HUMAN RIGHTS QUARTERLY

# The Privatization of Water Services: The Quest for Enhanced Human Rights Accountability

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**ABSTRACT**

Water has been regarded as the last frontier of privatization across the world. Most privatization arrangements do not involve any transfer of state assets to the private sector. Rather, the arrangements focus on the transfer of operational and managerial functions to the private sector. Several human rights concerns arise in any water privatization initiative. The fundamental question that arises is whether this transfer of functional responsibility gives rise to corresponding human rights duties on such nonstate actors and, if so, what the precise nature of these duties is. This article discusses the potential of voluntary initiatives for holding corporations responsible for the right to water in privatized contexts. It argues that although these voluntary initiatives contain flexible norms and procedures, from a legal pluralist perspective, these norms may be seen as law for participating firms. Such voluntary norms constitute an important development in a bid to hold corporations accountable for the right to water in the absence of binding international law norms on corporations.

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## I. INTRODUCTION

In the context of economic, social, and cultural rights, international human rights law imposes obligations on states to respect, to protect, to promote, and to fulfill the human rights of those within their jurisdiction.[1] At the very least, states are obligated to adopt policies and measures for the progressive realization of social rights such as the right to water.[2] By their nature, human rights treaties are state-focused because only states are intended to ratify them. This is not surprising, given that human rights treaties were adopted at a time when the state had an unrivalled role in providing goods and services, such as access to water, education, and health services.[3] Globalization,[4] liberalization, and privatization[5] have resulted in the erosion of the state's primary role in the provision and the management of goods and services such as water, health, and education. This reduction in state power has resulted in nonstate actors' increased involvement in the provision of a number of goods and services that are central to many social rights.[6]

As Petrova has noted, "Water has been called the last frontier of privatization across the world."[7] The water sector, especially in the early 1990s to early 2000s saw International Financial Institutions (IFIs), in collaboration with donor agencies and regional development banks, vigorously pushing

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1. M. Magdalena Sepúlveda, The Nature of Obligations Under the International Covenant on Economic, Social and Cultural Rights 157–64 (2003).
2. Adam McBeth, *Privatising Human Rights: What Happens to the State's Human Rights Duties when Services are Privatised?*, 5 Melb. J. Int'l L. 133, 133 (2004).
3. *Id.* at 134.
4. According to Bertucci & Alberti:

   > [G]lobalisation is a complex phenomenon, which encompasses a great variety of tendencies and trends in the economic, social and cultural spheres. It has a multidimensional character and thus does not lend itself to a unique definition. For purposes of simplicity, it may be described as [the] increasing and intensified flows between countries of goods, services, capital, ideas, information and people, which produce cross-border integration of a number of economic, social and cultural activities.

   *See* Guido Bertucci & Adriana Alberti, *Globalisation and the Role of the State: Challenges and Perspectives*, *in* Reinventing Government for the Twenty-First Century, State Capacity in a Globalising Society 17, 17 (Dennis August Rondinelli & Cheema G. Shabbir eds., 2003).
5. Danwood Mzikenge Chirwa, *Privatisation of Water in Southern Africa: A Human Rights Perspective*, 4 Afr. Hum. Rts. L. J. 218, 221 (2004).
6. Isa notes that:

   > With respect to the reduction of the role of the state, it is clear that liberalization, privatisation and deregulation spawned by neoliberal globalisation are aimed at reducing the role of the state in economic and social systems. As a result, sectors previously covered by the public sector are left in the hands of the market.

   *See* Felipe Gómez Isa, *Globalisation, Privatisation and Human Rights*, *in* Privatisation and Human Rights in the Age of Globalisation 9, 13 (Koen De Feyter & Felipe Gómez Isa eds., 2005).
7. Violeta Petrova, *At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water,* 31 Brook. J. Int'l L. 577, 577 (2006).

for privatization of water supply services.[8] IFIs promoted the involvement of multinational water corporations in particular as the panacea to the global water crisis.[9] The private sector, it was thought, would bring increased financing, efficiency, management skills, and technology to the water services sector.[10] Water privatization, therefore, became the centerpiece of IFIs, water think tanks, and donor agencies' policies in the water sector.[11] Purely private program initiatives in the water sector are, however, rare. Rather, privatization agreements in the water sector currently tend to involve different mixes of Public-Private Partnerships (PPPs), and are heavily influenced by market imperatives such as full cost-recovery.

These PPPs are seen as a way of forestalling opposition and controversies associated with outright divestiture of the delivery of water services by the government.[12] PPPs are an ostensibly improved model of private participation in the water sector—where granting increased responsibilities and decision making authority to a public partner mitigates the limitations of the private sector. Contemporary models of water privatization should, therefore, be understood as a continuum with a varying mix of public and private institutional involvement. Nevertheless, most human rights concerns that arise within the context of full divestiture also arise within the context of PPPs. These are discussed in section II below.

The relationship between human rights and nonstate actors has become a highly topical area in current international and comparative law. As the Special Representative of the Secretary-General on Human Rights and Transnational Corporations (SRSG) has noted, "[i]n recent decades, especially the 1990s, global markets have expanded significantly."[13] This can be attributed to

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8. *See* Patrick Bond, *Water Commodification and Decommodification Narratives: Pricing and Policy Debates from Johannesburg to Kyoto to Cancun and Back,* 15 Capitalism Nature Socialism 7, 8 (2004).
9. Petrova points out that water services privatization has been consolidated within the stewardship of a few water multinational companies, particularly from France and UK, and lately Germany. *See* Petrova, *supra* note 7, at 578–80; Karen Bakker, *The "Commons" Versus "Commodity:" Alter-Globalization, Anti-Privatization and the Human Right to Water in the Global South,* 39 Antipode 431 (2007); Melina Williams, Note, *Privatisation and the Human Right to Water: Challenges for the New Century,* 28 Mich. J. Int'l L. 487 (2007).
10. *See* Lennart J. Lundqvist, *Privatisation: Towards a Concept for Comparative Policy Analysis*, 8 J. Pub. Pol'y 7 (1988). *See also* David Parker, *The New Right, State Ownership and Privatisation: A Critique,* 8 Econ. & Indus. Democ. 349 (1995), who argues that arguments about privatization improving service performance and public finances remain uncorroborated as privatization may run counter to what its proponents claim. The author cites the privatization of the British Council housing as well as the privatization of the public transport in Britain as a case in point.
11. Sara Grusky & Maj Fiil-Flynn, Will the World Bank Back Down?: Water Privatization in a Climate of Global Protest 1 (2004).
12. David Alexander McDonald & Greg Ruiters, The Age of Commodity: Water Privatization in Southern Africa 15 (2005).
13. *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council," Report of the Special Representative of the Secretary-General*

free "trade agreements, bilateral investment treaties, and domestic liberalization and privatization."[14] Transnational corporations have acquired increased rights in national laws as part of market liberalization.[15] Such rights are "increasingly defended through compulsory arbitration before international [arbitral] tribunals" and free trade and bilateral investment agreements.[16] The central focus of this article is that access to water services is increasingly dependent on the actions and policies of private service providers because of the increase in privatization.[17] The fundamental issue is: whether this transfer of functional responsibility gives rise to corresponding human rights duties on nonstate actors and, if so, what are the precise natures of these duties.

This article is divided into four sections. The first section presents various water privatization models and the human rights concerns that are likely to arise in such contexts. The second section questions the efficacy and validity of the state centric focus of human rights treaties and the obstacles to accountability this causes in the context of water privatization. The third section traces the emergence of voluntary soft law initiatives to impose human rights responsibilities on nonstate actors. It discusses the potential for these initiatives to hold corporations responsible for the right to water in privatized contexts. The final section concludes by evaluating these nascent initiatives in the sphere of nonstate actor accountability for social rights such as water, and suggests that the best practices, principles, and accountability mechanisms derived from such mechanisms can be useful tools for holding corporations involved in the provision of water services accountable in the absence of binding norms. Although voluntary initiatives contain flexible norms and procedures, from a legal pluralist perspective, these norms may be seen as law for participating firms. The argument is developed that such voluntary norms constitute an important development in order to hold corporations accountable for the right to water in the absence of binding international laws on corporations.

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*on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts (SRSG)*, U.N. GAOR, Hum. Rts. Council, 4th Sess., Agenda Item 2, ¶2, U.N. Doc. A/HRC.4/035 (2007) [hereinafter *UN Mapping Report*].

14. *Id.*
15. *Id.*
16. *Id.*
17. *See* Patrick Bond, David Alexander McDonald & Greg Ruiters, *Water Privatisation in Southern Africa: The State of the Debate,* 4 Econ. & Soc. Rts. Rev. 1, 10 (2003).

## II. CONTEMPORARY MODELS OF WATER PRIVATIZATION AND HUMAN RIGHTS CONCERNS

Currently, most privatization arrangements do not involve any transfer of state assets to the private sector.[18] The arrangements focus instead on the transfer of operational and managerial functions to the private sector.[19] The water infrastructure and equipment typically remain in public hands, or transfer back to public ownership after a contractually agreed period.[20] Alternatively, there may be joint responsibilities between the state and the private entity in managing operations and functions, in the form of a joint venture. Most water privatization agreements involve different mixes of PPPs, often tailored to suit the specific needs of the state and the private operators.[21] These PPPs include management contracts, leases, and subcontracting specific activities to private actors.

The degree of private sector participation varies from one form of privatization to the other.[22] These privatization agreements involve different mixes of PPPs, often tailored to suit the specific needs of the state and the private operators.[23] In South Africa, water privatization is mainly operationalized through PPPs where the state retains some degree of control over the service.[24] Local authorities often lease out certain activities to private enterprises. This involves outsourcing or contracting out specific activities to private actors such as water system management and supply, meter reading, pipe laying, water testing and water cut-offs.[25]

The legal basis, nature, and scope of the right to water is widely addressed throughout the literature.[26] The normative content of the right to water as set out in the Committee on Economic, Social and Cultural Rights (CESCR)'s General Comment 15 encompasses both substantive and procedural components.[27] The substantive components of the right to water that apply

18. *See* Owiti A. K'Akumu, *Privatization Model for Water Enterprise in Kenya,* 8 Water Pol'y 539, 542 (2006).
19. McDonald & Ruiters, *supra* note 12, at 14.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. Chirwa, *Privatisation of Water in Southern Africa*, *supra* note 5, at 221–22.
25. *Id.* at 184.
26. Williams, *supra* note 9, at 469–505. *See generally* Wouter Vandenhole & Tamara Wielders, *Water as a Human Right - Water as an Essential Service: Does it Matter?*, 26 Neth. Q. Hum. Rts. 391 (2008); Inga Winkler, The Human Right To Water: Significance, Legal Status and Implications for Water Allocation (2012).
27. General Comment No. 15, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, adopted* 20 Jan. 2003 U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 29th Sess., 1, U.N. Doc. E/C.12/2002/11 (2003) [hereinafter General Comment No. 15].

in all circumstances comprise availability, accessibility, and the quality of water services.[28] The state has an obligation to prevent third parties, including private water providers from "compromising equal, affordable, and physical access to sufficient, safe and acceptable water."[29] The CESCR further elucidates the procedural requirements of the right to water as entailing the right to information concerning water issues, the right to participation, and the right to effective remedies.[30] The following section discusses some of the human rights concerns that are likely to arise in any water privatization scenario.

### A. Availability and Accessibility of Water Services

A number of human rights concerns arise in any water privatization initiative, including the availability of water. The CESCR explains the availability component of the right to water to mean that "water supply for each person should be sufficient and continuous for personal and domestic uses."[31] The human right to water also addresses water quality issues. Despite the involvement of the private water provider, water services must be free from "micro-organisms, chemical substances and radiological hazards."[32]

Physical and economic accessibility of water services are a constituent element of the normative content of the right to water even when privatization occurs.[33] The CESCR explains in General Comment 15 that water, water facilities, and water services must be affordable for all. Furthermore, the costs associated with securing water must be affordable and must not threaten the realization of other rights.[34] The above prescription by the CESCR highlights the principle of equity: vulnerable and poor members of society should not be subjected to a disproportionate burden of paying for water.[35] Exorbitant tariffs leading to a lack of affordability of water services would breach the principle of affordability. Any exorbitant tariff increases will put a tremendous strain on the poor and vulnerable, who find themselves threatened with the satisfaction of a basic need such as water, a precondition for the fulfillment of other human rights.

28. *Id.* ¶ 12.
29. *Id.* ¶ 24.
30. *Id.* ¶ 12.
31. *Id.* ¶ 12(a).
32. *Id.* ¶ 12(b).
33. *Id.* ¶ 12(c).
34. *Id.* ¶ 12(c)(ii).
35. *Id.* ¶ 27.

### B. Tariff Increases and Water Disconnections

A concern in any water privatization scenario is the likely disconnection of water services for nonpayment. The CESCR explains that unjustified disconnection from water services or facilities constitutes *prima facie* violations of the right to water.[36] The CESCR goes on to note that, "[l]aws and policies that permit service providers to disconnect water [services to] users in response to the non-payment of [water] bills must allow for due process."[37] Chirwa has traced the process in terms of which privatization and other commercialization policies relating to water in South Africa paved the way for tariff increases in the provision of water services, [38] resulting in an increasing number of disconnections of poor communities from water services.[39] One study found that "about 800–1000 disconnections per day were taking place in Durban[,] . . . affecting [an estimated] 25 000 people a week."[40] In the Philippines, although water tariffs initially declined and services improved in the immediate aftermath of privatization, the two private water operators requested a 15 percent tariff increase from the regulatory body within two years of the agreement.[41] This was the first in a series of rate increases that over the course of nine years, eventually left tariffs 500–700 percent higher than their pre-privatization levels.[42]

### C. Public Participation and Access to Information

Public participation and access to information for communities directly impacted by privatization are important human rights issues to consider. Akech notes that the Dar es Salaam water privatization process was presented as a *fait accompli* because there were neither public consultations nor participation pertaining to possible alternative policy options.[43] The public was kept uninformed during the entire Dar es Salaam privatization process. The privatization documents were deemed so confidential that not even members of parliament had access to them.[44] Rather, national and international

36. *Id.* ¶ 44(a).
37. Catarina de Albuquerque & Virginia Roaf, On the Right Track: Good Practices in Realising the Rights to Water and Sanitation 61 (2012).
38. Danwood Mzikenge Chirwa, *Water Privatisation and Socio-Economic Rights in South Africa*, 8 L. Democ. & Dev. 181, 197 (2004).
39. *Id.*
40. *Id.*
41. Sarah I. Hale, *Water Privatization in the Philippines: The Need to Implement the Human Right to Water*, 15 Pac. Rim. L. & Pol'y J. 765, 772 (2006).
42. *Id.*
43. Migai Akech, Privatisation and Democracy in East Africa 65 (2009).
44. Action Aid, *Turning off the Taps: Donor Conditionality and Water Privatisation in Dar se Salaam* 10 (2004) *available at* https://www.actionaid.org.uk/sites/default/files/doc_lib/turningoffthetaps.pdf.

technocrats conceived, developed, and implemented the entire privatization process without any public participation.[45] There is no doubt that this lack of transparency and public participation in the privatization process made it difficult for the public to determine whether the privatization process was in the public interest. The Dar es Salaam privatization process thus raises significant accountability issues with regard to the right to water, such as the right to information concerning water issues and the right to public participation in any water privatization process.[46]

International human rights law emphasizes that the conceptualization and implementation of policies affecting social rights such as water should occur in a manner that allows for public consultation and participation.[47] The right of individuals and groups to be consulted and "participate in decision-making processes that may affect their right to water must be an integral part of any policy, program, or strategy concerning water."[48] The CESCR has elaborated in General Comment 15 that "[i]ndividuals and groups should, in the formulation and implementation of national water strategies and plans, be given full and equal access to information concerning water issues held by public authorities or third parties."[49]

## D. Regulation and Monitoring

One of the key human rights concerns raised in some cases of water privatization is the paucity of effective regulation and monitoring mechanisms, which could ensure the realization of the right to water notwithstanding the privatization of water delivery services.[50] The examples of water privatization in Dar es Salaam, Tanzania; Cochabamba, Bolivia; and various municipalities in South Africa all reflect this. The Dar es Salaam privatization contract was made in the absence of an independent regulatory body to monitor the privatization agreement. The absence of a regulatory and monitoring body meant there was no independent authority to establish tariff levels.[51] Regulatory and monitoring mechanisms should scrutinize privatization contracts to ensure the contract provisions do not encroach on the right to

45. Akech, *supra*, note 43, at 65.
46. *Id.* at 66.
47. Chirwa, *Privatisation of Water in Southern Africa, supra* note 5, at 234.
48. General Comment 15, *supra* note 27, ¶ 48.
49. *Id.* ¶ 48.
50. Khulekani Moyo, Water as a Human Right Under International Human Rights Law: Implications for the Privatisation of Water Services 139–74 (Mar. 2013) (unpublished LLD dissertation, Stellenbosch University) (on file with JS Gericke Library, SUNScholar Research Repository, Stellenbosch University), *available at* http://scholar.sun.ac.za/handle/10019.1/80062.
51. *Id.* at 147.

water. At the very least, they should mandate that water service providers meet the minimum quantitative or qualitative levels of water provision as elaborated in General Comment 15.[52] Significantly, the regulatory and monitoring mechanisms should put in place strict water tariff control measures to prevent water service providers from charging exorbitant tariffs and thereby impeding the economic accessibility of water.[53]

## III. THE STATE CENTRIC FOCUS OF HUMAN RIGHTS: AN OBSTACLE TO ACCOUNTABILITY IN THE CONTEXT OF PRIVATIZATION

States are the primary duty bearers for the full range of human rights under the international human rights system. As such, they are also the primary focus of accountability for the realization of human rights.[54] The traditional international law approach conforms to the state-centric view of world politics. This system conceptualizes the state as the primary actor in the international system, with international law principally perceived as a mechanism to regulate relations between states only.[55] This approach ensures that only states are parties to international human rights treaties. It is therefore not surprising that only states may be cited as respondents under treaty

52. Anton Kok, *Privatisation and the Right to Access Water, in* Privatisation and Human Rights in the Age of Globalisation, *supra* note 6, at 259, 271.
53. *Id.* at 286.
54. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility,* 111 Yale L. J. 443, 461 (2001); J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa,* 18 Am. U. Int'l L. Rev. 851, 895 (2003); Asbjørn Eide & Allan Rosas, *Economic, Social and Cultural Rights as Human Rights, in* Economic, Social and Cultural Rights: A Textbook 22 (Asbjørn Eide, Catarina Krause & Allan Rosas eds., 2d ed., 2001); Robert McCorquodale, *Human Rights and Global Business, in* Commercial Law and Human Rights 89, 92–94 (Stephen Bottomley & David Kinley eds., 2002) emphasizing the primary responsibility of states in maintaining international human rights law and that this obligation remains that of the government even if the violator is a nonstate actor such as a corporation. *See also* Sarah Joseph, *Liability of Multinational Corporations in* Social Rights Jurisprudence: Emerging Trends in International and Comparative Law 613, 615–16 (Malcolm Langford ed., 2008) stating that "States have duties to respect, protect and fulfil human rights under international human rights law."
55. Antonio Cassese, International Law 3 (2001). This state-centric focus of international human rights can be traced to the development of human rights. The state's dominant position and potential to abuse its position of authority to the detriment of individuals' interests was the basis for human rights to insulate the latter against State interference. Traditionally, human rights were understood to function as a shield to protect the freedom of the individual against unlimited state control, and the state was the primary duty-bearer. Accordingly, all arms of government—the executive, legislature and judiciary—are in a position to engage the responsibility of the state for any wrongful acts that violate the rights of groups or individuals. *See generally Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83, U.N. GAOR, 53d Sess. A/56/49(Vol. I)/Corr.4. (2001), *available at* http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

complaint mechanisms—even in clear situations evidencing infringement of rights by a nonstate actor.[56]

The state's duty to protect against violations of human rights by nonstate actors is often raised as an argument against the need to recognize and impose direct human rights duties on nonstate actors.[57] The duty to protect enjoins the state to act positively to regulate, to prevent, and to remedy interferences by nonstate actors. In the context of the right to water, the state duty to protect would require the state to "regulate private interactions to ensure that individuals are not arbitrarily deprived of the enjoyment of their right to water by other private individuals" and groups.[58] As noted in the previous section, the involvement of the private sector in water delivery can give rise to a range of human rights concerns, making the state's protective duty essential.

However, the current global economic trend towards privatization and the withdrawal of the state in human rights sensitive services, such as water, have cast doubt on the efficacy of relying solely on the state's duty to protect.[59] There are a number of reasons why the state's protective duty is insufficient as a form of accountability for human rights violations by nonstate actors. First, the regulatory duty of the state as a component of the duty to protect against human rights violations requires both financial and human resources. This creates challenges for developing states that face both resource and capacity constraints.[60] Second, in the contemporary era of globalization, capital is highly mobile. Nonstate actors operate across state borders, as Multinational Corporations (MNCs) do, making it extremely difficult to attribute legal responsibility to a single state.[61] It is therefore difficult to impose high levels of control and regulation on nonstate actors without uniform international standards of regulation.[62]

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56. *See The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Afr. Comm'n on Hum. and Peoples' Rts., Comm. No. 155/96 (2001), *available at* http://www1.umn.edu/humanrts/africa/comcases/155-96.html.
57. *See* General Comment 15, *supra* note 27, ¶ 22; Matthew Craven, The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development 112 (1995), Eide & Rosas, *supra* note 54, at 23–24. *See* Danwood Mzikenge Chirwa, *In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights,* 8 Afr. Hum. Rts. L. J. 294, 295 (2008), explaining that "[c]entral to the reluctance to recognise the obligations of nonstate actors in relation to human rights is the age-old notion that human rights bind states only, not non-state actors."
58. Craven, *supra* note 57, at 112.
59. *See* Adam McBeth, *Privatising Human Rights: What happens to the State's Human Rights Duties when Services are Privatised?*, 5 Melbourne J. Int'l L. 133, 134 (2004).
60. *Id.* at 143.
61. *Id.* at 145.
62. Philip Alston, *The Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, *in* Non-State Actors and Human Rights 3–36 (Philip Alston ed., 2005).

Third, privatization and trade liberalization have seen the emergence of nonstate actors with powers akin to, and in some cases dwarfing, those of states. MNCs are very active in important sectors of national economies such as extractive industries, health, agriculture, and water services.[63] Some MNCs are such powerful global actors that a number of states, particularly developing countries, may lack the resources or will to control them.[64] Some states may have the necessary environmental and labor legislation, but their lack of monitoring and enforcement capacities may undermine the effectiveness of such laws.[65] These nonstate actors not only influence state policies concerning the provision of social services, but also directly participate in the protection of human rights-such as the right to water.[66] John Ruggie put in succinctly when he stated that:

> Clearly, a more fundamental institutional misalignment is present: between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation. For the sake of the victims of abuse, and to sustain globalization as a positive force, this must be fixed.[67]

Fourth, competition for foreign direct investment often creates a race to the bottom that limits how strictly some states may be willing to regulate and enforce existing environmental, labor and tax legislation against MNCs. David Graham and Ngaire Woods point out that many developing states often view strengthening labor and environmental regulation as hampering economic growth due to the perception that stricter standards will discourage inflows of foreign direct investment in favor of states with lower environmental and

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63. David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,* 97 Am. J. Int'l. L. 901, 909 (2003). This article will use the concept of nonstate actor to refer to both MNCs and domestic corporations unless the context indicates otherwise. MNCs and national corporations are key players in the privatization of water services, either individually or in the form of consortia. Significantly, much of the discussion relating to MNCs will be applicable and of relevance to domestic corporations generally. Although the adjective "transnational" or "multinational" may be employed to emphasize different characteristics of certain corporations, it does not really change the nature of the corporation as a legal entity. *See* Andrew Clapham, Human Rights Obligations of Non-State Actors 201 (2006).
64. *See generally* Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 Vand. J. Transnat'l L. 501 (2009).
65. Kathrine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market,* 3 J. Small & Emerging Bus. L. 93, 95 (1999).
66. Chirwa, *In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights, supra* note 57, at 295.
67. *UN Mapping Report, supra* note 13, ¶3.

labor standards.[68] In some cases, states go as far as collaborating with corporations in human rights violations. This was clearly the case as determined by the African Commission in the *SERAC* case.[69] Such realities cast aspersions on the utility of relying exclusively on states' protective obligations against the potentially harmful conduct of nonstate actors.[70] The lack of willingness or inability of states to regulate nonstate actors brings into sharp focus the lack of accountability of nonstate actors for activities that interfere with the human rights of individuals and groups.[71]

### A. Holding Corporations Accountable Within Domestic Jurisdictions

A domestic practice recognizing the application of human rights norms to nonstate actors is emerging. Jurisprudence from a range of jurisdictions increasingly imposes human rights liability on a range of nonstate actors for violations of constitutionally and legislatively protected human rights.[72]

The South African Constitution[73] expressly provides in sections 8(2) and (3) along with section 39(2) for the horizontal application of the Bill of Rights.[74] Section 8(1) provides that the Bill of Rights applies to all law and binds all organs of the state.[75] Section 8(2) of the South African Constitution provides that a provision in the Bill of Rights "binds a natural and

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68. David Graham & Ngaire Woods, *Making Corporate Self-Regulation Effective in Developing Countries*, 34 World Dev. 868, 869 (2006).
69. The African Commission noted in the *SERAC* case that

> In the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis.

*Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*: *Commc'n No. 155/96*, African Comm'n on Hum. & People's Rts., 30th Sess., ¶58, ACHPR/COMM/A044/1 (27 May 2002), *available at* http://www.escr-net.org/sites/default/files/serac.pdf.
70. Ratner, *supra* note 54, at 461.
71. Oloka-Onyango, *supra* note 54, at 895.
72. *See* Danwood Mzikenge Chirwa, Towards Binding Economic Social and Cultural Rights Obligations of Non-State Actors in International and Domestic Law: A Critical Survey of Emerging Norms 302–64 (May 18, 2005) (unpublished Doctor Legum thesis, Faculty of Law of the University of the Western Cape).
73. south african constitution. [hereinafter S. Afr. Const.] (1996).
74. Liebenberg has defined "horizontal application of the Bill of Rights" as referring to the applicability of the Bill of Rights in relations between private parties. *See* Sandra Liebenberg, Socio-Economic Rights: Adjudication Under a Transformative Constitution 321–22 (2010).
75. For a discussion on the horizontal application of South Africa's Bill of Rights see *id.*; Chirwa, Towards Binding ESC Rights, *supra* note 72, at 351–61 (2005); David Bilchitz, *Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations,* 125 S. Afr. L. J. 754, 773–83 (2008).

juristic person if, and to the extent that, it is applicable taking into account the nature of the right and the nature of any duty imposed by the right."[76] Furthermore, section 8(3) provides that whenever a court gives effect to the horizontal application of a right in the Bill of Rights, it "must apply, or if necessary develop, the common law to the extent that legislation does not give effect to the right."[77] Section 39(2) enjoins a court, tribunal or forum when interpreting any legislation, and when developing the common law or customary law "to promote the spirit, purport and objects of the Bill of Rights."[78] The above provisions create the possibility for socioeconomic rights, such as the right to water in legal relations between private parties.[79]

The Malawian Constitution also envisions the direct application of constitutionally protected rights to nonstate actors.[80] Section 15(1) of the Malawian Constitution provides that the human rights protected in that document "shall be respected and upheld . . . where applicable to them, by all natural and legal persons in Malawi." Furthermore, section 12(iv) of the Malawian Constitution states that "all institutions and persons shall observe and uphold the constitution and the rule of law." The above provisions of the Malawian Constitution envision direct horizontal application and present the possibility of applying constitutional rights directly to the conduct of nonstate actors.[81] Additionally, the constitutions of Ghana,[82] Namibia,[83] The

76. S. Afr. Const., *supra* note 73, § 8(2).
77. *Id.* § 8(3).
78. Liebenberg, *supra* note 74.
79. *Id.* South Africa's Constitutional Court acknowledges that at least some of the duties imposed by socioeconomic rights are binding on third parties. In its decision *in Government of the Republic of South Africa and Others v. Grootboom and Others*, the Constitutional Court held that section 26(1) imposes, at the very least, a negative obligation "upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing." *See Government of the Republic of South Africa and Others v. Grootboom and Others*, 2001 (1) SA 46 (CC), ¶ 34. *See also Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 651 (CC), ¶ 58 where the South African Constitutional Court stated that:

> It needs to be stressed however that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right.

80. For a discussion *see* Danwood Mzikenge Chirwa, Human Rights Under the Malawian Constitution 18–22 (2011).
81. *Id.* at 18.
82. Ghana Const. § 12(1) (1992); Malawi Const., § 15(1) (1994) contain a similar provision. They both provide that:

> The human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature and judiciary and all other organs of the Government and its agencies, and where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter.

83. Namib. Const., art. 5.

Gambia,[84] Lesotho,[85] Cape Verde,[86] and Zimbabwe[87] also expressly recognize that constitutional rights bind nonstate actors.

The recognition of binding human rights obligations for nonstate actors in a country's highest law may assist in addressing some of the accountability deficit with respect to nonstate actors. Nevertheless, a myriad of challenges remain in achieving real and effective accountability for nonstate actors under the laws of domestic jurisdictions. A University of Oxford study covering thirteen national jurisdictions focusing on access to justice under the domestic laws of Australia, Canada, the Democratic Republic of Congo (DRC), the European Union, France, Germany, India, Malaysia, the People's Republic of China, Russia, South Africa, the United Kingdom, and the United States illustrates this challenge.[88] The study highlights the various substantive, procedural and practical obstacles in holding MNCs accountable under domestic jurisdictions. Victims of corporate abuse face challenges such as the cost of litigation, the logistics of bringing a claim in a foreign country, and the need to access relevant information. Victims may also lack the requisite legal knowledge and expertise to investigate potential causes of actions in foreign jurisdictions.[89] These factors make it difficult for victims of human rights abuses by corporations to obtain adequate and prompt compensation in the home states of MNCs.[90]

There are other significant challenges in attempting to obtain redress in the MNC's home state. A key obstacle is the absence of extraterritorial application of the domestic laws of most states that are not intended to operate outside of the state in which they are enacted.[91] This poses a significant hindrance in holding MNCs accountable in their home states for wrongful activities committed against individuals or communities in host states.[92] Furthermore, claimants may have to contend with the potential conflict of laws of each home state in order to establish the jurisdiction of the home

84. Gam. Const. 16 Jan. 1997, § 5(1)(b) provides that a person who alleges that "any act or omission of any person or authority is inconsistent with; or is in contravention of a provision of this [act or] Constitution, may bring an action in a court of competent jurisdiction for a declaration to that effect."
85. Lesotho Const. 2 Apr. 1993, § 4(2).
86. *See* Cape Verde Const., art. 17 (1992), *available at* http://www.refworld.org/docid/3ae6b5bd0.html , which provides that "Constitutional norms regarding rights, liberties and guarantees shall bind all public and private entities and shall be directly enforced."
87. Zim. Const., art. 2(2).
88. *See generally* Oxford Pro Bono Publico, Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse, at i (2008), *available at* http://business-humanrights.org/en/pdf-obstacles-to-justice-and-redress-for-victims-of-corporate-human-rights-abuse.
89. *Id.* at iii.
90. *Id.*
91. *Id.* at ii.
92. *Id.*

state's courts to adjudicate the claim.[93] Significantly, even where claimants may establish jurisdiction under the domestic law of the host or home state, the claim may be challenged on the basis of the *forum non conveniens* doctrine—that the home state is not the appropriate forum to adjudicate the claim against the corporation.[94] The uncertainty as to whether victims of corporate human rights abuses may actually obtain final judgment in such cases may operate as an obstacle to such victims launching actions. This obstacle may incentivize other claimants to go for meager out-of-court settlements.[95] The following section considers whether international human rights law is applicable to nonstate actors with a specific focus on the context of water privatization.

## IV. THE APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW TO NONSTATE ACTORS IN THE CONTEXT OF WATER PRIVATIZATION

The question of the human rights obligations of nonstate actors under international law is at the heart of academic discussion.[96] A recent resolution drafted by Ecuador and South Africa, also signed by Cuba, Bolivia and Venezuela and supported by twenty countries was tabled for adoption at the twenty-sixth session of the Human Rights Council in 2014 requested the later "to establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights."[97] Human rights theory and practice questions the utility of relying solely on state responsibility to address the challenge posed on human rights by nonstate actors. It has been suggested that, in some circumstances, human rights already give rise to directly enforceable duties on nonstate actors although this may not be the case for all human rights in all circumstances.[98] Some of the core United Nations human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[99] the International Covenant on Economic,

93. *Id.*
94. *Id.* at iii.
95. *Id.* at iv.
96. Clapham, *supra* note 63, at 2. *See UN Mapping Report, supra* note 13, ¶ 33.
97. See Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Draft Resolution, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (2014), U.N. GAOR, Human Rights Council, 26th Sess., Agenda Item 3, U.N. Doc. A/HRC/26/L.22/Rev.1 (2014).
98. Clapham, *supra* note 63, at 2.
99. International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 Dec. 1965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., art. 2(1), 660 U.N.T.S. 195 (*entered into force* 4 Jan. 1969), *reprinted in* 5 I.L.M. 352 (1966).

Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR),[100] do not expressly impose duties on nonstate actors, such as corporations. These treaties impose generalized obligations on states to ensure the enjoyment of rights and to prevent abuse by nonstate actors of the protected rights.

The Universal Declaration of Human Rights (UDHR) established the normative framework for subsequent human rights instruments adopted after 1948.[101] The UDHR arguably establishes the potential basis for human rights responsibilities of nonstate actors.[102] The preamble to the UDHR provides that:

> The General Assembly [p]roclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end *that every individual and every organ of society,* keeping this Declaration constantly in mind, 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.[103]

Some contend that "organs of society" as used in the preamble to the UDHR encompass businesses because such entities clearly play crucial social and economic roles in society in the distribution of resources.[104] Louis Henkin, for example, argues that the notion of every individual and organ of society in the UDHR includes corporations.[105] Henkin further argues for the applicability of the UDHR on MNCs, pointing out that:

> At this juncture the Universal Declaration may also address multinational companies. . .The Universal Declaration is not addressed only to governments. It is a "common standard for all peoples and all nations." It means "that *every individual and every organ of society* shall strive—by progressive measures . . . to secure their universal and effective recognition and observance among the people of the member states." *Every individual* includes juridical persons. *Every individual and every organ of society* excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.[106]

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100. International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., art. 26, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) [hereinafter ICCPR].
101. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess, art. 1, U.N. Doc. A/RES/3/217A (1948) [hereinafter UDHR].
102. *Id.*
103. *Id.* pmbl. (emphasis added).
104. It has been pointed out that such an approach "is especially true for companies or other legal persons that are artificial constructs created in law as a way of organising commerce, to encourage investment and reduce risk." International Council on Human Rights Policy, Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies 59 (2002).
105. Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets,* 25 Brooklyn J. Int'l L. 24, 25 (1999).
106. *Id.*(emphasis added).

Although Henkin is correct that the UDHR's "aspirations and moral claims were addressed, and apply, to all humanity," John Ruggie argues that this "does not equate to legally binding effect."[107] The problem with the above provisions of the UDHR is that although it makes reference to individual duties, it is silent on what is the precise ambit of these duties.[108] The duties are owed to the community and not to specific human rights holders. The lack of subsequent state practice and *opinio juris* makes it doubtful that the above provisions of the UDHR and customary law result in binding human rights obligations on nonstate actors, such as MNCs.[109]

The UDHR, as a General Assembly resolution, is not binding *per se*.[110] However, as McCaffrey observes, "its most fundamental provisions are generally thought either to have passed into customary international law, or to constitute an authoritative interpretation of the UN Charter obligations, or both."[111] Some provisions of the UDHR have become binding customary international law on states, though it is unclear which provisions of the UDHR have now attained the status of customary law. Furthermore, if the UDHR is to be interpreted as imposing direct human rights obligations, such an

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107. *UN Mapping Report, supra* note 13, ¶ 37.
108. Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Act*ors, 11 Buff. Hum. Rts. L. Rev. 21, 35 (2005).
109. Hessbruegge further argues that paragraph 10 of the UDHR does not necessarily extend obligations under the UDHR to nonstate actors. Hessbruegge further states that it is equally conceivable that the UDHR tasks "'every individual and every organ of society' to strive to ensure that states continue to adhere to their international human rights obligations." *Id.* "After all, the Universal Declaration states quite clearly that 'Member States have pledged themselves to achieve . . . the promotion of universal respect for and observance of human rights and fundamental freedoms.'" *Id.*
110. *See* The Universal Declaration of Human Rights: A Commentary (Asbjøn Eide ed.,1992). Although this Commentary does not expressly contend that the UDHR has acquired the status of binding customary law, the Commentary conceives of the UDHR as a serious document with enormous legal repercussions. State officials, judges, lawyers and human rights advocates have invoked some of the provisions and often accepted them as binding. *See* Harold Hongju Koh, *Transnational Public Law Litigation,* 100 Yale L. J. 2347 (1991). *See also* Ian Brownlie who has referred to the UDHR as a "good example of an informal prescription given legal significance by the actions of authoritative decision-makers." *See* Ian Browlie, Principles of Public International Law 535 (2003). Navar has also pointed out that "[a]t the present time, though, to say that the Universal Declaration has no legal effect is to deny the potency and creative force it has amply demonstrated over the years since its adoption." *See* M.G. Kaladharani Nayar, *Human Rights: The United Nations and United States Foreign Policy,* 19 Harv. Int'l L. J. 813, 815–16 (1978) cited in Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is it still right for the United States?,* 41 Cornell Int'l L. Journal 251, 253 (2008). Gleick further notes that, although not legally binding, such declarations often either express already existing norms of customary international law or, as in the case of some of the fundamental rights provisions in the UDHR, will over time crystallize into customary norms. *See* Peter H. Gleick, *The Human Right to Water,* 1 Water Policy 487, 490 (1998).
111. Stephen C McCaffrey, *A Human Right to Water: Domestic and International Implications,* 5 Geo. Int'l Environmt'l L. Rev. 1, 8 (1992).

assertion may be challenged on the grounds that states are the only actors responsible for international human rights treaties. Adherents of the state centric approach will thus challenge any notion that the UDHR imposes direct human rights obligations on nonstate actors.

A range of non-binding state-initiated mechanisms, both within the United Nations and outside of the United Nations system have since been developed in an attempt to impose human rights responsibilities on non-state actors. Some of the key initiatives are: the Organization for Economic Cooperation and Development's Guidelines for Multinational Enterprises (OECD Guidelines),[112] the International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,[113] the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (Norms on TNCs),[114] and the UN Global Compact.[115] In 2008, the UN Human Rights Council adopted the report entitled "UN Protect, Respect, and Remedy: A Framework for Business and Human Rights" (UN Framework),[116] and in 2011 it adopted the UN Guiding Principles to operationalize the UN Framework.[117] This article will not conduct an in-depth discussion and analysis of all such

112. Org. for Econ. Cooperation & Dev. (OECD), OECD Guidelines for Multinational Enterprises (2011), *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf. The OECD Guidelines have been adopted by the thirty-four OECD member states as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania. *See id.* at 7.
113. International Labour Organization (ILO), Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2006), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.
114. The UN Commission on Human Rights had developed the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, but the UN General Assembly declined to adopt them in the face of significant opposition. *See* U.N. ECOSOC, Comm'n on Hum. Rts., 55th Sess., *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,* U.N. Doc. E/CN.4/ Sub.2/2003/12/Rev.2 (2003) [hereinafter *UN Norms*].
115. The UN Secretary-General, Kofi Annan, proposed the adoption by corporations of a global compact in 1999. The Global Compact involves different nonstate actors mainly in the private sector. Additionally, six specialized UN agencies, the International Labour Organization, the United Nations Development Programme, the United Nations Environment Programme, the Office of the High Commissioner for Human Rights, and the United Nations Industrial Development Organization actively participate in the UN Global Compact. In addition NGOs, labor associations, business associations, think tanks, and government representatives are part of the initiative. For a discussion and analysis of the UN Global Compact, *see* Bilchitz *supra* note 75, at 759; Joseph, *supra* note 54, at 617.
116. John Ruggie, Special Representative of the Secretary-General, *Protect, Respect and Remedy: A Framework for Business and Human Rights,* Hum. Rts. Council, 9, U.N. Doc. A/HRC/8/5 (2008) [hereinafter *UN Framework*].
117. *See* John Ruggie, Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Hum. Rts. Council, 5, U.N. Doc. A/HRC/17/31 (2011) [hereinafter *UN Guiding Principles*].

initiatives, as they have been analyzed widely in the literature.[118] Rather, the next section will focus on the United Nations' most recent effort at developing a transnational regulatory framework for MNCs and other business enterprises: the UN Framework and Guiding Principles.

### A. The UN Respect, Protect, and Remedy Framework and Guiding Principles

John Ruggie developed the UN Framework and Guiding Principles.[119] The UN Human Rights Council mandates the SRSG "[t]o identify and clarify standards of corporate responsibility and accountability for Transnational Corporations (TNCs) and other business enterprises with regard to human rights."[120] The mandate also requires the SRSG "[t]o elaborate on the role of states in effectively regulating and adjudicating the role of TNCs and other business enterprises with regard to human rights."[121]

It is against this background that in 2008 the SRSG proposed to the UN Human Rights Council a three-pillar framework for the application of human rights standards to corporations—the UN Framework.[122] The UN Framework is based on the notion of "differentiated but complementary responsibilities."[123] It encompasses the following three principles: the state duty to protect human rights; the corporate responsibility to respect human rights; and the access to remedies.[124]

The first prong of the UN Framework provides for a state's duty to protect against human rights abuses by third parties through regulation and

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118. Chirwa, *In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights, supra* note 57, at 265; *see generally* Peter Muchlinski, Multinational Enterprises and the Law (1995); Sigrun I. Skogly, The Human Rights Obligations of the World Bank and the International Monetary Fund (2001); *see also* Joseph, *supra*, note 54, at 613–27; Bilchitz *supra* note 75, at 754; Weissbrodt & Kruger *supra* note 63, at 901–22; Patrick Bernhagen & Neil J. Mitchell, *The Private Provision of Public Goods: Corporate Commitments and the United Nations Global Compact*, 54 Int'l Stud. Q. 1175 (2010); Surya Deva, *Global Compact: A Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship*, 34 Syracuse J. Int'l L. & Com. 107 (2006).
119. The SRSG mandate was replaced by a Working Group on Business and Human Rights. *See Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. GAOR, Hum. Rts. Council, 17th Sess., Agenda Item 3, ¶6, U.N. Doc. A/HRC/17/L.17 (2011).
120. High Commissioner for Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises,* U.N. ESCOR, Comm'n on Hum. Rts., Resolution 2005/69, ¶ 1(a), U.N. Doc. XVII, E/CN.4/2005/L.10/Add.17 (2005).
121. *Id.* ¶ 1.
122. See *UN Framework, supra* note 116, at 1.
123. *Id.*at 4, ¶ 9.
124. *Id.* at 4, ¶ 9.

adjudication. The second prong of the UN Framework orders corporations to respect human rights, through prohibiting corporations from infringing on the rights of others, and to address any adverse impacts resulting from their operations.[125] The corporate responsibility to respect the right to water has two significant but related aspects. First, nonstate actors have a duty to avoid causing or contributing to adverse human rights impacts through their own activities that impair the right to water.[126] Second, nonstate actors should seek to prevent or to mitigate adverse impacts linked to their operations that infringe on the right to water.[127]

The UN Framework and Guiding Principles provide an authoritative elaboration on the meaning of nonstate actor's responsibility to respect human rights, such as a right to water.[128] In order to ensure compliance with this obligation, corporations will need to take positive steps, for example, performing human rights due diligence.[129] In this regard, a due diligence standard of liability for corporations is recommended.[130] Human rights due diligence entails a systematic process to investigate and to measure the impact of policies, programs, projects, and interventions on human rights.[131] According to the UN Framework, the private provider of water services should undertake a human rights due diligence process as part of its responsibility to respect the right to water.[132] This process should enable the corporation to identify, to prevent, to mitigate and to account for any impacts on the right to water as a result of its operations.[133]

The third prong of the UN Framework seeks to enhance access for victims of human rights violations to effective remedies, both judicial and non-judicial.[134] This part of the prong emphasizes the need for more effec-

125. *See id.* ¶ ¶ 54–55.
126. *UN Guiding Principles, supra* note 117, princ.13(a).
127. *Id.* princ. 13(b).
128. *Id.* princ. 11.
129. The duty to respect is traditionally aligned only with negative duties but jurisprudence from South Africa eviction cases emphasizes the positive dimensions of this duty. For example, the right to respect access to housing, guaranteed under the South African constitution, is interpreted as entailing a duty not to evict people from housing unjustifiably. If they do evict them, they need to (a) engage meaningfully with them; and (b) provide alternative accommodation. *See Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v. City of Johannesburg*, 2008 (3) SA 208 (CC) at 10, ¶ ¶ 15–18, ¶ 46.
130. The UN Framework explains that the concept of due diligence "describes the steps a company must take to become aware of, prevent and address adverse human rights impacts." *See UN Framework, supra* note 116, ¶ 6.
131. Saskia Bakker et al., *Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument* (HeRWAI), 1 J. Hum. Rts. Prac. 436, 436 (2009).
132. *UN Framework, supra* note 116, at 17, ¶ 56.
133. *Id.*
134. *UN Guiding Principles, supra* note 117, at 4, ¶ 6.

tive remedies for corporate human rights abuses. These mechanisms are important where water services have been privatized in order to ensure the accountability of the private service provider. Such grievance mechanisms provide a framework for holding water service providers accountable for any deteriorating services, unmet performance standards, and unjustified tariff increases.[135] Where the nonstate provider identifies any abuse of the right to water as a result of its acts or omissions, it is expected to provide remediation through legitimate processes.[136]

It must, however, be noted that there are a number of problems with the UN Framework and Guidelines as espoused by the SRSG. Such limitations may dilute the efficacy of the initiatives in elaborating the responsibilities of corporations in situations of water privatization. The UN Framework and Guiding Principles do not offer any sound normative basis for why nonstate actors, such as corporations, should have human rights responsibilities. The only justification that one can decipher from the UN Framework and the Guiding Principles is that corporations should have a responsibility to respect human rights because "it is the basic expectation society has of business."[137] Furthermore, the SRSG's use of the term "responsibility" to respect rather than the "obligation" to respect human rights suggests that corporate human rights responsibilities do not generate any legal consequences.[138]

The UN Guiding Principles define human rights to mean, at a minimum, all internationally recognized human rights. These are explained as the rights enumerated in the UDHR, the ICCPR, the ICESCR, and the principles concerning fundamental rights in the eight ILO core conventions set out in the Declaration on Fundamental Principles and Rights at Work.[139] However, the Commentary to the UN Guiding Principles indicates that corporations might need to look beyond this minimalist human rights approach.[140] Corporations

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135. *Id.*
136. *See id.* at 20, princ. 22. A number of other Guiding Principles, for example Principles 24–31 are directly relevant to provision of remedies.
137. *See UN Framework, supra* note 116, at 5, ¶ 9; *UN Guiding Principles, supra* note 117, at 4, ¶ 6.
138. *See UN Framework, supra* note 116, at 16, at ¶ 54: "Failure to meet this responsibility can subject companies to the courts of public opinion—comprising employees, communities, consumers, civil society, as well as investors—and occasionally to charges in actual courts." *See also UN Guiding Principles, supra* note 117, Commentary, princ.12.
139. *See UN Framework, supra* note 116; *UN Guiding Principles, supra* note 117, Commentary, at 4, princ. 12. states:
[E]nterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.
140. *Id.*

need to consider other international human rights instruments related to groups of people, for example women, children, people with disabilities, and indigenous people.[141] The UN Framework does not catalogue the human rights duties that corporations must fulfill. Neither does the UN Framework define specific obligations for corporations, in the context of, for example, the right to water, but rather provides a general perspective on how corporations should function in relation to human rights.[142]

This circular approach of cataloguing human rights responsibilities for corporations creates particular challenges. Corporations are expected to surf through many state-focused human rights instruments to ascertain their own human rights responsibilities.[143] Significantly, the minimalist definition of "internationally recognized human rights" does not offer concrete guidance to companies in ascertaining their human rights responsibilities particularly in relation to the right to water in privatized scenarios.

The UN Framework and Guidelines generally reflect states' desire to maintain the traditional form of international law, where states remain the principal duty bearers in respect of human rights obligations. The UN Framework and its Guiding Principles provide very little to assist those states that, due to their precarious political or economic situation, are in a weak position to effectively regulate corporations involved with the provision of water services in privatization scenarios. The Guiding Principles appear to assume the ideal of a stable state, able to exercise its responsibilities to protect and remedy. These Principles make no effort to address the complex questions inherent in situations where states are either unwilling or unable to enforce corporate behavior. This lack of state oversight imperils many aspects of the human right to water. The Guiding Principles adopt an easier path of referring companies to international instruments that were drafted with states as the duty bearers. This approach of transplanting human rights obligations meant for states onto corporations creates a number of conceptual problems.[144] Lack of clarity regarding the normative basis of the human rights obligations directly binding on corporations implies that corporations will struggle to distill the precise nature of the duties imposed on them by the human rights instruments.[145] The following section discusses the emergence of voluntary initiatives and explores their potential for holding corporations responsible for the right to water in privatized contexts.

141. *Id.*
142. *Id.* princ. 11–15.
143. Surya Deva *Guiding Principles on Business and Human Rights: Implications for Companies,* 9 Eur. Company L. 101,103 (2012).
144. *Id.*
145. *Id.*

## B. Emergence of Voluntary Corporate Standards

Corporations have responded to public demand and to reputational concerns through adopting corporate codes of conduct and sectoral self-regulation initiatives.[146] Graham and Woods refer to this self-regulation as "attempts by corporations to establish rule-based constraints on behavior without the direct coercive intervention of states or other external actors."[147] Prominent among these are corporate codes of conduct, trade association codes, multi-stakeholder codes and state-backed voluntary codes. Such codes commit participants to minimum standards of human rights, labor, environmental, and related standards.[148]

States most concerned with pressing problems are increasingly collaborating with business and civil society to establish voluntary regulatory systems in specific operational contexts.[149] Thus, in addition to the increasing number of sectoral and internal corporate codes of conduct, one may observe a progression into increasingly complex multi-actor voluntary regulatory initiatives.[150] These innovative state-backed and multi-stakeholder hybrid mechanisms have the potential to respond effectively to the complexities inherent in the regulatory context of privatized water services. This is particularly true in the absence of international instruments directly binding on nonstate actors.[151]

A body of scholarship focuses on the rise of these self-regulation and other multi-stakeholder voluntary initiatives. Their inquiry centers on the ways in which "corporations and non-governmental organizations (NGOs) could play [an] increasingly important role in generating, deepening, and implementing transnational norms in such areas as human rights.[152] Gunther Teubner refers to this development as the *lex mercatoria*, noting that nonstate actors play an increasing role in lawmaking through the transnational law of economic transactions.[153]

This development forms a constituent part of global administrative law "though much of this transformation takes place beneath the surface of the international legal order and often goes unnoticed."[154] Bob Hepple uses the

146. Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 Am. J. Soc. 297, 300 (2007).
147. Graham & Woods, *supra* note 68, at 869.
148. *Id.*
149. *UN Mapping Report, supra* note 13, at 25, ¶ 85.
150. Abbott & Snidal, *supra* note 64, at 519.
151. *UN Mapping Report, supra* note 13, at 25, ¶ 85.
152. Graham & Woods, *supra* note 68, at 869 (internal citations omitted).
153. *See* Gunther Teubner, *Global Bukowina: Legal Pluralism in the World, in* Global Law Without a State (Gunther Teubner ed., 1997).
154. Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 Eur. J. Int'l L. 1 (2006).

theory of reflexive regulation as an entry point for understanding legislatively and judicially motivated models of participation in employment equity and socioeconomic rights.[155] Kenneth Abbot and Duncan Snidal refer to this adoption and implementation of nonbinding, voluntary standards of business conduct by corporations, NGOs and Intergovernmental Organizations (IGOs) as forms of "regulatory standard-setting."[156] The two authors argue that this cacophony of soft law norms develops into a system of transnational governance for business.[157]

### C. Characteristics of this New Regulatory Phenomenon

Abbott and Snidal indicate two particularly striking features about these new regulatory initiatives.[158] The first is the central role of private actors, operating independently and through collaborations, coupled with the modest and indirect role of the state.[159] Significantly, NGOs, labor unions, corporations, and industry groups, whose own activities or those of their supply chains are the targets of regulation, monitor these arrangements.[160] Although states are not central to their governance or operations, states and IGOs often support and even participate in some of these largely corporate-driven initiatives.[161] Traditional state-based international regulatory arrangements now take innovative forms.[162] IGOs, such as the UN Global Compact the OECD Guidelines, engage firms to influence the regulatory process.

Abbott and Snidal also suggest that the voluntary nature of these regulatory norms, as opposed to state-mandated regulations, lack the force of binding law.[163] It is additionally noteworthy that even IGO initiatives, such as the UN Global Compact or the OECD Guidelines, operate through a voluntary soft law approach rather than the traditional hard law of, for example,

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155. Bob Hepple, *Negotiating Social Change in the Shadow of the Law,* 129 S. Afr. L. J. 248, 255 (2012).
156. Abbott & Snidal, *supra* note 64, at 506–07.
157. *Id.* at 509.
158. *Id.* at 505.
159. *Id.*
160. *Id.*
161. Meidinger calls such arrangements "supragovernmental," because they are established by private actors with governments playing only minor roles. *See* Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?,* 8 Chic. Int'l L. J. 513, 516 (2008).
162. Abbott & Snidal, *supra* note 64, at 505.
163. These norms are "voluntary" in the sense that they are not legally required. However, firms often adhere because of pressure from NGOs, customer requirements, industry association rules, and other forces that render them mandatory in practice. See *id.* at 506.

binding treaties.[164] Soft law instruments are those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules.[165]

The best practices, principles, and accountability devices derived from such mechanisms may be useful tools for holding corporations involved in the provision of water services in privatized contexts, accountable in the absence of formally binding legal norms. Although many of these voluntary initiatives entail an indirect role for the state a growing number involve significant state participation.

### D. Significance of Voluntary Initiatives for Holding NonState Actors Accountable

Most voluntary mechanisms use a bottom up approach by societal actors, often in response to perceived state failures to regulate and to pressure both civil and public society actors.[166] States' inability or unwillingness to regulate gives these voluntary initiatives significant potential to ameliorate state regulatory inadequacies that create space for these mechanisms to develop.[167] These initiatives attempt to close regulatory gaps that contribute to corporate human rights abuses. As the UN Mapping Report notes, as these voluntary initiatives begin to incorporate stronger accountability mechanisms, the lines between strictly voluntary and mandatory spheres for participants become blurred[168] Filippo Zerilli has aptly observed:

> The burgeoning of sites from which actors and institutions produce and perceive normativity has broken the monopoly of the nation-state over law and policy-making for its citizens. Along with national actors, transnational, supranational, and non-state actors such as NGOs and social movements are strongly interlinked and increasingly contribute to shaping the production of norms and regulations affecting the everyday life of many people within and beyond national borders.[169]

Good examples of these types of initiatives are the International Finance Corporation (IFC) Performance Standards for Corporations[170] and the Equa-

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164. *Id.*
165. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J Legal Analysis 171, 172 (2010).
166. Abbott & Snidal, *supra* note 64, at 521.
167. The weakness of the state is a major reason for the rise of such voluntary initiatives. *See* Gráinne de Búrca & Joanne Scott, *Introduction: Narrowing the Gap? Law and New Approaches to Governance in the European Union*, 13 Colum. J. Eur. L. 513, 513–14 (2007).
168. *UN Mapping Report, supra* note 13, at 13, ¶ 61.
169. Filippo M. Zerilli, *The Rule of Soft Law: An Introduction*, 56 J. Global & Hist. Anthrop'gy 3, 7 (2010).
170. The International Financial Corporation (IFC)'s Policy and Performance Standards on Environmental and Social Sustainability are directed towards clients, providing

tor Principles.[171] No corporation is obliged to accept World Bank funding through the IFC. If, however, a corporation accepts such funding, it must comply with certain performance criteria under the Equator Principles and the IFC Performance Standards for Corporations to be eligible for continued funding. States and corporations are free to join and to participate in the Extractive Industry Transparency Initiative (EITI),[172] but if they do, extractive corporations must issue public reports of their payments to states. States also must report on the revenue they receive from corporations within their jurisdiction participating in the EITI.

There is evidence that voluntary international environmental standards have a positive effect on corporate behavior. Potoski and Prakash have analyzed US firms' compliance with the International Organisation for Standardization's (ISO 14001) environmental program and found a positive impact on corporate behavior.[173] In addition, the Kimberly Process Certification Scheme has reduced the flow of conflict diamonds to one percent of the total market, from three or four percent since the voluntary scheme became operational in 2003.[174]

Although voluntary initiatives contain flexible norms and procedures throughout the regulatory process, from a legal pluralist perspective, these norms may be seen as "law" for participating firms. Voluntary initiatives complement or substitute for mandatory "hard law."[175] Legal pluralism refers to the coexistence of multiple overlapping norms and legal regimes.[176] Legal pluralism encompasses diverse perspectives on law, ranging from the

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guidance on how to identify risks and impacts, and are designed to avoid, to mitigate, and to manage risks and impacts as a way of doing business in a sustainable way. These include stakeholder engagement and disclosure obligations of the client in relation to project-level activities. Together, the eight Performance Standards establish standards that the client is to meet throughout the life of an investment by IFC. *See* Int'l Fin. Corp. (IFC), Performance Standards on Environmental and Social Sustainability (2012), *available at* http://www1.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES.

171. The Equator Principles are a voluntary set of standards for determining, assessing, and managing environmental and social risk in project finance transactions. The Equator Principles are primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making. Project Finance is often used to fund the development and construction of major infrastructure and industrial projects. The Equator Principles are adopted by financial institutions and are applied where total project capital costs exceed US $10 million. *See generally The Equator Principles*, (4 June 2013), *available at* http://www.equator-principles.com/index.php/about-ep/about-ep.
172. *See* Extractive Industry Transparency Initiative (EITI), EITI Rules (Sam Bartlett et al. eds., 2011), *available at* http://eiti.org/files/2011-11-01_2011_EITI_RULES.pdf.
173. Patrick Bernhagen & Neil J. Mitchell, *The Private Provision of Public Goods: Corporate Commitments and the United Nations Global Compact,* 54 Int'l Stud. Q. 1175.
174. *UN Mapping Report, supra* note 13, at 17, ¶ 59.
175. Abbott & Snidal, *supra* note 64, at 530.
176. Zerilli, *supra* note 169, at 7.

recognition of differing legal orders within the nation-state, to a more far reaching and "open-ended concept of law that does not necessarily depend on state recognition for its validity."[177] A number of scholars argue that the hard and soft logic of law are not mutually exclusive and are "better seen as tools provided with a different degree of normativity along a *continuum,* rather than in the binary logic distinctive of legal positivism."[178]

Brian Tamanaha notes that legal pluralism may be observed through a multiplicity of legal orders ranging "from the lowest local level to the most expansive global level."[179] These include state, regional, village, town, or municipal, transnational, and international laws of various types.[180] In many societies, there are customary, indigenous, and religious laws connected to distinct ethnic, cultural, or religious groups within the society. There is also an "evident increase" in quasi-legal activities, including everything from private judging, policing, and prisons, to the continuing expansion of *lex mercatoria*—a body of law that is nearly solely the result of private law making activities.[181]

While most academic and political debates about the law are still directed at the concept of a national legal order with a centralized and public legislation, more and more law-making actors appear besides the national legislators, operating in different transnational legal fields and on different levels.[182] Of significance are the laws of institutions such as the World Bank, International Monetary Fund and the World Trade Organization. Although these organizations are subject to the will of their member states, the same is not true for the many nonstate actors operating on the different transnational fields. In areas such as the World Wide Web, technology and sports, for instance, private entities create their own law without any involvement of public legislatures.[183] Private arbitration tribunals are likely to solve MNCs' contractual conflicts according to MNC-established "law."[184]

The above issues are important in the understanding of law. First, when there are many different public and private lawmaking entities participating in different areas and on different local, international or supranational levels, then a uniform concept of law is hard to maintain.[185] Rather, legal theory

177. Anne Griffiths, *Legal Pluralism*, in An Introduction to Law and Social Theory 289 (Reza Banakar & Max Travers eds., 2002).
178. Zerilli, *supra* note 169, at 11.
179. Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global,* 30 Sydney L. Rev 375, 375 (2008).
180. *Id.*
181. *Id.*
182. Klaus Günther, *Legal Pluralism or Uniform Concept of Law? Globalisation as a Problem of Legal Theory,* 5 No Found.: An Interdisciplinary J. L. & Just. 5, 5 (2008).
183. *Id.* at 6.
184. *Id.*
185. *Id.*

must deal with many different and diverse normative systems.[186] Günther argues that "the positivist concept of *one* legal system that is logically ordered and hierarchically differentiated turns into a *plurality* of legal regimes."[187] Legal pluralism, according to Günther, seems to "turn the idea of a unified legal system into a mere fiction."[188] The importance of legal pluralism is in its recognition of various standards beyond state-promulgated norms to include norms created by corporations and other nonstate actors. Such soft law norms, albeit with some weaknesses, constitute an important development in a bid to hold corporations to account in the absence of international law norms directly binding on corporations.

Braithwaite argues that these voluntary initiatives are valuable for developing states that lack essential capacities for traditional regulation in the absence of formally binding international law obligations on corporations.[189] Some voluntary initiatives draw on the often greater resources and capacities of corporations. For example, inspections of water suppliers may be more effective when performed by knowledgeable corporations in partnership with specialized NGOs than by public inspectors who may lack the necessary expertise. Voluntary initiatives will likely reduce resource demands on the state. This constitutes a significant advantage in an era when many states and agencies face both shrinking resources and budget cuts.[190]

### E. The State's Role in Voluntary Regulatory Mechanisms

It is significant to note that despite the nature of the emerging voluntary mechanisms, the state must play an important role especially with regard to corporate-driven initiatives operating within their domestic jurisdictions. States should convene, encourage and provide material and logistical support in the creation of multi-stakeholder voluntary initiatives. States also participate and collaborate in such initiatives and influence their norms.[191] They may provide legitimacy and moral support for such mechanisms by participating in such schemes.[192] States should also require such voluntary mechanisms to abide by procedural and substantive norms applicable to public law such as due process, the setting of minimum standards, and other substantive parameters.[193]

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186. *Id.*
187. *Id.*
188. *Id.*
189. John Braithwaite, *Responsive Regulation and Developing Economies*, 34 World Dev. 884, 884, 896 (2006).
190. Meidinger, *supra* note 161, at 519–20.
191. Abbott & Snidal, *supra* note 64, at 549.
192. *Id.* at 574.
193. *Id.* at 523.

Abbott and Snidal have argued that for those voluntary mechanisms operating within their domestic jurisdiction, the state should be in a position to step in with mandatory regulation. The threat of such intervention reinforces the effectiveness of such voluntary mechanisms.[194] Hepple has also explained the importance of the state's sanctioning power lurking in the background to enhance the effectiveness of voluntary mechanisms.[195] According to Hepple, this kind of regulation encompasses three interlocking mechanisms.[196] The first involves internal scrutiny by the organization independently ensuring effective self- regulation. The second mechanism involves interest groups who must be informed, consulted and engaged in the process of change.[197] The third is an enforcement agency, which should provide the back-up role of assistance and imposing sanctions where voluntary methods prove ineffectual.[198] According to Hepple, these interlocking mechanisms create a triangular relationship among those regulated, stakeholders whose interests are affected, and the enforcement agency to safeguard the public interest.[199] The following section discusses the above initiatives and related voluntary mechanisms' relevance in holding nonstate actors accountable within the context of water privatization.

## F. Potential of Soft Regulatory Mechanisms as a Basis for Accountability in the Water Privatization Scenarios

These soft regulatory mechanisms hold much unexamined potential for promoting human rights accountability by nonstate actors in the context of water privatization schemes. These voluntary mechanisms, in the absence of binding norms, help to shape and to constrain the practices of corporations involved in the provision of human rights sensitive services, such as water. Furthermore, such mechanisms may eventually be incorporated into binding national or international law leading to their transformation into hard law.[200]

The significance of the UN Global Compact in the water privatization sector is that it has brought some degree of awareness about corporate responsibility for human rights. This approach provides a measure of impetus for change of policies.[201] The UN Global Compact strengthened its compli-

194. *Id.* at 574.
195. *See* Hepple, *supra* note 155, at 255.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 Am. J. Int'l L. 443, 444 (1983).
201. Bilchitz, *supra* note 75, at 759.

ance mechanism through adopting a revised Communication on Progress (COP).[202] This mechanism, despite the voluntary nature of the initiative, helps to focus the spotlight on the human rights-infringing activities of those MNCs members to the UN Global Compact involved in the provision of water services.[203] The COP is the most important expression of a participant's commitment to the UN Global Compact and its principles.[204] A water corporation would, for instance, be required to post its COP on the UN Global Compact website and to share it widely with its stakeholders.[205] Any infringement by the corporation of its COP policy (such as the failure to disclose details of any human rights due diligence relating to its water project) would result in a change from participant status to noncommunicating status. This may eventually lead to the expulsion of the participant.[206]

Despite the SRSG's criticism of the Norms on TNCs for their alleged "exaggerated legal claims," entailing the direct imposition of a wide range of duties on corporations by human rights law,[207] the Norms on TNCs enhance corporate responsibility for the human right to water, especially where water services have been privatized. The Norms on TNCs marked "a radical departure from previous international efforts addressing the obligations of nonstate actors with regard to human rights."[208] The intention of the UN Sub-Commission in relation to the Norms on TNCs was clearly to provide for legally binding and enforceable obligations for nonstate actors. Unlike previous initiatives, however, the Norms on TNCs extend the human rights responsibilities beyond TNCs and provide for the human rights obligations of other business enterprises.[209] The Norms on TNCs offer the promise of holding water corporations directly liable for any infringement of the human right to water.

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202. *See UN Global Compact Policy on Communicating Progress* (25 Feb. 2011), *available at* http://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy_Feb11.pdf [hereinafter *Global Compact Policy*].
203. The COP is an annual public disclosure to stakeholders such as investors, consumers, civil society and states on the corporation's progress in implementing the UN Global Compact. The COP requirement serves several important purposes. These include advancing transparency and accountability, enabling continuous performance improvement, safeguarding the integrity of the UN Global Compact and the United Nations, and helping build a growing repository of corporate practices to promote dialogue and learning. *See Global Compact Policy supra* note 202, ¶ 1(a)–(c).
204. *Id.* Overview.
205. *Id.* ¶ 2(a)–(b).
206. *Id.* Overview.
207. *See Promotion and Protection of Human Rights, Interim Report of the Secretary-General's Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,* U.N. ESCOR, Comm'n on Hum. Rts., 62nd Sess., Agenda Item 17, ¶59, U.N. Doc. E/CN.4/2006/97 (2006).
208. Danwood Mzikenge Chirwa, *The Long March to Binding of Obligations of Transnational Corporations in International Human Rights Law,* 22 South Afr. J. Hum. Rts. 76, 96 (2006).
209. *Id.* at 96.

Significantly, the Norms on TNCs provide for monitoring mechanisms that recognize the importance of internal self-regulation and external monitoring.[210] Their interpretation of human rights instruments as imposing direct human rights obligations on corporations differ from the traditional approach that focuses exclusively on states as the sole bearers of human rights obligations.[211] This makes the Norms on TNCs a more promising tool for ensuring that nonstate actors such as MNCs and business enterprises involved in the provision of water services respect and protect the right to water.[212]

The UN Framework and Guiding Principles are equally important in understanding the role of corporations in water privatization scenarios. Although these UN initiatives do not constitute changes to the existing international law, they develop international law in relation to nonstate actors. These initiatives clarify the duty of corporations to respect the human right to water as well as the need to carry out due diligence assessments intended to avoid infringing on human rights of others. The above initiatives further elaborate the corporate duties not to infringe on others' enjoyment of the right to water. They underscore the necessity of addressing any adverse impacts on the right to water resulting from corporate activities. The above UN initiatives also emphasize the importance of access to an effective remedy (both judicial and nonjudicial) when victims' right to water is infringed.[213]

Two overarching principles may be derived from the above on the responsibilities of nonstate actors for the right to water; the corporate responsibility to respect the right to water and the nonstate actors' responsibility to provide for grievance. These two principles are analyzed in further detail in the following section.

## G. Nonstate Actor Responsibility to Respect the Right to Water

In its traditional sense, the obligation to respect the right to water entails a duty to refrain from acts or omissions that have the effect of interfering or depriving individuals of their enjoyment of the right to water.[214] The obligation to respect is broad enough to proscribe the adoption of policies that result in denial of access by poor communities to the right, rather than simply prohibiting interference, with existing access to water services.[215]

The UN Framework and Guiding Principles discussed above provide authoritative elaboration on the meaning of nonstate actors' responsibility

210. *UN Norms, supra* note 114, ¶ 16.
211. Williams, *supra* note 9, at 491.
212. *Id.* at 489.
213. *UN Guiding Principles, supra* note 117, at 22, princ. 25.
214. Craven, *supra* note 57, at 110.
215. *Id.*

to respect the right to water.[216] The corporate responsibility to respect the right to water has two significant aspects. First, nonstate actors have a duty to avoid causing or contributing to adverse human rights impacts through their own activities that impair the right to water.[217] Second, nonstate actors should seek to prevent or to mitigate adverse impacts linked to their operations that infringe on the right to water.[218]

The UN Framework emphasizes that nonstate actors should observe internationally recognized human rights even where national law is weak, nonexistent or not enforced.[219] Nonstate actors involved in the provision of water services are enjoined to give particular attention to water use in contexts of extreme poverty. They should also be conscious of how conflicts or humanitarian emergencies might impact the right to water as part of their responsibility to respect the right.[220] The right to water remains an important right "even in situations where the national government is oppressive, national laws are not enforced, or local authorities are unwilling or unable to observe national law."[221] Nonstate management of water services often raises the concern that such entities might limit or impede the right of access to water. Any regulatory approach that is consistent with the human right to water should ensure that the provider does not over-emphasize full-cost recovery and other commercial objectives at the expense of the normative elements of water as a human right.[222] Particularly important in privatization scenarios are issues concerning disconnections and tariff increases. The duty to respect enjoins the private provider of water services to undertake a human rights impact assessment as part of its responsibility to respect the right to water as elaborated in the following section.

### H. Human Rights due Diligence with Respect to the Right to Water

Human rights due diligence or impact assessments are a relatively new tool in the toolbox of human rights practitioners. Human rights due diligence entails a systematic process to investigate and to measure the impact of policies, programs, projects, and interventions on human rights.[223] There is a growing realization, even in the corporate community, of the need to integrate human rights into corporate policies and practices.[224]

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216. *See UN Guiding Principles, supra* note 117, princ. 11.
217. *Id.* princ. 13(a).
218. *Id.* princ.13(b).
219. *See generally* UN *Framework, supra* note 116, ¶ 7.
220. Institute for Human Rights, *Water, Business and Human Rights* 28 (2011), http://www.ihrb.org/pdf/More_than_a_resource_Water_business_and_human_rights.pdf.
221. *Id.*
222. *See* General Comment 15, *supra* note 27, ¶ 12.
223. Bakker et al., *supra* note 131, at 436.
224. *Id.* at 436.

The Norms on TNCs provide for an obligation on corporations to undertake periodic human rights impact assessments of their operations and activities.[225] The commentary to the Norms on TNCs explains that a corporation must study the human rights impacts of any intended project before it embarks on such a project.[226] Notably, impact assessments are quite an established procedure under environmental law. Human rights impact assessments by nonstate actors, before and during the life of a project, may serve a useful purpose in forestalling actual and potential human rights violations.

The private provider of water services should undertake a human rights impact assessment as part of its responsibility to respect the right to water. This entails taking steps to become aware of, to prevent and to address adverse human rights impacts as part of its human rights due diligence.[227] This process should enable the corporation to identify, to prevent, to mitigate, and to account for any impacts on the right to water as a result of its operations.[228] A number of tools exist to examine a range of activities from a human rights perspective. These include assessing the potential impact of development programs of foreign governments on beneficiary countries, the impact of government policy and legislation on domestic protection of human rights, and the impact of MNCs on human rights.[229]

Corporations should observe particular requirements in exercising due diligence as part of their duty to respect the right to water.[230] In order to be able to respect the right to water, nonstate actors need to know the actual and potential impacts on access to water.[231] Due diligence procedures in the context of water services requires a comprehensive, proactive attempt to identify risks that may undermine the realization of the right to water. The assessment should explicitly focus on human rights, including the right to water, and should specifically address the human rights impact on the most excluded and marginalized groups. The risk assessment needs to be ongoing—recognizing that the risks to the right to water may change over time as

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225. *UN Norms*, *supra* note 114, ¶ 16. For an in-depth analysis of the UN Norms, see Bilchitz *supra* note 75, at 765.
226. *See Commentary on the Norms in the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,* U.N. ECOSOC, Comm'n on Hum. Rts., 55th Sess., U.N. Doc. E/CN.4/ Sub.2/2003/38/Rev.2 ¶ 16(i)(2003).
227. *UN Framework*, *supra* note 116, ¶ 56.
228. *See UN Guiding Principles, supra* note 117, ¶ princ. 15.
229. Bakker et al., *supra* note 131, at 437. Some of the key examples are the human rights impacts assessments models developed by Rights and Democracy; the International Finance Corporation in association with the International Business Leaders Forum and the UN Global Compact; and the Health Rights of Women Assessment Instrument developed by Aim for Human Rights. For various models of human rights impacts assessments see *Information on Human Rights Impact Assessment,* Hum. Rts. Impact Res. Ctr., *available at* http://www.humanrightsimpact.org.
230. See *UN Guiding Principles, supra* note 117, princ. 15.
231. *Id.*

the corporation's operations evolve.[232] The responsibility to carry out human rights due diligence, with respect to the right to water, may also require the taking of affirmative steps by corporations. Such steps involve implementing policies and mechanisms to identify actual and potential harm to the right to water and the provision of grievance mechanisms.[233]

In exercising due diligence, nonstate service providers should consider the country and local context in which they carry out their activities, such as the institutional capacities of the state in order to identify specific human rights challenges.[234] Furthermore, the water service providers must also consider whether it might contribute to violations of the right to water through its relationships with other actors.[235] Water delivery systems need to be scrutinized holistically to ensure that their outcomes conform to the normative standards imposed by the right to water. [236] Despite the involvement of a private provider, water must at all times be available in a quantity sufficient to satisfy all personal and domestic needs.[237] Water must be safe, so as not to pose a threat to human health, and should comply with the World Health Organization Guidelines for Drinking Water Quality.[238] The provider must ensure that the water supply is sufficiently reliable to allow for sufficient amounts for personal and domestic needs over the entire day.[239] The nonstate actor should also ensure that water is available within the vicinity of the household, healthcare facility, school, or public place.[240]

Although water does not necessarily have to be provided for free, the provider should meet human rights standards, based on the right to water. The tariffs and connection costs must be accessible to all sections of the community, including marginalized individuals and groups living in extreme poverty. The CESCR states that accessibility of water services is a constituent element of the normative content of the right to water.[241] This means that "[w]ater and water facilities and services have to be accessible to everyone without discrimination."[242] These standards will ensure physical access to

232. *See UN Guiding Principles, supra* note 117, princ.17(c).
233. [hereinafter *Special Rapporteur Sanitation Report*].
234. *Id.* ¶ 27.
235. *Id.*
236. Khulekani Moyo, *Privatisation of the Commons: Water as a Right; Water as a Commodity,* 22 Stellenbosch L. Rev. 804, 815–18 (2011).
237. *See Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque (2009),* U.N. GAOR, Human Rights Council, 12th Sess., Agenda Item 3, at 12, ¶ 34, U.N. Doc. A/HRC/12/24 (2009). *Special Rapporteur Report, supra* note 233, ¶ 26.
238. *Id.* at 12, ¶ 35.
239. *Id.* at 24, ¶ 75.
240. *Id.*
241. General Comment 15, *supra* note 27, ¶ 12.
242. *Id.* ¶ 12(c).

water facilities that provide sufficient, safe, and regular water. The CESCR explains in General Comment 15 that "[w]ater, and water facilities and services must be affordable for all."[243] It further states that the costs associated with securing water must be affordable and must not threaten the realization of other human rights.[244] In the context of nonstate actor involvement in water services provision, particular care must be taken to ensure that individuals have access to essential levels of water despite their inability to pay.[245]

## V. NONSTATE ACTOR RESPONSIBILITY TO PROVIDE FOR GRIEVANCE MECHANISMS

The provision of effective grievance mechanisms forms a significant component of the UN Framework and Guidelines as well as the soft law mechanisms discussed above. Grievance mechanisms are important where water services have been privatized and to ensure the accountability of the private service provider. Grievance mechanisms provide a framework for holding water service providers accountable for any deteriorating services, unmet performance standards, and unjustified tariff increases.[246] A nonstate service provider has a responsibility to put in place mechanisms that allow individuals and groups to bring alleged human rights abuses of the right to water to the attention of the service provider.[247]

The allocation of oversight roles must avoid any conflicts of interest, for instance, between ensuring the effectiveness of the grievance mechanism, on the one hand, and defending the actions or decisions of certain parts of the corporation on the other. In order to be legitimate, grievance mechanisms should be easily accessible to individuals and groups affected by the nonstate actor's operations.[248] Where the nonstate provider identifies any abuse of the right to water as a result of its acts or omissions, it is expected to provide remediation through legitimate processes.[249]

The grievance mechanisms must be predictable, provide clear and known procedures, ensure clarity on the types of processes available, and guarantee the means of monitoring implementation. The procedures for grievance remediation must also be equitable and should ensure that aggrieved parties have reasonable access to sources of information and advice necessary to

243. *Id.* ¶ 12(c)(ii).
244. *Id.*
245. *Id.* ¶ 48.
246. *Id.* ¶ 56.
247. *Id.* ¶ 58.
248. *Id.*
249. *See UN Guiding Principles, supra* note 117, princ. 22. A number of other Guiding Principles, for example, Principles 24–31 are directly relevant to provision of remedies. *See also Special Rapporteur Report, supra* note 233, ¶ 58.

engage in a fair grievance process. It is also important that the procedures must be rights-compatible by ensuring that outcomes and remedies are in accordance with the right to water and related human rights.[250]

The internal mechanisms should augment but not compete with or undermine state-based judicial and nonjudicial mechanisms. Nonstate service providers must not obstruct individuals and groups from accessing state-based accountability mechanisms such as court proceedings.[251] State-based adjudicative mechanisms are particularly important in the absence of an amicable resolution between the rights beneficiaries and the water service provider.[252] State-based mechanisms and other alternatives include courts, the state ombudsman or complaints offices specific to an industry, a labor standards office, a National Contact Point,[253] a national human rights institution, or any other state-administered or statutory body empowered to take such a role.[254] Other alternative grievance mechanisms may include local and traditional mechanisms used by indigenous or other communities.

## VI. CONCLUSION

The state centric nature of the current international human rights framework poses considerable challenges for holding nonstate actors accountable for human rights in the era of globalization, privatization, and liberalization. Recent experiences demonstrate that nonstate actors, such as corporations, can and, often do, abuse human rights, such as the right to water. This is particularly the case where states are unable or unwilling to reign in such entities. International and regional human rights treaties do not directly address these actors, despite their increasing involvement in the distribution of human rights sensitive services, such as the provision of water.

Water has been regarded as the last frontier of privatization across the world. The water sector, especially in the early 1990s to early 2000s, saw IFIs vigorously pushing for privatization of water supply services. The pri-

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250. *See UN Guiding Principles, supra* note 117, princ. 31(a)–(h).
251. *See Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque (2010),* U.N. GAOR, Human Rights Council, 15th Sess., Agenda Item 3, ¶ 59, U.N. Doc. A/HRC/15/31 (2010) *available at* http://www.aquafed.org/pdf/A-HRC-15-31-AEV_releaseJuly09_2010-06-29.pdf.
252. *See* Hepple, *supra* note 155, at 255; General Comment 9, *The Domestic Application of the Covenant*: U.N. ESCOR, 19th Sess., U.N. Doc. E/C.12/1998/24 (1998), ¶ 9.
253. These mechanisms are available for OECD member states that have adhered to the OECD Guidelines. The Corporate Responsibility to Respect Human Rights: An Interpretative Guide, U.N. Hum. Rts. Office of High Comm'r, 66 (2012), *available at* http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.
254. *Id.*

vate sector was viewed as bringing the much needed financing, efficiency, management skills, and technology to the water services sector. This has resulted in the increased prevalence of nonstate actors' involvement in the provision of water services.

Most privatization arrangements currently do not involve any transfer of state assets to the private sector. Rather, the arrangements focus instead on the transfer of operational and managerial functions to the private sector. A number of human rights concerns arise in any water privatization initiative. These include: the availability of water, water quality issues, and physical and economic accessibility of water services. Other key human rights concerns include public participation and access to information for communities directly affected by water privatization, and the need for effective monitoring mechanisms to protect the right to water—notwithstanding the privatization of water delivery services.

In the absence of directly binding international human rights law norms, a range of nonbinding initiatives exist to impose human rights responsibilities on nonstates actors. The UN has binding norms on MNCs, including initiatives aimed at identifying, clarifying, and elaborating international human rights responsibilities of nonstate actors as reflected in the UN Framework and Guiding Principles. Voluntary soft law initiatives involving corporations, states, NGOs, and IGOs have emerged in an attempt to impose direct human rights responsibilities on corporations in the absence of binding international standards.

This article identified and discussed the relevance of these norms for holding water corporations accountable for their obligations imposed by the human right to water in the context of privatization schemes. Despite the limitations posed by the voluntary nature of such initiatives, these mechanisms exhibit potentially novel forms of accountability that can help fill the regulatory gaps with respect to nonstate actors. Voluntary initiatives are valuable especially for developing states that are either unwilling or lack the essential capacities to regulate MNCs. These emerging mechanisms, along with strengthening the domestic legislation of states, play an important role in holding private water providers accountable for the human right to water.

This article argued that although these voluntary initiatives contain flexible norms and procedures throughout the regulatory process, from a legal pluralist perspective, however, these norms may be seen as law for participating firms. These soft law norms and multi-stakeholder institutional mechanisms—although imperfect—constitute an important development to hold corporations responsible for the right to water. In the absence of international law norms directly binding on corporations and the accompanying institutional mechanisms to enforce these norms, enhancing the accountability potential of soft law regulatory mechanisms is worth deeper investigation.

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