transnational corporations, together with roughly 700,000 subsidiaries and millions of suppliers in every corner of the globe.⁹⁰ 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.⁹¹

The private sector may have a responsibility for these high numbers. For instance, the non-governmental organization FIAN International reports that a private company is allegedly contaminating water in the River Chambira basin in Peru.⁹² 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.⁹³ An oil pipeline network funded by a German state-owned bank has allegedly destroyed access to water and livelihoods in Ecuador.⁹⁴

88. See *On the Margins of Profit: Rights at Risk in the Global Econ.*, HUMAN RIGHTS WATCH, (Feb. 18, 2008), <http://hrw.org/reports/2008/bhr0208/>; see also, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corps. & Other Bus. Enters., *Corps. & Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, U.N. Doc. A/HRC/8/5/Add.2 (May 23, 2008) (by John G. Ruggie) (summarizing the scope and patterns of alleged corporate-related human rights abuse found in a sample of 320 cases), <http://www.business-humanrights.org/Documents/RuggieHRC2008>.

89. U.N. ECOSOC, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Promotion and Protection of Human Rights*, ¶ 12, U.N. DOC. E/CN.4/2006/97 (Feb. 22, 2006) (prepared by J. Ruggie) available at <http://daccess-ods.un.org/TMP/4686402.38046646.html> [hereinafter J. Ruggie's 2006 Report].

90. United Nations Conference on Trade and Development, 2005, *World Investment Report 2005: Transnational Corporations and the Internationalization of R&D*.

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

92. FIAN International, *Identifying and Addressing Violations of Human Right to Water: Applying the Human Rights Approach*¹⁰ (prepared by Maike Gorsboth), <http://www.fian.org/resources/documents/others/identifying-and-addressing-violations-of-the-human-right-to-water/?searchterm=Identifying and Addressing Violations of Human Right to Water>.

93. *Id.*

94. *Id.* at 12.

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).⁹⁵ And in 2003, the Indian government decided to divert water, meant for 20,000 peasant families, for a water theme park in India.⁹⁶ The construction of dams has also led to the deprivation of water by communities living in the area. Several thousands of people were allegedly deprived of their access to water in Ghana due to the damming of the river Subri.⁹⁷ The project proceeded on the basis of an investment agreement between Newmont Mining Corporation and the government of Ghana.⁹⁸ 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.⁹⁹ 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 peoples settled in the basin.¹⁰⁰ Further, the International Fact Finding Mission, an international non-governmental organization, 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.¹⁰¹

III. 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.”¹⁰² It further notes:

[I]ndustrial bodies (including both private corporations and State owned enterprises) are often major consumers of water. It is predicted that in

95. *Id.* at 11.

96. *Id.*

97. FIAN International, *Identifying and Addressing Violations of Human Right to Water: Applying the Human Rights Approach, Revised and Updated Edition 2008* 12 (prepared by Maïke Gorsboth and Esther Wolf), <http://www.fian.org/resources/documents/others/identifying-and-addressing-violations-of-the-human-right-to-water-1/?searchterm=Identifying%20and%20Addressing%20Violations%20of%20Human%20Right%20to%20Water>.

98. *Id.*

99. *Id.* at 14.

100. *Id.* at 15.

101. FIAN International, *Investigating Some Alleged Violations of the Human Right to Water in India* 9-13, [http://www.fian.org/resources/documents/others/fian-international-2013-investigating-some-alleged-violations-of-the-human-right-to-water-in-india/?searchterm=Investigating some alleged violations of the human right to water in India](http://www.fian.org/resources/documents/others/fian-international-2013-investigating-some-alleged-violations-of-the-human-right-to-water-in-india/?searchterm=Investigating%20some%20alleged%20violations%20of%20the%20human%20right%20to%20water%20in%20india).

102. Institute for Business and Human Rights, *Business, Human Rights & Right to Water, Challenges, Dilemmas, Opportunities, Roundtable Consultative Report*, January 2009, at 3, available at <http://www.institutehrb.org/Downloads/Draft%20Report%20-%20Business,%20Human%20Rights%20and%20Water.pdf>.

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.¹⁰³

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 of the right to water.¹⁰⁴ 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.¹⁰⁵

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. 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. 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 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 national legal orders or international law. In contrast, the relevance of distinguishing between the first two situations may be less obvious, as many national rules derive their origins from international law and vice versa. Nonetheless, the distinction between national and international levels can be made and is legally and practically relevant.

103. *Id.* at 18.

104. John H. Knox, Concept Paper on Facilitating Specification of the Duty to Protect, Prepared for U.N. SRSG on Business and Human Rights (Dec. 14, 2007), available at <http://www.business-humanrights.org/Updates/Archive/SpecialRepPapers> (follow hyperlink under Discussion Papers).

105. Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates*, 4 NW. U. J. INT'L HUM. RTS. 331 (2005), available at <http://www.law.northwestern.edu/journals/jihr/v4/n2/3>.

A. Legal Sources of Corporate Human Rights Obligations Under the Right to Water

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 or participants in that system. Any valid positive norm derives its legal authority from its membership in a legal order, which gives it binding force. Legal scholarship has so far predominantly focused on the international legal obligations of corporations.¹⁰⁶ 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 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.”¹⁰⁷ 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.¹⁰⁸ Domestic laws include protection for human rights that can be enforced against corporations.¹⁰⁹

106. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443, 449 (2001); NICOLA M. C. P. J'AGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS (2002); 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.

107. FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 10 (Oxford University Press, 2007).

108. 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).

109. See generally Sarla Fitzgerald, *Corporate Accountability for Human Rights Violations in Australian Domestic Law* (2005) 11(1) AUSTRALIAN J. OF HUM. RTS. 2, available at <http://www.austlii.edu.au/au/journals/AJHR/2005/2.html> (a detailed discussion on human rights obligations in domestic law); Sophie van Bijsterveld, *Human Rights and Private Corporations: A Dutch Legal Perspective*, 6.4 ELECTRONIC J. OF COMPARATIVE L. (Dec. 2002), available at <http://www.ejcl.org/64/art64-21.html>; S. Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW (2000); C. HEYNS AND F. VILJOEN, THE IMPACT OF THE UNITED NATIONS HUMAN RIGHTS TREATIES ON THE DOMESTIC LEVEL (2002).

The corporate human rights obligations under the right to water, as noted, derive legal authority primarily from national legal orders.¹¹⁰ Domestic laws, which place human rights obligations on corporations, including the human right to water, exist in many states.¹¹¹ The most important statutes are 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 as constitutional protections of human rights can 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, South Africa, Uganda, and Ecuador all include numerous human rights in their national constitutions, including the right to water.¹¹² It must be recognised, however, that only a few constitutions contain explicit obligations under the human right to water that can be enforced against both natural and legal persons.

A few examples of national constitutions containing corporate obligations under the human right to water are provided here. In South Africa, the provisions of the South African Bill of Rights require 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.¹¹³ Article 27 of the Constitution of South Africa provides, “[E]veryone has the right to have access to... sufficient... water.”¹¹⁴ A further example from Uganda also demonstrates that human rights obligations under the right to water derive from national constitutions. The Constitution of Uganda provides, in Article XIV, that “all Ugandans enjoy rights and opportunities and access to... clean and safe water.”¹¹⁵ Similarly, Section 47 of the Constitution of Uruguay provides: “[W]ater is an essential natural resource for life. Access to water services and sanitation are essential human rights.”¹¹⁶ Further, Article 17 of the Constitution of the Lao People’s Democratic Republic provides that “All organizations and citizens must protect... water sources,” which suggests this

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

111. See S. JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 11 (2004); see also Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. OF TRANSNAT'L L. 801, 808-809 (2002); S. Joseph, *Liability of Multinational Corporations: International and Domestic Laws and Procedures*, in SOCIAL ECONOMIC RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 613 (Malcolm Langford ed., 2007).

112. S. AFR. CONST. 1996, ch. II, § 27(1)(b); ECUADOR CONST. 1998, art. 23, 120; UGANDA CONST. 1995, art. XIV(ii).

113. See S. AFR. CONST. 1996, ch. II, § 8(2).

114. S. AFR. CONST. 1996, ch. II, § 27(1)(b).

115. UGANDA CONST. art. XIV(b).

116. CONST. OF URUGUAY, § 47.

provision addresses legal persons.¹¹⁷ The Constitution of Gambia provides, “The State shall endeavour to facilitate equal access to clean and safe water.”¹¹⁸ Similarly, the Constitution of Ethiopia provides that “every Ethiopian is entitled, within the limits of the country’s resources, to... clean water.”¹¹⁹ Similar provision can be found in Article 127 of the Constitution of Guatemala.¹²⁰

All in all, national legal orders that create the right to water can be found in the constitutions of Belgium, Colombia, Democratic Republic of Congo, Ecuador, Ethiopia, Gambia, Guatemala, Kenya, Panama, Philippines, South Africa, Spain, Uganda, Uruguay, Venezuela and Zambia.¹²¹ 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.”¹²² Hence, it appears that under a constitutional and normative framework, corporations share human rights obligations in national legal orders equally with individuals and the state.

Corporations are obliged to comply with obligations in national legal orders, which also include the protection of human rights.¹²³ There are numerous examples of corporate human rights obligations deriving from national legislation. 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. National corporate law principles, legislation, and practices directly or indirectly create corporate human rights obligations in countries such as France, Spain, Brazil,¹²⁴ Belgium, the Netherlands, Kenya, Finland, Argentina, Australia, Canada, France, India, Indonesia, Japan, New Zealand, Papua New Guinea, Singapore and the UK.¹²⁵ In

117. CONST. OF THE LAO PEOPLE’S DEM. REP. art. 17.

118. CONST. OF GAMBIA 1996, Art. 216(4).

119. CONSTITUTION OF ETHIOPIA (1998), Article 90(1).

120. CONSTITUCION POLITICA DE LA REPUBLICA DE GUATEMALA [CONSTITUTION] Nov. 17, 1993, art. 127.

121. WORLD WATER COUNCIL [WWC], RIGHT TO WATER: MOVING TOWARDS A GLOBAL CONSENSUS? 4 (Mar. 2007).

122. INT’L COMM’N OF JURISTS [ICJ], CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY, VOLUME 3: CIVIL REMEDIES, REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES 7 (Sept. 16, 2008).

123. See U.N. Special Representative of the Secretary-General, *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: Rep. of the Special Representative of the Secretary-General*, ¶ 54, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> [hereinafter J. Ruggie’s *Promotion of All Human Rights*].

124. UNESCO, *Outcome of the International Experts’ Meeting on the Right to Water* (October 2009), <http://unesdoc.unesco.org/images/0018/001854/185432e.pdf>.

125. U.N. Special Representative of the Secretary-General, *Mandate of the Special Representative*

France, for example, the Water Bill provides for the right to water in the following way: “[E]veryone has the right, for their alimentation and hygiene, to have access to drinking water, on the condition that it is economically affordable to everyone.”¹²⁶ Likewise, municipalities in Spain are obliged to offer access to water and sewer services.¹²⁷ Consequently, public and private corporations in those countries have obligations to provide such access. In Belgium, water is a right in all three regions.¹²⁸ 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.”¹²⁹ The National Water Resource Management Strategy of the Kenyan government provides: “[W]ater required to meet basic human needs and to maintain environmental sustainability will be guaranteed as a right.”¹³⁰ Further, the Dutch national legal order effectively recognizes water as a human right.¹³¹ 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.”¹³² 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 shall be made available to all residents of California at an affordable cost.”¹³³ Therefore, a substantial number of countries from every continent, from Latin America to Asia, include the right to water in their constitutional laws or national legislations.¹³⁴ Consequently, it may be argued that corporate obligations arising from the right to water are well established and well recognized within national legal orders. Further, Mali, Mauritania and Senegal signed Senegal River Water Charter 8, 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.”¹³⁵ Similarly, Indian courts have held that the right to life

of the Secretary General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, (July 5, 2010) (by John Ruggie), available at <http://www.reports-and-materials.org/Ruggie-corporate-law-project-Jul-2010.pdf>.

126. Loi 2006-1772 du 30 décembre 2006 sur l’eau et les milieux aquatiques [Law 2006-1772 of December 30, 2006 on Water and Aquatic Environments], JOURNAL OFFICIEL DE LA REPUBLIC FRANÇAISE [J.O.] [Official Gazette of France], Dec. 31, 2006.

127. Regulating the Local System Law art. 26.1 (R.D.-Ley 1985, 80) (Spain).

128. INT’L ENVTL. L. RES. CTR. [IELRC], THE RIGHT TO WATER IN BELGIUM 6 (2008).

129. INT’L ENVTL. L. RES. CTR. [IELRC], THE RIGHT TO DRINK WATER REQUIRES NATIONAL LAWS TO BE EFFECTIVE 2 (April 2007).

130. THE NAT’L WATER RES. MGMT. STRATEGY (2006 TO 2008), THE RIGHT TO WATER AND SANITATION KENYA 4 (2008).

131. H.F.M.W. VAN RIJSWICK, MOVING WATER AND THE LAW, ON THE DISTRIBUTION OF WATER RIGHTS AND WATER DUTIES WITHIN RIVER BASINS IN EUROPEAN AND DUTCH WATER LAW 15-16 (Europa Law Publishing 2008).

132. WATER SERVICES ACT § 1 (Finland).

133. CAL. PUB. UTIL. CODE § 739.8(a) (Deering 2009).

134. UNITARIAN UNIVERSALIST SERV. COMM. [UUSC], A BIBLIOGRAPHY OF PRIMARY AND SECONDARY SOURCES OF LAW ON THE HUMAN RIGHT TO WATER 16-21 (Mar. 2007).

135. Charte des Eaux du Fleuve Senegal [Charter for the Waters of the Senegal River] art. 4, Mali-

in Article 21 of the constitution of India includes the right to safe and sufficient water.¹³⁶ In *Attakoya Thangal v. Union of India* (1990), Justice Sankaran Nair of the Kerala High Court noted, “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.”¹³⁷ The Argentinean courts have also upheld the human right to water in several decisions.¹³⁸

In *Mazibuko v. City of Johannesburg*, the Constitutional Court of South Africa recently held 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.¹³⁹ 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.”¹⁴⁰

From this analysis of national legal orders, it becomes clear that a number of sources of national law 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 still problematic. Nevertheless, 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.

To restate, 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.

Mauritania-Sen., May 28, 2002.

136. 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 (last visited Nov. 11, 2010).

137. *Attakoya Thangal v. Union of India*, A.I.R. 1990 Ker 321 (India).

138. See CTR ON HOUS. RIGHTS & EVICTIONS [COHRE], LEGAL RESOURCES FOR THE RIGHT TO WATER: INTERNATIONAL AND NATIONAL STANDARDS 111-114 (Oct. 1, 2003) (summarizing Argentinean cases).

139. *Mazibuko v. City of Johannesburg*, 2010 (4) SA 1 (CC) at 85-87, ¶ 166-169 (S. Afr.).

140. Jeremy Valeriotte, *Chile's Supreme Court Upholds Indigenous Water Use Rights*, THE SANTIAGO TIMES, Nov. 30, 2009.

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 to and binding on the entire international community or any part of it. Arguably, international law, which also applies in relation to corporate human rights obligations, is a much shallower normative system than national legal orders. Nevertheless, this section argues that the international system may offer supplementary answers in relation to national 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 such as judicial decisions and academic commentaries.¹⁴¹ Several international human rights treaties include state obligations to protect the right to water in relation to the activities of corporations.¹⁴² 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.¹⁴³

At this point it should be noted that the scholarly debate on the strength of the direct and 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.¹⁴⁴ In contrast, Ruggie has concluded that the main international human rights

141. Statute of the International Court of Justice art. 38(1), April 18, 1946, 59 Stat. 1031, T.S. 993, available at <http://www.unhcr.org/refworld/docid/3deb4b9c0.html>; Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 115, 118 (Malcolm D. Evans ed., 2d ed. (2006)); Jorg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems*, 15 EUR. J. INT'L L. 523 (2004); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2005) (critiquing the custom as a source of international law).

142. JOHN H. KNOX, CONCEPT PAPER ON FACILITATING SPECIFICATION OF THE DUTY TO PROTECT (2007) available at <http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Internationalorganizations/UNhumanrightsmechanisms> (follow hyperlink to PDF).

143. See *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22 (2008); Bus. & Human Rights Res. Ctr., *Case Profile: BP lawsuit (re Colombia)*, available at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/BPlawsuitreColombia>.

144. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 266-270 (2006); NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATION: IN SEARCH OF ACCOUNTABILITY 75-95 (2002); PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 519-524 (2d ed. 2007); David Kinley and Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 961-993 (2004); Nathaniel Stinnet, *Regulating the Privatization of War: How to Stop Private Military Firms from Committing Human Rights Abuses*, 28 B.C. INT'L & COMP. L. REV. 211, 217-18 (2005); David Weissbrodt & Maria Kruger, *Current Development: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 919-20 (2003).

instruments do not seem to impose direct legal responsibilities on corporations.¹⁴⁵ 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.”¹⁴⁶ 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,”¹⁴⁷ or if the “language is indicating an intent to subject [the actors] to international enforcement mechanisms in the future.”¹⁴⁸ In other words, international obligations cannot be directed toward corporations if they leave its enforcement to the national legal orders of states.¹⁴⁹ 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.”¹⁵⁰ 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 existence of potential international jurisdiction. Kamminga correctly notes, “[T]here are no reasons of principle why companies cannot have direct obligations under international law.”¹⁵¹

As noted, international treaties 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.”¹⁵² Ratner has suggested a method for translating obligations under current international human rights law to the corporate context by employing four criteria: “[a 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.”¹⁵³ He submits that such a theory “offers a starting point for global actors to develop a corpus of

145. Representative of the Special Representative of the Secretary General, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 44, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007).

146. 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; See, CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 107-109 (2003).

147. Carlos M. Vasquez, *Direct vs. Indirect Obligations of Corporations under International Law*, 43 COLUM. J. TRANSNAT’L L. 927, 940 (2005).

148. *Id.* at 941.

149. *Id.* at 934-35.

150. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 481 (2002).

151. MENNO T. KAMMINGA, PRESENTATION AT THE 71ST CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION: CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW (2004).

152. CLAPHAM, *supra* note 144, at 91.

153. Ratner, *supra* note 150, at 496-97.

law that would recognize obligations on businesses to protect human rights.”¹⁵⁴ In sum, “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 regulate non-state actors.”¹⁵⁵ It is clear that international norms may have applicability to corporations even if there is no international mechanism established for enforcing this norm.

The 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:

[T]hat 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.”¹⁵⁶

The preambular provision is implemented in Articles 29 and 30 of the Universal Declaration. Article 29 articulates the correlative private duty that everyone has to respect the rights of others.¹⁵⁷ 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.”¹⁵⁸ Addressing the preamble, Henkin notes, “[E]very 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.”¹⁵⁹ 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.”¹⁶⁰ The OECD 1976 Guidelines for Multinational Enterprises (revised in 2000) requires multinational enterprises to “respect the human rights of those affected by their

154. *Id.* at 530.

155. Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 930 (2005).

156. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at pmb. (Dec. 10, 1948).

157. *Id.* at art. 29(2).

158. *Id.* at art. 30.

159. Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 17 (1999).

160. U.N. Comm. on Human Rights, *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, at ¶ 1 (Aug. 26, 2003).

activities consistent with the host government's international obligations and commitments."¹⁶¹ The ILO Tripartite Declaration states 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."¹⁶² 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."¹⁶³

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 obligations 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 Organization 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."¹⁶⁴ 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.¹⁶⁵

161. ORG. FOR ECON. CO-OPERATION AND DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: TEXT, COMMENTARY AND CLARIFICATIONS 14 (2001).

162. INT'L LABOR ORG., TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (3rd ed. 2000); see also Jernej Letnar Čerňič, *Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 6 MISKOLC J. INT'L L. 24 (2009).

163. 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, G.A. Res. 53/144, U.N. Doc. A/RES/53/144, at art. 18, ¶ 3 (Mar. 8, 1999).

164. OECD, *Codes of Corporate Conduct: An Inventory*, at A ¶ 4, TD/TC/WP(98)74/FINAL (May 3, 1999). See also OECD Directorate for Financial, Fiscal and Enterprise Affairs, *Codes of Corporate Conduct: Expanded Review of their Contents*, (OECD, Working Paper No. 2001/6); Fiona McLeay, *Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: a Small Piece of a Larger Puzzle*, (N.Y. Univ. Sch. of Law Global Law Working Paper 2005/1).

165. ILO, Working Party on the Social Dimensions of the Liberalization of International Trade,

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 responsibility for their activities.¹⁶⁶ They include the normatively non-binding obligations and commitments of corporations. In other words, codes of conduct do not create legal, but at most moral, obligations.¹⁶⁷ They are drafted by the corporations themselves because it is in their interests to adopt them. The codes of conduct include principles, standards, or guidelines.¹⁶⁸ 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.”¹⁶⁹ They may be specific or 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. This paper will examine the human rights policies relating to the right to water of several corporations. For instance, in Pepsi Corporation’s Pepsi Guidelines in Support of the Human Right to Water, it “agrees... to ensure that our business engagement across the globe, first and foremost, respects the human right to water.”¹⁷⁰ 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;”¹⁷¹ 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;”¹⁷² and that Pepsi “will involve communities in our plans to develop water

Overview of Global Developments and Office Activities Concerning Codes of Conduct, Social Labelling and Other Private Sector Initiatives Addressing Labour Issues, at ¶ 26 GB 273/WP/SDL/1 (Rev. 1) (Nov. 1998).

166. Christopher Wright & Alexis Rwabizambuga, *Institutional Pressures. Corporate Reputation, and Voluntary codes of Conduct: An Examination of the Equator Principles*, 111 BUS. SOC’Y REV. 89, 90 (2006).

167. N. Bernaz et P.-F. Morin, *L’Onu et sociétés transnationales: La nécessité d’une collaboration opérationnelle en matière de droits sociaux internationaux*, in UNE SOCIÉTÉ INTERNATIONALE EN MUTATION: QUELS ACTEURS POUR UNE NOUVELLE GOUVERNANCE? [*The UN and Transnational Societies: The need for operational collaboration in the field of international social rights*, in A CHANGING INTERNATIONAL SOCIETY: WHAT ACTORS FOR A NEW GOVERNANCE?] 75 (Laurence Boisson De Chazournes & Rostane Mehdi eds., 2005).

168. See, e.g., Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT’L L. 389, 401 (2005); Mark Baker, *Promises and Platitudes: Toward a New 21st Century Paradigm for Corporate Codes of Conduct?*, 23 CONN. J. INT’L L. 123, 128-29 (2007).

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

170. *Partnerships & Community*, PEPSICO, http://www.pepsico.com/Download/PepsiCo_Water_Report_FNL.pdf (last visited Nov. 13, 2010).

171. *Id.*

172. *Id.*

resources.”¹⁷³ 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;”¹⁷⁴ 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.”¹⁷⁵

Similarly, the Coca-Cola Company emphasizes: “[J]ust 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.”¹⁷⁶ 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.”¹⁷⁷ 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,” while committing itself to the promotion and expansion of “knowledge and know-how in this issue.”¹⁷⁸ Similarly, 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.”¹⁷⁹ 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.”¹⁸⁰

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.”¹⁸¹ CEO Water Mandate recognizes that businesses “have a

173. *Id.*

174. *Id.*

175. *Id.*

176. *Sustainability*, THE COCA-COLA COMPANY, http://www.thecoca-colacompany.com/citizenship/water_more.html (last visited Nov. 13, 2010).

177. *Id.*

178. *Meaning and Mission*, SUEZ ENVIRONNEMENT, <http://www.suez-environnement.com/en/sustainable-development/foundation/meaning-and-mission/meaning-and-mission> (last visited Nov. 13, 2010).

179. Nestlé Water Management Report, *Water Management Report and Nestle* (Mar. 2007), http://www.unglobalcompact.org/docs/issues_doc/Environment/ceo_water_mandate/water_mandate_cops/Nestle_CEOWater.pdf.

180. International Federation of Private Water Operators, Code of Ethics, § 1.

181. United Nations, *The CEO Water Mandate*, http://www.unglobalcompact.org/Issues/Environment/CEO_Water_Mandate/ (last updated Nov. 3, 2010).

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.”¹⁸² In its preamble, the CEO Water Mandate states its six coverage areas: “Direct Operations; Supply Chain and Watershed Management; Collective Action; Public Policy; Community Engagement; and Transparency.”¹⁸³ In this way, 63 companies have endorsed the CEO Water Mandate and adopted the Mandate into their corporate policies and operations.¹⁸⁴ The problem with all of these references is that they are not sufficiently 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.¹⁸⁵ This paper therefore argues that the voluntary commitments represent the third and additional layer of corporate obligations. Corporate codes of conduct are essential in promoting compliance with human rights obligations amongst corporations and they offer an often necessary 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.”¹⁸⁶ In other words, corporations may encourage local authorities to develop an effective means of protecting human rights.¹⁸⁷ They should not, however, 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 select human rights, whereas others are omitted.¹⁸⁸ In addition, most do not support the mechanisms and independent monitoring of their implementation.¹⁸⁹ It may appear that they can be described as

182. *Id.*

183. *Id.*

184. United Nations, The CEO Water Mandate - Endorsing CEOs, http://www.unglobalcompact.org/Issues/Environment/CEO_Water_Mandate/endorsingCEOs.html

185. See Patricia R. Waagstein, *From 'Commitment' to 'Compliance': The Analysis of Corporate Self-Regulation in the BP Tangguh Project, Indonesia*, 5 JURNAL HUKUM INTERNASIONAL UNPAD 100 (2005). She concludes “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.” *Id.* at 117.

186. See McLeay, *supra* note 164, at 19.

187. See Murphy, *supra* note 168, at 398-99 : Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L. 309, 314 (1994) (suggesting that multinational corporations often have the capability to influence government policies and practices).

188. See Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 180 (1997).

189. *Corporate Liability for Violation of International Human Rights Law*, 114 HARV. L. REV. 2025, 2025-26 (2001).

lex imperfecta. Marks and Clapham explain 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.”¹⁹⁰

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. Nevertheless, they provide an additional layer from which the corporate commitment to observe the human right to water can be derived. Identifying corporate human rights obligations under the right to water is a significant exercise, of which the voluntary commitments of corporations are a small but important part.

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 international law. It appears to be a *non sequitur* to expect that a normatively shallow system of international law could break the conundrum of human rights obligations that normatively full-fledged national legal orders 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.¹⁹¹ Other commentators argue that only states can violate international human rights.¹⁹² Even though the precise content of the obligations of corporations is unclear, it may appear self-evident that corporations must at least comply with fundamental human rights standards, including the right to water. Even still, some practitioners and commentators argue that corporations do not have any obligations and responsibilities even under the human right to water.¹⁹³ No matter how plausible this conclusion might sound, it is not persuasive, as national legal orders, international treaties and declarations now include human rights obligations of corporations relating to the right to water. The scope of substantive obligations, however, and whether they are direct or indirect, remains contested. In a similar vein, Ruggie states that “There are legitimate arguments in

190. See MARKS & CLAPHAM, *supra* note 15, at 192-93.

191. International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002), http://www.ichrp.org/files/reports/7/107_report_en.pdf; see also Frey, *supra* note 188 at 158; Paust, *supra* note 111, at 803-04.

192. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870 (1997).

193. Press Release, United Nations Human Rights Council Adopts 13 Resolutions, Appoints 13 New Mandate Holders and Extends Eight Mandates (June 18, 2006), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/F862D09328BA5EACC125746C006CB1DF?>

support of the proposition that it may be desirable in some circumstances for corporations to become direct bearers of international human rights obligations."¹⁹⁴ 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."¹⁹⁵ Thus, 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.

B. 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. Human rights have been formulated within the relationship between the individual and the state.¹⁹⁶ A person 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 toward individuals and, vice-versa, the obligations of individuals toward the state. These are vertical human rights obligations. Van der Walt observes, "[A] vertical application of fundamental rights refers to the application of these rights to the vertical relation between the state and the subject."¹⁹⁷ 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. These 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 other private actors. In other words, the horizontal application of fundamental rights includes "the horizontal relationship between private law subjects or private individuals."¹⁹⁸ Some commentators argue that one would dilute and distort the concept of human rights by applying human rights obligations horizontally between private subjects.¹⁹⁹ This statement encompasses one of the most common arguments against the horizontal effect of human rights obligations between private actors. However, this presents a very

194. See J. Ruggie's 2006 Report, *supra* note 89.

195. *Id.*

196. Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 GEO. INT'L ENVTL. L. REV. 309, 331 (1998).

197. Johan van der Walt, *Blixen's Difference: Horizontal Application of Fundamental Rights and the Resistance to Neocolonialism*, LAW, SOC. JUSTICE & GLOBAL DEV. (Apr. 30, 2003), available at http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/walt/.

198. *Id.*

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

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, the argument omits one of the most important characteristics of human rights law.²⁰⁰ Challenging this historical understanding of the application of human rights law is central for invoking a horizontal application of fundamental rights.²⁰¹

This section argues that human rights obligations also apply within a horizontal relationship between private parties. The category of corporate human rights obligations includes binary or correlative obligations – in other words, corporate obligations to protect the ability of individuals, local communities, and indigenous peoples to enjoy human rights.²⁰² These are the obligations of corporations toward other private actors. They cannot be set out within a traditional vertical matrix of human rights law; these obligations are inherently horizontal. While such obligations strengthen the promotion and protection of human rights, traditional human rights law leaves the identification of human rights obligations and its enforcement to national legal orders.²⁰³

A number of jurisdictions now provide for a direct horizontal application of human rights obligations.²⁰⁴ Section 9 of the 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.”²⁰⁵ This section also places an obligation on private actors not to discriminate against others.²⁰⁶ The Constitutional Court of South Africa confirmed this horizontal application of human rights between private individuals in cases such as *Fose v. Minister of Safety and Security*,²⁰⁷ *Soobramoney v. Minister of Health*²⁰⁸ and *Minister of Health v. Treatment Action Campaign*.²⁰⁹ Additional support for a horizontal application of human rights can be found in jurisprudence under the Irish Constitution.²¹⁰ Equally important, the German Constitutional Court

200. See Andrew Clapham, HUMAN RIGHTS IN THE PRIVATE SPHERE, 92 (Claredon Press, 1996) [hereinafter HUMAN RIGHTS IN THE PRIVATE SPHERE]; HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY, (Angela Hegarty & Siobhan Leonard eds., Cavendish Publishing Co. Ltd., 1999); see generally Walt, *supra* note 197.

201. See Walt, *supra* note 196.

202. Kinley & Tadaki, *supra* note 144, at 939.

203. See Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, INT’L J. OF CONSTITUTIONAL LAW (2003) (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).

204. Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, UCLA School of Law Public Law & Legal Theory Research Paper Series Research Paper No. 03-14, (2003).

205. S. Afr. Const., 1996, ch. 2, § 9, cl. 3.

206. S. Afr. Const., 1996, ch. 2, § 9, cl. 4.

207. See *Fose v. Minister of Safety and Security* 1997 SA 786 (CC) at 87 (S. Afr.).

208. *Soobramoney v. Minister of Health, KwaZulu-Natal*; 1998 (1) SA 765 (CC) at 33 para. 54 (S. Afr.).

209. *Minister of Health et al. v. Treatment Action Campaign et al.*, 2002 (5) SA 721 (CC) at 64-65 para 106 (S. Afr.).

210. *Hosford v. John Murphy & Sons*, [1988] I.L.R.M. 300 (H. Ct.) (Ir.); *Meskeil v. Coras Iompair*

(*Bundesverfassungsgericht*) confirmed the horizontal nature of human rights in the Basic Law (*Grundgesetz*) of the Federal Republic of Germany through the well-known *Lüth* decision.²¹¹ States have obligations to implement their human rights obligations 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 recognize the obligations of international human rights law that have been drafted and developed by states. On the contrary, it appears that one would dilute and distort the whole concept of human rights by denying their application in horizontal relationships between private parties.²¹²

C. 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.²¹³ It first examines a tripartite typology of human rights obligations.²¹⁴

The former UN Special Rapporteur on the Right to Food, Asbjørn Eide, introduced the tripartite typology, distinguishing state obligations for economic, social and cultural human rights at three levels: the obligations to respect, protect, and fulfil human rights.²¹⁵ 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

Eircann, [1973] I.R. 121, 132-33 (Ir.) quoted in Stephen Gardbaum, *The Horizontal Effect of Constitutional Rights*, 102 MICH. L. REV. 387, 396 (2003).

211. Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Jan. 15, 1958, 7, 198 (Ger.).

212. 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. JÄGERS, *supra* note 144, at 36-37.

213. See, e.g., Hakeem O. Yusuf, *Oil on Troubled Waters: Multinational Corporations and Realising Human Rights in the Developing World with Particular Reference to Nigeria* 8.1 Afr. Hum. Rts. L. J. 79, 96-97 (2008) (arguing that corporations should be similarly obligated to respect, promote and protect human rights).

214. See M SEPULVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 157 (2003); Special Rapporteur on the Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *Report on the Right to Adequate Food as a Human Right*, United Nations Econ. & Soc. Council Comm. on Human Rights, ¶65, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987) (by Asbjørn Eide) [hereinafter *Report on the Right to Adequate Food as a Human Right*]; ASBJØRN 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?*, 5 Hum. Rts. L. Rev. 81.

215. See generally *Report on the Right to Adequate Food as a Human Right*, *supra* note 214.

to *aid* the deprived.”²¹⁶ 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.²¹⁷ The tripartite obligations to respect, protect, and fulfil human rights apply universally to all rights and entail a combination of negative and positive duties.²¹⁸ 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.”²¹⁹ 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.²²⁰

Tripartite obligations to respect, protect and fulfil the human right to water can apply also to corporations.²²¹ Eide confirms this point by writing, “[I]t should

216. HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 52 (1980).

217. International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, at 6, Jan. 26, 1997; See U.N. Comm. on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)* at 15, May 12, 1999.

218. African Commission on Human and Peoples’ Rights, 30th Sess., transmitted by letter dated May 27, 2002 from the Director of the Center for Economic and Social Rights concerning Communication 155/96, ¶44, ACHPR/COMM/A044/1 (May 27, 2002). Commission interpreted the African Charter for Human and Peoples’ Rights and developed four-fold typology of human rights obligations in the case of Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, (Communication 155/96, May 27, 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 fulfil these rights,’ *Id.* at para. 44.

219. SHUE, *supra* note 216.

220. Asbjørn Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 HUM. RTS. L.J. 35, 37(1989).

221. See JÄGERS, *supra* note 144, at 77-78; CLAPHAM, *supra* note 144, at 230-31.

be kept in mind, however, that all members of society share responsibility for the realization of human rights.”²²² 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.²²³ They address a wide area in which corporations exercise their influence.²²⁴ Therefore, the tripartite typology can also be used as an analytical tool to examine and investigate the nature and 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.

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, they are obliged to do no harm to others' enjoyment of water resources. This rule derives from the ancient Roman principle *sic utere tuo ut alterum non laedes*.²²⁵ According to Eide, the obligation to respect requires:

[T]he 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 ways she or he finds best to satisfy the basic needs.²²⁶

For corporations, the obligation to respect human rights implies that its corporate activities must refrain from interfering with or violating the rights of people.²²⁷ Ruggie notes that “the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds

222. *Report on the Right to Adequate Food as a Human Right*, supra note 214, at ¶ 65.

223. U.N. ECOSOC Comm. on Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 1, Submitted by Sub-Comm. on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

224. U.N. High Commissioner on Human Rights, *Report of the United Nations High Commissioner on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, ¶¶ 37-38, U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005); David Weissbrodt & Maria Kruger, *Human Rights Responsibilities of Businesses as Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS 315, 336 (Philip Alston ed., 2005); Kinley & Tadaki, supra note 144, at 946-48.

225. Elizabeth E. Ruddick, Note, *The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced*, 77 B.U. L. REV. 429, 471 (1997). The author defines the term as meaning “that one should use his own property in such a manner as not to injure that of another, *id.* at 471 n.231. She also points out that this has become a widely accepted term in environmental law, *id.* at 470-71.

226. *Report on the Right to Adequate Food as a Human Right*, supra note 214, at ¶ 67; JÄGERS, supra note 144, at 79.

227. Frey, supra note 188, at 163.

elsewhere.”²²⁸ In another report, Ruggie stated that corporate responsibility to *respect* human rights “has acquired near-universal recognition by all stakeholders.”²²⁹ His 2009 Report recognizes, “[T]here may be situations in which companies have additional responsibilities. But the responsibility to respect is the baseline norm for all companies in all situations.”²³⁰ Tripathi and Morrison argue, “[I]ndependent 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.”²³¹ The Joint Committee of the House of Commons correctly noted, “[T]he responsibility on businesses to respect human rights is not merely voluntary.”²³² 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.²³³ In this regard, one commentator has suggested that a company’s obligation to respect and protect the right to 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.²³⁴ Corporate obligations to respect the human right to water go beyond the sphere of employees and extend to all individuals affected by corporate activities.²³⁵ Corporate responsibility and corporate obligations to respect human rights have been recognised in a number of international documents and also within the United Nations.²³⁶

The Institute for Business and Human Rights asserts: “[P]rivate water providers should abide by all laws, regulations, targets and benchmarks applicable to them in this regard. Several private water providers have recognized the right to water.”²³⁷ In this way, private water providers can:

228. J. Ruggie’s *Promotion of All Human Rights*, *supra* note 123, at ¶ 55.

229. Special Representative of the Secretary-General, *Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 46, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (by John Ruggie) [hereinafter J. Ruggie’s *Towards Operationalizing*].

230. *Id.* at ¶ 48.

231. SALIL TRIPATHI & JASON MORRISON, WATER AND HUMAN RIGHTS: EXPLORING THE ROLES AND RESPONSIBILITIES OF BUSINESS, THE CEO WATER MANDATE 4 (2009) available at http://www.unglobalcompact.org/docs/issues_doc/Environment/ceo_water_mandate/Business_Water_and_Human_Rights_Discussion_Paper.pdf.

232. House of Lords & House of Commons Joint Committee on Human Rights, *Any of Our Business? Human Rights and the UK Private Sector*, 1st Rep. of Sess. 2009-10, ¶ 110, HL Paper 5-I HC 64-I (Dec. 16, 2009) available at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf>.

233. Special Representative of the Secretary General, *supra* note 229, at ¶¶ 24-25.

234. See CLAPHAM, *supra* note 144, at 230-31.

235. JÄGERS, *supra* note 144, at 80.

236. See J. Ruggie’s *Towards Operationalizing*, *supra* note 229, at ¶¶ 54-55, 58.

237. INST. FOR BUS. & HUMAN RIGHTS, BUSINESS, HUMAN RIGHTS & RIGHT TO WATER, CHALLENGES, DILEMMAS, OPPORTUNITIES, ROUNDTABLE CONSULTATIVE REPORT 19 (2009), available

... 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.²³⁸

The measures that corporations could adopt to ensure respect for the human right to water 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 violations of the right to water.²³⁹ The next section discusses the corporate obligation to protect the human right to water. It must be noted that the obligations to respect and to protect function simultaneously and are complementary.

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 right to water of individuals as well as local communities.

Corporate obligations to protect the human right to water have both an *internal* and an *external* dimension.²⁴⁰ Protection must be offered against the activities of a parent corporation, subsidiary corporation and business partners. Corporations have obligations to protect the 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 also includes 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.²⁴¹

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."²⁴² 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

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

238. *Id.*

239. *See id.*

240. *See* MARKS & CLAPHAM, *supra* note 15, at 230-31.

241. *See* MARKS & CLAPHAM, *supra* note 15, at 231.

242. *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd.*, at ¶ 75 (Aug. 28, 2008) [hereinafter *UK-NCP Afrimex Decision*].

diligence is applied to the supply chain.”²⁴³ In other words, an obligation to protect the human right to water denotes that corporations are obliged to adopt internal regulations and take other measures to prohibit and prevent human rights violations *internally*, in their own activities, and also *externally*, in business relationships with third parties such as subsidiaries, contractors, sub-contractors and business partners throughout their supply chains.²⁴⁴

Similarly, Clapham suggests that corporations have the “duty to ensure that the contractors with which they do business are complying with the Norms.”²⁴⁵ He argues that the obligation to protect exists “even if... threats do not derive from the corporation itself.”²⁴⁶ It appears, therefore, that the corporate obligation to protect the right to water extends much further than the obligation to respect the right. The obligation to protect is relevant particularly in the relationship between a corporation and third parties.²⁴⁷ 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.”²⁴⁸ He further notes, “[T]he 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.”²⁴⁹

As to the corporate obligation to protect the human right to water, Tripathi and Morrison argue that private corporations should take the following actions: “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.”²⁵⁰ In addition, corporations can ensure the affordability of water services in the following ways:

[By] 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,

243. *Id.* at ¶ 76.

244. See INT’L COMM’N OF JURISTS, CORPORATE COMPLICITY AND LEGAL ACCOUNTABILITY, VOLUME 1: FACING THE FACTS AND CHARTING A LEGAL PATH, REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES 29-30 (2008).

245. MARKS & CLAPHAM, *supra* note 15, at 231

246. *Id.*

247. Jägers, *supra* note 144, at 83.

248. Spec. Rep. of the Sec’y-Gen. 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*, Human Rights Council, ¶ 58, U.N. Doc A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie), available at <http://www.reports-and-materials.org/Ruggie-report-2010.pdf>.

249. *Id.* at ¶ 65.

250. TRIPATHI & MORRISON, *supra* note 231, at 6.

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.²⁵¹

The World Health Organization notes in its Report on the Right to Water that companies may, “depending on their nature,” make the following commitments:

- To “advance the provision of services so that the number of people served should always increase;
- establish sustainable policies toward 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.”²⁵²

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, 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.²⁵³ Along these lines, the Commentary of the UN Norms suggests that corporations should “initially work with perpetrators to reform or decrease violations.”²⁵⁴ In this respect, the Institute for Business and Human Rights explains:

[P]rivate 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.²⁵⁵

251. *Id.*

252. WORLD HEALTH ORGANIZATION, THE RIGHT TO WATER 36 (2003), available at http://www.who.int/water_sanitation_health/rtwrev.pdf.

253. *See id.*

254. *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Commission on Human Rights, ¶ 15 U.N. Doc E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003).

255. INST. FOR BUS. & HUMAN RIGHTS, *supra* note 237, at 19.

Measures taken by corporations and their 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.”²⁵⁶ Similar provisions can be found in the codes of conduct and internal human rights policies of British Petroleum,²⁵⁷ Chevron,²⁵⁸ Citigroup,²⁵⁹ Coca-Cola,²⁶⁰ Exxon Mobil,²⁶¹ Total,²⁶² General Motors,²⁶³ Wal-Mart,²⁶⁴ Conoco-Philips,²⁶⁵ Daimler-Chrysler²⁶⁶ and De Beers.²⁶⁷

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.²⁶⁸ 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.”²⁶⁹ The corporate obligation

256. SHELL, BUSINESS AND HUMAN RIGHTS, A MANAGEMENT PRIMER 23 (2008), available at http://www.shell.com/static/envirosoc-en/downloads/management_primers/business_and_human_rights_primer.pdf.

257. BRITISH PETROLEUM, HUMAN RIGHTS: A GUIDANCE NOTE (2005), available at http://www.bp.com/livcassets/bp_internet/globalbp/STAGING/global_assets/downloads/BP_Human_Rights_2005.pdf.

258. *Human Rights Statement*, CHEVRON CORP., <http://www.chevron.com/globalissues/humanrights/> (last updated May 2010).

259. *Statement on Human Rights*, CITIGROUP, <http://www.citigroup.com/citi/citizen/approach/humanrights/index.htm> (last visited Nov. 3, 2010).

260. COCA-COLA CO., HUMAN RIGHTS STATEMENT (2007), available at http://www.thecocacolacompany.com/citizenship/pdf/human_rights_statement.pdf.

261. EXXONMOBIL, HUMAN RIGHTS (2009), available at http://www.exxonmobil.com/Corporate/Files/human_rights_brochure.pdf.

262. TOTAL CORP., CODE OF CONDUCT 11 (2007), available at http://www.total.com/MEDIAS/MEDIAS_INFOS/827/FR/Total-code-conduct-en.pdf.

263. *Corporate Responsibility*, GENERAL MOTORS, <http://www.gm.com/corporate/responsibility/> (last visited Nov. 10, 2011).

264. *Requirements for Suppliers: Equal Opportunity Practices*, WAL-MART <http://walmartstores.com/Suppliers/248.aspx> (last visited Nov. 3, 2010).

265. *Human Rights Position*, CONOCO-PHILIPS CORP., <http://www.conocophillips.com/EN/susdev/policies/humanrightsposition/Pages/index.aspx> (last visited Nov. 10, 2010).

266. *Human Rights*, DAIMLER-CHRYSLER, http://sustainability2008.daimler.com/cgi-bin/show.ssp?companyName=daimler&language=English&report_id=nb-2008&id=6035&quickSearch=HR3 (last visited Nov. 3, 2010).

267. *Social Responsibility: De Beers Diamond Policy*, DE BEERS, <http://www.debeers.com/page/socialresp> (last visited Nov. 5, 2010).

268. *U.N. Norms*, *supra* note 34, at 4.

269. *Id.* at Commentary, art. 1.

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.²⁷⁰ The Institute for Business and 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.”²⁷¹

A corporation may become the primary holder of an obligation to fulfil the human right to water in a failed state where there is no efficient governmental control or authority.²⁷² A similar situation may occur when corporations operate in territories where a state is unable to fulfil the rights of the people living there. States are and should be primarily responsible to fulfil this obligation. It is true, however, that corporations may have a secondary responsibility toward society that reinforces their obligation to respect and protect human rights. The size and availability of a corporation’s resources will play a large role in meeting the standards of the obligation to fulfil.²⁷³ 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 extent given their available resources.

D. 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 of a corporation such as the South-West Orissa Bauxite Mining Corporation 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 affect the right to water environment and the health of communities;

The production and marketing of products that are detrimental to clean and safe water;

Direct involvement in any violation of the right to water in relation to its employees, other individuals and the wider community;

Complicity in violations of the right to water;

270. INST. FOR BUS. AND HUMAN RIGHTS, *supra* note 237, at 19.

271. *Id.*

272. *Id.* at 7.

273. JÄGERS, *supra* note 144, at 85.

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 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;”²⁷⁴

Institute effective monitoring to ensure that the above-mentioned policies are being followed, and to initiate disciplinary proceedings when they are violated;²⁷⁵

Protect individuals from abusive conduct by third-parties and 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 externally in their supply chains and in business relationship with contractors, sub-contractors and business partners;

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;

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;

274. GLOBAL REPORTING INITIATIVE INDEX GUIDELINES, HR 2, <http://www.lg.com/jp/download/pdf/gri-Index.pdf> (last visited Nov. 20, 2010); *see also G3 Guidelines: Disclosure on Management Approach*, GLOBAL REPORTING INITIATIVE, <http://www.globalreporting.org/ReportingFramework/G3Online/DMA> (last visited Nov. 20, 2010).

275. GRI INDEX, *supra* note 274; DISCLOSURE ON MANAGEMENT APPROACH, *supra* note 274.

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 the right to water;

A human rights policy and strategy and internal codes of conduct that address human rights challenges and that include measures to prevent and to respond to human rights violations of the right to water.

External obligations where government services are not available such as 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;"²⁷⁶

To introduce the necessary reforms to existing corporate structures or business policies;²⁷⁷

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 proactive strategy for the protection of the water in the area in which they operate;

To provide water services for the families of the workers and the public as a whole in the area in which they operate.

IV. CONCLUSION

A plausible argument can be made that corporations operating in the area of the Niyamgiri 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. Corporations should therefore seriously consider the implications of their business activities on the daily lives of the local communities. This paper has attempted to conceptualize a normative approach toward 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, secondarily from the international level and thirdly from

276. *Amnesty International Human Rights Principles for Companies: An Introduction*, UNIV. OF MINN. HUMAN RIGHTS LIBRARY, <http://www1.umn.edu/humanrts/links/aihrprinc.html> (last visited Nov. 5, 2010).

277. Part of the strategy may be the adoption of internal supervisory mechanisms.

unilateral voluntary commitments made 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. In sum, these inherently interconnected sections have attempted to explain the concept of corporate responsibility for the human right to water.

