Saar Blueprints

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Multinational Corporations and the Human Right to Water

07 / 2020 EN

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Preface

This publication is part of an e-paper series (Saar Blueprints), which was created as part of the Jean-Monnet-Saar activity of the Jean-Monnet Chair of Prof. Dr. Thomas Giegerich, LL.M. at the Europa-Institut of Saarland University, Germany. For more information and content visit http://jean-monnet-saar.eu/.

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Postfach 15 11 50

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ISSN

2199-0050 (Saar Blueprints)

Citation

Huang, Yunzhi, Multinational Corporations and the Human Right to Water, 05/20 EN, online via:http://jean-monnet-saar.eu/?page_id=67

A. Introduction

I. Importance of Water

It is axiomatic that water is fundamental for our survival, as "water is the essence of life".[1] Humans can only live for four days without water,[2] and are wholly dependent on it in other aspects such as sanitation, agriculture and even in our industries.[3] The importance of water cannot be overstated; access to safe water is necessary for the enjoyment of other human rights and crucial to human dignity,[4] and is the key to "poverty reduction…sustainable development and… for achieving any and every one of the millennium development goals".[5]

II. The Human Right to Water (HRtW)

The Human Right to Water (HRtW) is commonly understood to be implicitly included in Art. 11 ICESCR,[6] however, some States and regions do also recognise it as an autonomous right.[7] This paper assumes that the HRtW exists and contains three substantive aspects, just as the Committee on Economic, Social and Cultural Rights (CESCR) suggests – safeguarding quantity, quality and accessibility, where 'accessibility' encompasses physical and economic accessibility.[8]

III. Water Problems Plaguing the World

Despite its importance, billions worldwide are deprived of access to clean water. Even in the most developed of countries, water rights are neglected,[9] and "clean water is far from a given".[10] Existing challenges are further exacerbated by escalating population numbers and climate change, resulting in water demands gradually surpassing its available supply,[11] even

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1 *Baric*, Law & Society Review, 50/2016, p. 123, 123; see also *Arden,* I.C.L.Q, 65/2016, p. 771, 771.

2 *Barrett; Jaichand,* S.Afr. J. on Hum. Rts., 23/2007, p. 543, 543; *Spector,* Here's how many days a person can survive without water, https://www.businessinsider.de/how-many-days-can-you-survive-without-water-2014-5?r=US&IR=T, (last accessed on 26/10/19).

3 *Arden,* (fn 1), p. 771; *Donoho,* ILSA J. Int'l & Comp. L., 19/2012, p. 91, 92.

4 *Barrett; Jaichand,* (fn 2), p. 545.

5 *Baric*, (fn 1), p. 128.

6 UN Economic and Social Council 29th session, General Comment 15, *The right to water,* 20 January 2003, UN Doc. E/C.12/2002/11, Para. 3; for more info., see: *Huang,* The Human Right to Water, 05/19 EN.

7 *Obani/ Gupta*, R.E.C.I.E.L., 24/2015, p. 27, 34; *Council of the European Union,* Declaration by the High Representative, Catherine Ashton, on behalf of the EU to commemorate the World Water Day, 7810/10 P 12/10 Press 71, 22 March 2010, para. 2; for more info., see: *Huang,* The Human Right to Water, 05/19 EN.

8 UN Economic and Social Council 29th session, (fn 6), Para. 12(a) – (c).

9 *Harder,* The University of the Pacific Law Review, 50/2018, p. 1, 7.

10 *Donoho,* (fn 3), p. 92.

11 *Winkler,* European Parliament Study, July 2015, p. 16, 17; *Donoho,* (fn 3), p. 93; *Schroering,* J. World-Systems Research, 25/2019, p. 1, 1. *Miles,* in: Alam, Klein, Overland (eds.), p. 53, 53; *Pitts,* Rutgers J. L. & Pub. Pol'y, 6/2009, p. 334, 370.

leading some to believe that "the next wars will be fought over water resources".[12] This global water crisis has undoubtedly reached critical status, and will continue to intensify.

In conflict situations, access to clean water is a critical for survival, without which, high risks of a disease outbreak exist.[13] For example, during the Yemen conflict, there were multiple cholera outbreaks due to water deprivation.[14] Similarly, experts confirmed that during war-time, "the lack of clean, fresh water killed just as many people as bullets and bombs."[15] Unfortunately, despite its catastrophic ramifications, past experiences have proven that water rights are "one of the first rights to be denied" in conflict zones.[16]

Considering the severity of the global water crisis and the frequent disregard of the HRtW during conflict situations, immediate attention and rectification is necessary.

IV. Limitations and Structure

Although the HRtW and the Human Right to Sanitation are closely linked, they should be distinguished from one another.[17] Therefore, this paper will focus solely on the HRtW.

This paper aims to examine private water companies' (PWCs) relationship with the HRtW. PWCs in this paper refer only to multinational private water corporations subject to water privatisation agreements. While acknowledging other corporate relationships with the HRtW, such as businesses as water users or polluters,[18] this paper will concentrate solely on PWCs as academic debate thus far has largely neglected to examine them despite their indispensable role in the realisation of the HRtW.[19] Additionally, the terms 'corporations', 'companies' or 'businesses' in this paper will refer exclusively to multinational corporations (MNCs). Equally important, 'water privatisation' is understood to be "the partial or total transfer of managerial control of a water undertaking from the public sector to a private operator".[20]

This paper will first examine the substantial influence corporations have on human rights, the global move toward water privatisation and its effects. Next, a State's human right obligation

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[12] *Angelo/ D'Odorico/ Rulli,* WIRES Water, 5/2018, p. 1, 1; see also *Jorgensen,* J. Int'l L. & Int'l Rev., 3/2007, p. 57, 57; *Winkler,* (fn 11), p. 16.

[13] *ACF,* The Legal Framework, 2009, p. 16; *Diep et al*, IIED Working Paper, 2018, p. 17; *Robertson,* in: Barnhizer (ed.), p. 79, 79.

[14] *Diep et al*, (fn 13), p. 17.

[15] *Jorgensen,* (fn 12), p. 58.

[16] *ACF,* (fn 13), p. 16, 105; see also *Jorgensen,* (fn 12), p. 58.

[17] UN GA, *Report of the independent expert on the issue of human rights obligations related to access to safe drinking and sanitation, Catarina de Albuquerque* of 1 July 2009, UN Doc. A/HRC/12/24; UN GA 70th session, Agenda item 72(b), *The human rights to safe drinking water and sanitation*, 18 November 2015, UN Doc. A/C.3/70/L.55/Rev. 1; *Cornea,* Cross-Border J. For Int'l Stud., 1/2016, p. 47, 48.

[18] UN OHCHR, Fact Sheet No. 35, 2010, p. 30; *Dias,* NUJS L. Rev. 4/2011, p. 495, 500.

[19] *Karunananthan,* Geoforum, 98/2019, p. 244, 244.

[20] *Sandeep,* NUALS L.J. 4/2010, p. 49, 53; see also *McMurry,* Hum. Rts. & Int'l Legal Discourse, 5/2011, p. 233, 237; *Moyo,* Stellenbosch L. Rev. 22/2011, p. 804, 812; *Karunananthan,* (fn 19), p. 248.

when water is privatised will be briefly analysed. Following this, attention will turn to the international, regional, national and self-imposed corporate human rights obligations applicable generally along with those relevant in times of conflict. Subsequently, the germane national, international and regional enforcement mechanisms will be evaluated. Finally, recommendations will be made on how to strengthen and improve corporate obligations and existing enforcement mechanisms, to sufficiently protect the HRtW from further PWCs' abuse.

B. Corporations and Human Rights

With growing evidence confirming the impact corporations have on human rights,[21] it is now indisputable that corporations play a fundamental role in the realisation of human rights, including the HRtW.[22] MNCs have been associated with corruption, wealth disparities, political interferences and "a descent to 'the lowest common denominator of human rights…standards"[23]; MNCs are a "source of major concern regarding… human rights violations and abuses, including water rights"[24], therefore require scrutiny.

MNCs often also expand to operate in areas of conflict,[25] where they are either a "catalyst for positive change"[26] or perpetrators of egregious human rights abuses.[27] Although MNCs have the capacity to enable peacebuilding and reconstruction, such as by facilitating peacemaking activities,[28] or by boosting the State's economy,[29] unfortunately, in practice, they often fail to achieve this potential, often even escalating the conflict instead.[30] In conflict zones, the State is "often absent or involved in human rights violations itself".[31] For MNCs, this weak, possibly corrupt, governance allows them to violate existing regulations without consequences,[32] thereby exacerbating the conflict.[33] Experts have confirmed the significant role corporations play in conflicts, finding that MNCs perpetuated and profited from war[34]. For example, experts discovered that corporations in the Democratic Republic of Congo (DRC)

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[21] *Cernic,* Denv. J. Int'l. L & Pol'y, 39/2011, p. 303, 316.
[22] *Bilchitz,* SUR Int'l J. on Hum Rts. 7/2010, p 199, 210; *Cernic,* (fn 21), p. 305; *Herz,* in: Barnhizer, p. 263, 264.
[23] *Dias,* (fn 18), p. 497.
[24] *Cavallo,* Merkourious-Utrecht J. Int'l & Eur. L. 29/2013, p. 39, 40.
[25] *The Global Compact,* Training Tool: Doing business in conflict-affected countries, 2013, p. 7; *van Dorp*, p. 19.
[26] *Miller et al.,* A Seat at the Table: Capacities and Limitations of Private Sector Peacebuilding, 2019, p. 19.
[27] *International Alert,* p. 125; UN OHCHR, (fn 18), p. 31.
[28] *Miller et al.,* A Seat at the Table: Capacities and Limitations of Private Sector Peacebuilding, 2019, p. 19.
[29] *The Global Compact,* (fn 25), p. 8.
[30] *Wisner,* JICJ 0/2018, p. 1, 2.
[31] *van Dorp,* p. 17.
[32] *Diep et al*, (fn 13), p. 28; *The Global Compact,* (fn 25), p. 7; *Bantekas,* B.U. Int'l L.J, 22/2004, p. 309, 327.
[33] *van Dorp,* p. 17.
[34] *Wisner,* (fn 30), p. 2; *van Dorp,* p. 20.

fuelled and sustained the war, as it allowed them to illegally exploit resources from the DRC.[35]

Regarding the HRtW, it is evident that corporations are key to its realisation.[36] When water is privatised, PWCs are directly linked to the fulfilment of the HRtW.

C. Increased Role of Corporations – The Move Toward Privatisation

Since the 1980s, there has been an escalation of MNCs' participation in the previously State-run provision of water,[37] due to a variety of reasons as discussed below.

I. Failure of the Public Sector

Proponents of privatisation contend that water privatisation is necessary because the public sector has, for many decades, severely underperformed and has failed to sufficiently provide water to its people.[38] Although there are a handful of successful PWCs, such as in Bogota and Phnom Phen,[39] these are a definite minority and as per Eliasson, "governments can rarely… provide all of the financing and human capacity we need"[40], from which it can be seen that the State is largely incapable of adequately safeguarding the HRtW[41]. Consequently, privatisation of water is seen as "the 'right' medicine"[42] and PWCs are represented as "a saviour… a benefactor possessing both the technology and financial resource to serve human rights objectives"[43]. The belief is that PWCs possess the much-needed funds and technology to rectify problems with water systems that are plaguing States worldwide, in pursuit of the HRtW.[44]

II. Water Privatisation is Necessary for Sustainability

Water privatisation is also presented by many as a panacea to water scarcity.[45] Once privatised, water would be treated as an economic good and users would be appropriately

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35 *Wisner,* (fn 30), p. 3.
36 UN OHCHR, (fn 18), p. 30; *Cavallo,* (fn 24), p. 41; *Guaghran,* Am. Soc'y Int'l L. Proc. 106/2012, p. 52, 53.
37 *Cavallo,* (fn 24), p. 40; UN OHCHR, (fn 18), p. 30; *Russell,* Int. J.L.C., 7/2011, p. 1, 1.
38 *Paul,* Ind. J. Global Legal Stud. 20/2013, p. 469, 471; *O'Neill,* Colo. J. Int'l Envtl. L & Pol'y 17/2006, p. 357, 378; *Petrova,* Brook J. Int'l L. 31/2006, p. 577, 587.
39 *Petrova,* (fn 38), p. 591.
40 *Karunananthan,* (fn 19), p. 249.
41 ibid.
42 *Cernic,* (fn 21), p. 306.
43 *Karunananthan,* (fn 19), p. 249.
44 *Sandeep,* (fn 20), p. 53; *Petrova,* (fn 38), p. 587; *Paul,* (fn 38), p. 470, 471; *Bluemel,* Ecology L.Q. 31/2004, p.957, 956; *McMurry,* (fn 20), p. 238. *Bakker,* Antipode, 39/2007, p.430, 436; *Harder,* (fn 9), p. 7.
45 *Bakker,* (fn 44), p. 432; *O'Neill,* (fn 38), p. 358; *Moyo,* (fn 20), p. 814.

charged.[46] The right pricing techniques adopted by PWCs would then minimise a consumer's wasteful behaviour,[47] thereby prolonging its future availability.[48] The Johannesburg Declaration confirmed the role of PWCs, and considered corporate involvement paramount for sustainable development.[49] Therefore, water privatisation was, and continues to be, aggressively encouraged.

III. Financial Institutions Demanding Privatisation

The escalation of water privatisation is also a result of the policies of financial institutions, with many making water privatisation a precondition for loans and debt forgiveness.[50] For example, the funding Tanzania received from the World Bank (WB), the African Development Bank and the European Investment Bank was conditional on water privatisation.[51] Figures also demonstrate that in 2000, 12 out of 40 loans from the International Monetary Fund (IMF) had water privatisation as a prerequisite.[52] With such policies, many States, mainly developing States, are compelled to privatise their water sector and become heavily reliant on PWCs.

IV. Trillion Dollar Industry

Nowadays, MNCs are eager to invest in the global water market, a sector that is increasingly valuable,[53] with some asserting that water has become a more important commodity than oil,[54] and in 2006, the WB estimated the water market to be at US$ 1 trillion.[55] Considering the growing scarcity of water, one can only imagine its worth today. Coupled with the aforementioned forceful advocacy, the global trend toward water privatisation is no surprise.

D. Negative Effects of Privatisation

Despite its proclaimed benefits, actual results from water privatisation have been described as "less than promising".[56] As Pathirana accurately notes, "it is ironic that privatisation, which is prescribed… as a poverty reduction strategy, should result in such developing countries

46 *Moyo,* (fn 20), p. 814.
47 *Moyo,* (fn 20), p. 814; *Bluemel,* (fn 44), p.962; *Bakker,* (fn 44), p. 441.
48 *O'Neill,* (fn 38), p. 358.
49 UN, Johannesburg Declaration on Sustainable Development, A/CONF. 199/20, 04/09/2002.
50 *Petrova,* (fn 38), p. 578; *Sandeep,* (fn 20), p. 54; *McMurry,* (fn 20), p. 236.
51 *Barrett; Jaichand,* (fn 2), p.547; *Moyo,* (fn 20), p. 814.
52 *Sandeep,* (fn 20), p. 54.
53 *Cavallo,* (fn 24), p. 41; *Miles,* (fn 11), p. 53; *Paul,* (fn 38), p. 471.
54 *Miles,* (fn 11), p. 53.
55 *O'Neill,* (fn 38), p. 359.
56 ibid.

becoming further mired in poverty and deprivation".[57] The policies adopted by PWCs are often riddled with problems,[58] eventually and inevitably leading to violations of the HRtW.

The biggest concerns with water privatisation are the "arbitrary and illegal disconnections"[59] and the "price hikes that follow"[60]. These concerns are well-founded since there are many documented experiences of these fears materialising. Such incidents happened in Indonesia,[61] in Nelspruit,[62] in Czech Republic[63] and even in the UK[64]. The number of water disconnections skyrocketed as well. For example, in Tanzania, it was reported that within the first six months of the contract, "entire communities were cut-off to force payment… and people paying did not have water coming out of their taps".[65] Tanzania's water minister subsequently stated that water supply had deteriorated since privatisation.[66] Similarly, after water privatisation in Nelspruit, authorities reported a spike in unforeseen disconnections.[67] In the UK, within five years of privatisation, disconnections for non-payment tripled.[68]

The astronomical inflation in water prices coupled with the largescale disconnections had broader ramifications, causing health epidemics in multiple countries. For example, KwaZulu Natal experienced cholera outbreaks owing to such policies,[69] and Birmingham saw a surge in dysentery rates, which coincided with the increased disconnections.[70]

PWCs have also neglected vulnerable and marginalised groups, often treating their interests as secondary to that of the PWCs.[71] Since rural projects are less profitable, PWCs are wary and unwilling to invest in them, disregarding the water needs of those who live there.[72] For example, in Chennai, a PWC-led project aimed at expanding the water supply network did not even consider the poor.[73] Likewise, in Jakarta, although the PWCs claimed to have increased water access by 50%, this was only done in the rich, middle-class and industrial areas; "poor communities…remained without piped water".[74] This apathy toward the HRtW of

[57] *Pathirana,* Sri Lanka J. Int'l L. 16/2004, p. 1, 1.
[58] *Schroering,* (fn 11), p. 2.
[59] UN OHCHR, (fn 18), p. 31.
[60] *Miles,* (fn 11), p. 60.
[61] *Pathirana,* (fn 57), p. 7.
[62] *Barrett; Jaichand,* (fn 2), p. 549.
[63] ibid
[64] *Barrett; Jaichand,* (fn 2), p. 550; *Sandeep,* (fn 20), p. 58.
[65] *Barrett; Jaichand,* (fn 2), p. 548.
[66] ibid
[67] ibid.
[68] *Barrett; Jaichand,* (fn 2), p. 550; *Sandeep,* (fn 20), p. 58.
[69] *Petrova,* (fn 38), p. 589; *Barrett; Jaichand,* (fn 2), p. 551.
[70] *Barrett; Jaichand,* (fn 2), p. 550.
[71] UN OHCHR, (fn 18), p. 30.
[72] *Williams,* Mich. J. Int'l L. 28/2007, p. 469, 503.
[73] *Sandeep,* (fn 20), p. 55.
[74] *Sandeep,* (fn 20), p. 59.

the vulnerable and marginalised groups is a consequence of privatisation, one that is extremely worrisome.

All the aforementioned problems were perfectly exemplified in the Cochabamba water war. Due to pressures from the WB, the Bolivian government decided to privatise its water system, granting Aguas del Tunari a 40-year concession contract.[75] Although the contract stipulated maximum price hikes of 20%,[76] this was not abided by. The exact percentage of inflation remains uncertain.[77] Regardless, it was undoubtedly a dramatic escalation in water tariffs, one contrary to the contract, and an amount many in Cochabamba simply could not afford. It did not only affect the poor – "even business owners and those in the middle-class homeowners saw their bills double" and "ordinary workers saw up to a quarter of their monthly salary go to paying water bills".[78] Simultaneously, there were widespread disconnections for those who could not pay.[79] Throughout this, Aguas del Tunari maintained that they had never raised prices more than 34%,[80] and attributed the costly water bills to the wasteful behaviour of residents.[81] However, this explanation is improbable. As persuasively asserted by Cochabamba residents and The Defence of Water and Life, the figures did not add up – "the people knew they were using the same amount as always", as opposed to 5 times more like the bills claimed; "it wasn't possible".[82] Consequently, there were protests, demanding the termination of the contract.[83]

The experience in Cochabamba, along with all other examples illustrated, clearly demonstrate that the concerns people have with water privatisation are valid; they can, and have, materialised. Therefore, privatisation in this sector might not be as beneficial as purported.

E. States' Obligation to Protect

It is generally accepted that a State's human rights obligations run concurrent to that of the MNCs';[84] water privatisation does not relinquish States of their obligations.[85] This notion is in accordance with the Vienna Convention on the Law of Treaties, which prohibits States from

75 *Baer,* Journal of Hum. Rts., 14/2015, p. 353, 354.
76 *Beltran,* Global Issue Paper No. 4, 2004, p. 24.
77 *Beltran,* (fn 76), p. 24; *Baer,* (fn 75), p. 354; *O'Neill,* (fn 38), p. 367.
78 ibid.
79 *Baer,* (fn 75), p. 354.
80 *Beltran,* (fn 76), p. 24.
81 *O'Neill,* (fn 38), p. 367.
82 ibid.
83 *Baer,* (fn 75), p. 354.
84 *Bohoslavsky/ Martin/ Justo,* Int. Law: Rev. Colomb. Derecho. Int. Bogota (Colombia), p. 63, 75; *Thielbörger,* p. 165; *McMurry,* (fn 20), p. 259.
85 *Thielbörger,* p. 165; *Moyo,* (fn 20), p. 818; *McMurry,* (fn 20), p. 259.

using domestic law to escape their Treaty duties,[86] and is an approach confirmed by the Inter-American Court of Human Rights and the UN Human Rights Council.[87]

I. Host State: Obligation to Protect

The host State's obligation to protect against corporate human rights violations is well-established – UN treaty bodies and regional human rights courts and academics have endorsed it.[88] Regarding the HRtW, according to the CESCR in General Comment 15 (GC 15), this obligation requires States to "prevent third parties from interfering in any way with the enjoyment of the right to water", "third parties include… corporations".[89] Where water is privatised, the CESCR clarifies that States failing to "effectively regulate and control" PWCs are in violation of their obligation.[90] States must prevent PWCs from violating the HRtW by establishing "an effective regulatory system… which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance".[91] Although the GC 15 is not legally binding, it is of considerable legal value,[92] with national courts explicitly referencing the GC 15 when rendering decisions.[93] Therefore, when considering it together with the widely accepted obligation of host States to protect against corporate human right violations, there is strong indication that host States have a duty to protect, through the adoption of appropriate national legislations and mechanisms, PWCs from interfering with the HRtW.[94]

II. Home State: Obligation to Protect

A home State's obligation to protect is much less clear-cut.[95] The CESCR alluded to it in GC 15, suggesting that States take steps "to prevent their own…companies from violating the right to water…in other countries".[96] However, as previously noted, GC 15, although influential, is non-binding, and there is insufficient evidence elsewhere to support this idea; a conclusion cannot be drawn based on GC 15 alone. Therefore, as McMurry accurately identified,

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86 *McMurry,* (fn 20), p. 259.

87 *Bohoslavsky/ Martin/ Justo,* (fn 84), p. 75.; *Thor,* Global Bus & Dev. L.J., 26/2013, p. 315, 321.

88 UN Economic and Social Council 29th session, (fn 6); *Ruggie,* American Journal of Int'l L., 101/2007, p. 819, 829; ECtHR, *Lopez Ostra v Spain*, App. No. 16798/90, 09 December 1994; African Commission on Human and People's Rights, *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria,* Case no. 155/96, 27 May 2002, para. 44 ff.

89 UN Economic and Social Council 29th session, (fn 6), Para. 23.

90 UN Economic and Social Council 29th session, (fn 6), Para. 44(b).

91 UN Economic and Social Council 29th session, (fn 6), Para. 24.

92 *Arden,* (fn 1), p. 784; *Scheuring,* UCL J.R., 15/2009, p. 147, 153.

93 *Bulto,* Melb. J. Int'l L. 12/2011, p. 290, 302.

94 *Moyo,* (fn 20), p. 809; *Barrett; Jaichand,* (fn 2), p. 546; UN OHCHR, (fn 18), p. 28; *Chesterman,* NYU J. Int'l L. & Pol. 36/2004, p. 307, 310.

95 *McMurry,* (fn 20), p. 250; *Ruggie,* (fn 88), p. 830.

96 UN Economic and Social Council 29th session, (fn 6), Para. 33.

"more scholarly debate is required, but as of now, it is accepted that there is no impediment to home States regulating the activities of their corporations abroad".[97]

F. Corporate Obligations

Traditionally, States were the sole subjects of human rights law.[98] However, due to the increased role of corporations, many contend that the conventional doctrine is "insufficient"[99] and "an outdated and outmoded view"[100]; international human rights law ought to evolve and reflect today's realities[101], depart from tradition and hold corporations liable for violations[102].

I. Corporations Should Have Obligations

As demonstrated before, it is unquestionable that MNCs are exceedingly financially and politically influential in our globalised market.[103] Their growing power and visibility demand for MNCs' responsibility under international human rights law.[104] The saying, 'with great power comes great responsibility', best encapsulates this first argument. Secondly, knowing that MNCs regularly interfere with human rights like the HRtW, and will continue to do so due to the move toward privatisation, some logically demand accountability.[105] Bilchitz validly argues that "excluding corporate liability can seriously undermine the possibility of realising a wide range of human rights",[106] including the HRtW. As justly identified by Moyo, "the impact [MNCs]…have on the realisation of human rights through their business activities, makes many of the… arguments against imposing human rights obligations on them hard to sustain".[107] Finally, many question why MNCs are able to benefit from international law, such as having separate legal personality, but are able to avoid international responsibility for non-economic, for example, human right, abuses,[108] arguing that surely MNCs should "be subject to the very international law that creates it".[109] Bearing all arguments in mind, the notion that MNCs ought to have obligations under international human rights law is definitively compelling.

[97] *McMurry,* (fn 20), p. 250.
[98] *Petrova,* (fn 38), p. 602; *Wallace,* p. 158.
[99] *Cavallo,* (fn 24), p. 43.
[100] *Wallace,* p. 322.
[101] *Wallace,* p. 181, 191.
[102] *Petrova,* (fn 38), p. 602.
[103] *Petrova,* (fn 38), p. 602; *Russell,* (fn 37), p. 23; *Wallace,* p. 185.
[104] *Wallace,* p. 158, 193; *Alston*, p. 315; *Aguirre,* Afr. Hum. Rts. L.J. 5/2005, p. 239, 264.
[105] *Bilchitz,* (fn 22), p. 211; *Cavallo,* (fn 24), p. 45; *Alston*, p. 143.
[106] *Bilchitz,* (fn 22), p. 211.
[107] *Moyo,* (fn 20), p. 821.
[108] *Bilchitz,* (fn 22), p. 208; *Alston*, p. 172.
[109] *Aguirre,* (fn 104), p. 264; see also *Alston*, p. 174.

II. International Obligations of Corporations

Many, such as Cernic, Cavallo, Ratner & Vazquez, assert that there are no obstacles barring MNCs, including PWCs, from having direct obligations under international law.[110]

1. Corporate Obligations under the ICESCR

While the CESCR has recognised the responsibility of MNCs to realise human rights, confusion remains as to whether there exists a legally binding obligation on MNCs. In GC 18, although the CESCR confirmed that private actors have responsibility regarding the right to work, they then reiterated that the ICESCR is not binding on enterprises.[111] Similarly, in GC 15, the CESCR emphasised that "States… and other actors in a position to assist… [must] provide international assistance and cooperation" to enable developing countries to realise the HRtW.[112] The CESCR's use of broad and vague wording strongly suggests that the HRtW does not yet impose legally binding obligations on MNCs. Further contributing to ambiguity, the CESCR declared that "while only States are parties to the Covenant and thus ultimately accountable for compliance with it, the private business sector has responsibilities in the realisation of the right".[113] It appears that while PWCs could have human right responsibilities under the ICESCR, they are certainly not legally binding, therefore, alternatives must be explored.

2. Corporate Soft Law "Obligations" and Voluntary Initiatives

Although the following means are not legally binding, they are influential in shaping international law.[114] They indicate legal trends,[115] and "a plethora of universally agreed upon voluntary instruments…, when combined with universal human rights law applied over time, become a solid indicator of what behaviour constitutes customary practice".[116]

a) UN Global Compact ("the Compact")

Described as "the world's largest corporate sustainability initiative", the Compact is a purely voluntary initiative calling on companies "to align strategies and operations with universal

[110] *Cernic,* (fn 21), p. 325; *Cavallo,* (fn 24), p. 63; *Ratner*, Yale L.J., 111/2001, p. 443, 488; *Vazquez*, Colum. J. Transnat'l L., 43/2005, p. 927, 930.

[111] UN Economic and Social Council 35th session, General Comment 18, *The right to work,* 6 February 2006, UN Doc. E/C.12/GC/18, Para 52; *Ruggie,* (fn 88), p. 833.

[112] UN Economic and Social Council 29th session, (fn 6), Para. 38; *Bantekas,* (fn 32), p. 316.

[113] UN Economic and Social Council, General Comment 12, *The right to adequate food,* 12 May 1999, UN Doc. E/C.12/1995/5, Para 20; *Cavallo,* (fn 24), p. 62.

[114] *Cavallo,* (fn 24), p. 184, 186; *Petrova,* (fn 38), p. 611; see also *Aguirre,* (fn 104), p. 259; *Bulto,* (fn 93), p. 310.

[115] *Cavallo,* (fn 24), p. 53.

[116] *Aguirre,* (fn 104), p. 259; see also *Beail-Farkas,* Wis. Int'l L.J., 30/2013, p. 761, 778,

principles".[117] Two of the Compact's principles relate to human rights – "businesses should support and respect the protection of internationally proclaimed human rights", and "make sure that they are not complicit in human right abuses".[118] Participating companies must annually report their progress in implementing the Compact's principles[119]. Failure to do so would result in them being listed as "non-communicating" on the Compact website and risk being delisted completely.[120] Moreover, claims of systemic violations of any the principles can be brought to the Compact office, which, if it deems there to be a prima face case, will forward the complaint to the company, request comments and "must be kept informed of any actions taken by the company to address the situation".[121] Regarding PWCs, the Compact would guide their operations, forcing volunteers to consider and respect the HRtW in their policies. Unfortunately, as of September 2019, only half of the leading PWCs are signatories to the Compact.

The reach of the Compact is further limited by the fact that it lacks oversight mechanisms, such as an effective monitoring system, to contest participants who fail to abide by Compact principles,[122] leading Williams to conclude that "it seems unlikely that the Global Compact will play a large role in realising the human right to water".[123] The lack of such means is proving problematic and the annual reporting mechanism mentioned previously has also proven to be inadequate. Contrary to Bantekas' declaration that the Compact's reporting mechanism was adhered to by the majority of companies,[124] a study found that almost 25% of the Compact's participants are non-communicating. Without any effective mechanism in place to weed out the 'fake' participants,[125] 'bluewashing' is tolerated,[126] and the value of the Compact in forcing PWCs to respect the HRtW in their operations is diminished; one could argue that it even completely disappears, since no human right considerations must be made in practice, thereby turning the Compact into a mere marketing tool.[127] While the Compact "may not seem to be an efficient means" of curbing corporate human right violations,[128] it still had a vital form of success – it increased international corporate awareness of not only the concept of corporate social responsibility (CSR), but also the fact that their business activities almost

[117] *UN Global Compact,* Who Are We, https://www.unglobalcompact.org/what-is-gc (last accessed on 29/10/19).
[118] *UN Global Compact,* The Ten Principles of the UN Global Compact, https://www.unglobalcompact.org/what-is-gc/mission/principles (last accessed on 29/10/19).
[119] ibid.
[120] ibid.
[121] *Dias,* (fn 18), p. 515 – 516.
[122] *Petrova,* (fn 38), p. 604; *Williams,* (fn 72), p. 488; *Wallace,* p. 236.
[123] *Williams,* (fn 72), p. 488.
[124] *Bantekas,* (fn 32), p. 320.
[125] *Zenkiewicz,* Rev. Int'l L & Pol., 12/2016, p. 121, 138.
[126] The term 'bluewashing' is when corporations use the UN blue flag to appear compliant with human rights standards. See: *Wallace,* p. 237.
[127] *Chesterman,* (fn 94), p. 328.
[128] *Chesterman,* (fn 94), p. 329.

always have human right implications.[129] Regardless, due to the voluntary nature of the Compact and its lack of oversight mechanisms, no adequate human right obligations are imposed on PWCs.

b) CEO Water Mandate ("the Mandate")

Participants of the Compact can also opt to join the CEO Water Mandate. Recognising the critical role corporations play in addressing the global water crisis,[130] the Mandate provides companies with strategies on operating in a way that "promotes and fosters the sustainable and equitable management" of water, thereby addressing problems relating to water deprivation and promotes sustainability.[131] Endorsing States commit to adopting the Mandate's blueprints in its operations and are to report annually on their progress. The Mandate is particularly beneficial for PWCs; by offering sector-specific guidelines, it is more likely to be understood and applied by PWCs, obliging them to act in accordance with the HRtW. However, the Mandate has shortcomings similar to that of the Compact. Unsurprisingly, due to its voluntary nature, its scope of application is extremely limited. Only 2 major PWCs have endorsed the Mandate.[132] Moreover, just like the Compact, this Mandate lacks an oversight mechanism. Furthermore, it is probable that the Mandate faces equal challenges with non-communicating parties that the Compact encounters. These defects in the Mandate cast strong doubt on its effectiveness and, like the Compact, fails to impose sufficient human right obligations on PWCs.

c) OECD Guidelines for Multinational Enterprises ("the Guidelines")

The Guidelines are equally non-binding.[133] Described as "recommendations addressed by governments to multinational enterprises",[134] this voluntary initiative lays down standards of best practice for MNCs. Recognising that corporations impact human rights, the Guidelines stress that MNCs should respect and void violating human rights, and find ways to mitigate or prevent their abuse, adopt corporate policy codifying this commitment, carry out appropriate human rights due diligence and provide for remedies when necessary.[135] Per the Guidelines, the minimum standard of human rights that MNCs ought to abide by includes the ICESCR, thereby indirectly encompassing the HRtW.[136] As of 2019, the Guidelines apply to

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[129] *Aguirre,* (fn 104), p. 252; *Wallace,* p. 236.
[130] *The Global Compact,* The CEO Water Mandate, 2011, p. 3.
[131] *CEO Water Mandate,* What is Water Stewardship?, https://ceowatermandate.org/course/101-the-basics/lessons/what-is-water-stewardship/ (last accessed 22/10/2019).
[132] *CEO Water Mandate,* Endorsing Companies, https://ceowatermandate.org/about/endorsing-companies/ (last accessed 22/10/2019).
[133] OECD Guidelines for Multinational Enterprises, 2011, p. 3.
[134] ibid.
[135] OECD Guidelines for Multinational Enterprises, 2011, pt. 40.
[136] OECD Guidelines for Multinational Enterprises, 2011, pt. 39.

MNCs operating in or from OECD States and 12 non-members.[137] The inclusion of MNCs operating from participating States is beneficial, pragmatic and broadens the scope of application by ensuring that the Guidelines are also able to target MNCs operating in non-participating States. Participating States are additionally required to establish and maintain National Contact Points (NCPs) to promote national observance of the Guidelines and deal with local complaints against MNCs.[138] NCPs have the potential and capabilities to effectively stop MNCs from continuing harmful corporate activity. For example, in 2013, an NGO brought a claim to the UK NCP, alleging that Soco International's oil exploration on an UNESCO site had the potential to cause adverse human right impacts, in violation of the Guidelines.[139] The NCP appointed a mediator and a settlement was reached between the parties – one that barred the MNC from continuing their current operation and any future operations on UNESCO sites.[140] Although this case is not water-specific, it is still relevant as it exemplifies the power and ability of the NCP to halt current and even future operations that bear human right risks. Unfortunately, this might be too idealistic. There is scepticism about the independence and effectiveness of NCPs; many strongly believe that the bodies monitoring the NCPs, the OECD Investment Committee and the Working Party on Responsible Business Conduct, consist of State officials, and therefore are likely to prioritise economic interests, resulting in NCPs having an innate pro-business bias.[141] Whilst this may be true, it does not completely undermine the value of the NCPs and the Guidelines. The Guidelines are government-backed recommendations hence indicative of what participating States deem to be standards they can agree upon. Moreover, considering the current surge in complaints NCPs deal with[142], questions regarding effectiveness of NCPs ought to be revisited in the future, since there exists, as of now, insufficient evidence. Regardless, owing to the existence of NCPs, despite the Guidelines' non-binding nature, MNCs operating in or from participating States do have, to some extent, obligations to respect the HRtW.

d) UN draft Norms ("the Norms")

While maintaining the State as the primary duty holder, the Norms was the first non-voluntary initiative that imposed direct, legally binding, international human right obligations on MNCs.[143] Claiming to "derive legal authority from their sources in treaties and customary in-

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[137] *OECD,* About the OECD Guidelines for Multinational Enterprises, https://mneguidelines.oecd.org/about/ (last accessed on 29/10/19).

[138] *Bantekas,* (fn 32), p. 319; *Ewelukwa,* Int'l Law, 49/2015, p. 179, 190; *Cavallo,* (fn 24), p. 56; *OECD,* (fn 137).

[139] *UK NCP,* Complaint from WWF International against Soco International Plc, 2014; *Ewelukwa,* (fn 138), p.190.

[140] *Ewelukwa,* (fn 138), p. 191.

[141] *Wallace,* p. 278, 279; *Petrova,* (fn 38), p. 604.

[142] *Cavallo,* (fn 24), p. 56.

[143] *Bantekas,* (fn 32), p. 319; *Bilchitz,* (fn 22), p. 201; *Ruggie,* (fn 88), p. 820, 832; *Russell,* (fn 37), p. 3; *Petrova,* (fn 38), p. 606.

ternational law",[144] the Norms emphasised that "within their respective spheres of activity and influence", MNCs have obligations to "promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international law as well as national law", including the HRtW, as specifically mentioned in the Norms.[145] Its Commentary outlined six corporate obligations: to use due diligence to ensure corporate activities are not contributing to human right abuses in any way; to protect against benefitting from such violations; to not undermine efforts promoting and safeguarding human rights; to utilise their influence to promote respect for human rights; to assess their human right impact; and to avoid complicity in human right abuses.[146] The Norms would have bound all PWCs, imposing upon them legally binding human right obligations to protect the HRtW,[147] thereby minimising the negative impacts PWCs have on the HRtW; at the minimum, they would have been expected to provide the basic needs for access to clean water that the HRtW demands.[148]

The revolutionary scope of application of the Norms would have been invaluable to the protection of the HRtW against PWCs. Disappointingly but understandably, whilst it acknowledged the "useful elements and ideas", the UN Commission on Human Rights rejected the Norms on grounds that it lacked legal standing.[149] This critique is echoed by many;[150] the Commission was not convinced that the Norms were restatements of international legal principles applicable to companies as claimed, and subsequently appointed a Special Representative on the Issue of Business and Human Rights, John Ruggie, tasked with identifying existing legal principles.[151] Later, Ruggie confirmed the Commission's suspicions.[152] Nevertheless, as proclaimed by NGOs and academics, the Norms represented a "pivotal step in the right direction",[153] and something future regulations could build on and improve.[154] Petrova describes the Norms as "an invaluable tool for ensuring that water privatisation will not

[144] *Ruggie,* (fn 88), p. 832.

[145] UN Sub-Commission on the Promotion and Protection of Human Rights 55th session, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* of 16 August 2003, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2.

[146] *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,* August 2003, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2.

[147] *Williams,* (fn 72), p. 490; *Petrova,* (fn 38), p. 607.

[148] *Williams,* (fn 72), p. 490.

[149] *Cavallo,* (fn 24), p. 59; *UN Commission on Human Rights,* RES 2004/116, *Responsibilities of transnational corporations and related business enterprises with regard to human rights* of December 2004, UN Doc. E/CN.4/2004/127.

[150] *Petrova,* (fn 38), p. 606; *Ruggie,* (fn 88), p. 827; *Bilchitz,* (fn 22), p. 205; Ruggie, Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises of 22/02/2006, UN Doc. E/CN.4/2006/97; *Russell,* (fn 37), p. 4.

[151] *Ruggie,* (fn 88), p. 827.

[152] *Ruggie,* (fn 88), p. 821.

[153] *Wallace,* p. 241; *Aguirre,* (fn 104), p. 260; *Williams,* (fn 72), p. 491; *Weissbrodt*, Int'l Law FORUM du droit int'l, 7/2005, p. 290, 292.

[154] *Aguirre,* (fn 104), p. 257.

endanger, and will promote the realisation of, the human right to water",[155] however, as it currently stands, the Norms have no effect on PWCs.

e) Ruggie's Protect, Respect and Remedy Framework ("the Framework")

As mentioned previously, while the Norms were not adopted, Ruggie was appointed to determine the human right obligations corporations have or should have. Accordingly, in 2008, Ruggie presented the Protect, Respect and Remedy Framework, which comprised three pillars. Firstly, it reiterated the State's duty to protect against human right abuses committed by third parties; secondly, it stressed the need for more accessible remedies; finally and most importantly, it emphasised the corporate responsibility to respect human rights, which includes the exercise of due diligence to avoid human right violations.[156] Per Russell, this would involve corporations "adopting a human right policy… undertaking human right impact assessments and tracking ongoing developments through both monitoring and auditing processes".[157] Additionally, Ruggie recognised that for corporations performing public functions, this duty might "require that positive steps be adopted to ensure that negative consequences do not result from corporate action"[158]; PWCs would definitely fall under this category, thereby providing an additional safeguard for the HRtW and curtail their disregard for this right. However, its potential impact and effectiveness in strengthening the human right responsibilities of MNCs was diminished due to its non-binding nature, leaving many disappointed. Weissbrodt, the architect of the Norms, accused Ruggie of "derail[ing] the standard setting process and bow[ing] to the corporate refusal to accept any standards except voluntary codes".[159] Nevertheless, the UN Human Rights Council unanimously adopted Ruggie's Framework, and sought to operationalise it.[160]

f) UN Guiding Principles on Business and Human Rights (GP)

The GP essentially expounds how corporations ought to operate to abide by the Framework and ensure that their corporate activities respected human rights.[161] The GP also targets financial institutions, "encouraging them to apply the principles when formulating their policies for loans and grants".[162] If adopted, it could transform the water privatisation sector. States pressured by financial institutions to privatise their water would see value in and prioritise the

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[155] *Petrova,* (fn 38), p. 608.
[156] Ruggie, Protect, Respect and Remedy: A Framework for Business and Human Rights of 07/04/2008, UN Doc. A/HRC/8/5; *Russell,* (fn 37), p. 5; *Bohoslavsky/ Martin/ Justo,* (fn 84), p. 72.
[157] *Russell,* (fn 37), p. 5; see also *Bilchitz,* (fn 22), p. 204.
[158] *Bilchitz,* (fn 22), p. 206.
[159] *Weissbrodt,* Berk. J. Int'l L. 26/2008, p. 373, 390.
[160] UN Human Rights Council, Res. 8/7, 18 June 2008, UN Doc. A/HRC Res/8/7.
[161] *Guaghran,* (fn 36), p. 52; *UN Working Group on Business and Human Rights,* Statement on the implications of the Guiding Principles on Business and Human Rights, 2014, p. 8; *Moyo,* (fn 20), p. 821; *Shift,* Human Rights Due Diligence in High Risk Circumstances, 2015, p.3
[162] *Ewelukwa,* (fn 138), p. 181.

HRtW during negotiations with PWCs and therefore be less likely to be exploited by them. Additionally, financial institutions would be forced to think twice before demanding water privatisation. However, the GP is non-binding and does not, on its own, establish any enforcement mechanisms. It is therefore, in practice, weak and ineffective in policing PWCs.[163]

A Working Group was established by the UN Human Rights Council,[164] with one of its aims being, to promote the Framework and improve the GP.[165] With the Working Group certainly aware of its above highlighted flaws, the GP could improve in the future, providing for more practically effective and operative principles obliging PWCs to fulfil the HRtW.

III. International Investment Arbitration

When water is privatised and concession is granted to a foreign investor, the relationship between State and PWC is governed not just by their concession contract, but also by the Bilateral Investment Treaty (BIT) between the State the PWC has invested in (i.e. the host State) and the State where the PWC has nationality (i.e. the home State). BITs nowadays always include an arbitration clause – if a dispute between parties arises, it will be settled through international arbitration. The BIT also includes standards protecting the foreign investor, such as the guarantee of fair and equitable treatment and protection against unlawful expropriation. This means that when investors feel that their standards of protection were violated due to any decision of the State, "the corporation is entitled to go to international arbitration"[166]. The claim will probably be submitted to the ICSID, which has dealt with disputes involving PWCs and States before,[167] with Thielbörger even claiming that "for now, ICSID arbitrators remain most crucial in deciding on issues related to the human right to water".[168]

1. ICSID Cases

When scrutinising ICSID cases regarding water privatisation, there is strong indication that ICSID arbitrators seem to favour the rights of the PWCs, often disregarding the HRtW.[169]

For example, succumbing to pressures from the WB and the IMF, Tanzania privatised their water and the contract was awarded to City Water Services (City), which was essentially controlled by Biwater, a UK-based company.[170] From the beginning, City underinvested, failed to fulfil their contractual agreements of improving Tanzania's water infrastructure and

[163] *Guaghran,* (fn 36), p. 52.
[164] UN Human Rights Council Res. 26/9, 14 July 2014, UN Doc. A/HRC/Res/26/9.
[165] UN Human Rights Council Res. 26/9, (fn 164); *van Dorp,* p. 18.
[166] *Bohoslavsky/ Martin/ Justo,* (fn 84), p. 84; *McMurry,* (fn 20), p. 256.
[167] *McMurry,* (fn 20), p. 256.
[168] *Thielbörger,* p. 167.
[169] *McMurry,* (fn 20), p. 257.
[170] *Miles,* (fn 11), p. 66.

yet attempted to raise water prices.[171] Consequently, the Tanzanian government terminated City's contract and deported its top executives.[172] Based on the UK-Tanzania BIT, BiWater brought a claim to ICSID, alleging breaches of their standards of protection.[173] Subsequently, although no compensation was due, the arbitral tribunal did find that Tanzania illegally expropriated the foreign investment.[174] Additionally, the tribunal did not comment on "any relationship between the human right to water, the termination of the contract and the rights of the investor";[175] this is despite the fact that City's corporate activities, or rather, lack thereof, clearly directly hindered the realisation of the HRtW in Tanzania, and signalled the tribunal's unwillingness to consider relevant aspects external to the investment, such as human rights, choosing instead to prioritise the investor's interests. This reluctance was confirmed in the ICSID case involving Border Timbers, where the tribunal wrongfully found there not to be an interdependence between international investment law and international human rights law.[176] This finding blatantly contradicts reality – as previously illustrated, corporations do have human rights impacts. Additionally, the realisation of the HRtW when water is privatised is surely dependent, at least to some extent, on the operating PWC.[177] Similarly, in the case concerning Vivendi Water, an arbitrary tribunal granted an award in favour of the investor, without even referencing Argentina's HRtW arguments.[178] Comparable was the case involving Buenos Aires' 30-year water privatisation concession contract granted to Azurix, a US company.[179] When water was found to be polluted and undrinkable, leading the government to warn people against drinking the water and to "minimise exposure to it through limiting showers and baths", considering it a risk to public health,[180] the authorities fined Azurix for breach of contract regarding water quality, and issued regulations barring the company from collecting tariffs for the period of contamination.[181] Based on the US-Argentina BIT, Azurix brought a claim to ICSID, alleging violation of standards of protection, due to the regulatory action taken by Argentina.[182] Unsurprisingly, the tribunal granted an award in favour of Azurix, citing "the legitimate expectation of the investor at the time of entering into the investment, the investor's right to know beforehand any rules and regulations that would govern the investment and the presupposition of a favourable disposition towards foreign investment".[183]

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[171] *Miles,* (fn 11), p. 67.
[172] *Miles,* (fn 11), p. 67; *Rice,* Biwater fails in Tanzanian damages claim, https://www.theguardian.com/business/2008/jul/28/utilities.tanzania (last accessed 29/10/19)
[173] *Miles,* (fn 11), p. 67.
[174] *Bohoslavsky/ Martin/ Justo,* (fn 84), p. 89; *Miles,* (fn 11), p. 68.
[175] *Bohoslavsky/ Martin/ Justo,* (fn 84), p. 89.
[176] *Bohoslavsky/ Martin/ Justo,* (fn 84), p. 91.
[177] *Arden,* (fn 1), p. 783; *Cavallo,* (fn 24), p. 48.
[178] *Arden,* (fn 1), p. 782.
[179] *Miles,* (fn 11), p. 64.
[180] *Miles,* (fn 11), p. 65.
[181] *Miles,* (fn 11), p. 65; *Chazournes,* p.220.
[182] *Miles,* (fn 11), p. 65.
[183] ibid.

Although the regulation was adopted to protect its citizens after the public health scare caused by Azurix's abuse of the HRtW, the tribunal hardly considered the human rights, instead focusing solely on the legitimate expectations of the investor, leaving one wondering about the expectations of the Argentinians and their HRtW. With many similar cases, it is evident that arbitral tribunals fail to strike a fair balance between the HRtW and the interests of PWCs, often to the complete disregard of the HRtW.

However, then came the Urbaser case, which human rights lawyers believe "signal[led] a way to hold corporations liable for human right violations under public international law".[184] Buenos Aires privatised their water and granted a concession contract to AGBA, of which Urbaser, a Spanish company, was a majority shareholder. Due to the financial crisis, Argentina froze tariffs and Urbaser took to ICSID and claimed that this adversely affected their economic equation that prompted the contract, alleging a violation of standards of protection pursuant to the Spain-Argentina BIT.[185] Argentina counterclaimed, arguing "that the contract gave rise to bona fide expectations" that Urbaser would invest, and when they failed to do so, resulted in AGBA's failure to perform their contractual obligations of expanding water coverage, thereby violating good faith principles and impacting human rights.[186] Argentina argued that since both BIT parties had ratified certain human right treaties and the purpose of the contract was to "guarantee access to water", Urbaser had obligations toward the realisation of the HRtW.[187] Urbaser responded by arguing that "human rights bind States, not private parties",[188] additionally claiming that it is "widely recognised" that foreign investors and host States are treated differently – "States cannot counterclaim, do not have rights under the BIT and BITs do not impose obligations on [foreign] investors".[189] Revolutionarily, the tribunal found nothing to suggest that the BIT precluded the host State from having rights and explained that the BIT must be read in harmony with other international law, such as human rights law.[190] Moreover, the tribunal asserted that the approach adopted by previous tribunals "has lost impact and relevant"[191], suggesting that PWCs could bear obligations regarding the HRtW.[192] The tribunal identified 3 core human right obligations of corporations. Firstly, to not "engage in activity aimed at destroying human rights". Secondly, to perform; "investors can only be obligated to provide water on the basis of private contractual law" and "must fulfil these contractual obligations in a way that does not violate general international law".[193] Fi-

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[184] *Crow/Escobar,* B.U. Int'l L. J., 36/2018, p. 87, 88.
[185] *Crow/Escobar,* (fn 184), p. 92.
[186] *Crow/Escobar,* (fn 184), p.93.
[187] ibid.
[188] ibid.
[189] *Crow/Escobar,* (fn 184), p. 96.
[190] *Crow/Escobar,* (fn 184), p. 97.
[191] ibid.
[192] ibid.
[193] *Crow/Escobar,* (fn 184), p. 105.

nally, to abstain from corporate activity contrary to international law, including human rights and humanitarian law.[194] This case was radically different from previous, and as accurately expressed by Crow, "this case is considered to be a victory for human rights, a step toward greater international corporate responsibility and a counterweight to the past inequality of the system".[195] While these findings only apply to this specific case and are not binding on any other tribunal, this bold step toward finally recognising the impact water privatisation has on the HRtW supports the clear trend toward imposing international human right obligations on corporations,[196] and will hopefully inspire more tribunals in future cases to adopt the same balanced approach.

2. Problems with ICSID

Since the ICSID is funded by the WB and considering the WB's continuous advocation for water privatisation, some question ICSID's partiality in water privatisation cases. For example, in reference to the Cochabamba case, the Municipal Council of San Francisco wrote a letter to ICSID demanding the case to stop – "from our point of view, ICSID and the World Bank should not even be dealing with this issue…[because] the World Bank is not a neutral party in this matter."[197] This conflict of interest might explain arbitral tribunals' initial disregard for the HRtW despite the glaring correlation between the investment and the breach of the HRtW.

Additionally, ICSID arbitrations generally prohibit third party participation – they cannot access documents, make submissions or attend hearings.[198] Miles accurately labels this restriction as "entirely inappropriate in disputes involving public interest matters, especially where the issues revolve around the access to water",[199] since arbitrators in such cases make decisions affecting the peoples HRtW.[200] Arbitral tribunals have previously recognised this relationship, expressing that "the factor that gives this case particular public interest is that the investment dispute centres around the water distribution… Those systems provide basic public services to millions of people… Any decision rendered in this case… has the potential to affect the operation of those systems and the public they serve".[201] In the Cochabamba case, on grounds that "the outcome of the case would have an immediate and profound impact" on the people,[202] NGOs and the public requested to access submissions, for a

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194 *Crow/Escobar,* (fn 184), p. 106.
195 *Crow/Escobar,* (fn 184), p. 91.
196 *Crow/Escobar,* (fn 184), p. 95.
197 *Beltran,* (fn 76), p. 40.
198 *Miles,* (fn 11), p. 67; *McMurry,* (fn 20), p. 249; *Thielbörger,* p. 165.
199 *Miles,* (fn 11), p. 68.
200 *Thielbörger,* p. 166.
201 ICSID, *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal SA v Argentine Republic,* ICSID Case No. ARB/03/19, Order (19 May 2005), para 19.
202 *O'Neill,* (fn 38), p. 373.

public hearing and for the tribunal to visit Bolivia directly to conduct a fact-finding mission.[203] Disappointingly, the tribunal rejected the request although this matter was unmistakably of public interest.[204] This flawed system leaves the people who are arguably most affected by the decision in the dark and could be considered a violation of the right to participate,[205] which will subsequently be examined further. Thankfully, in 2006, the ICSID Arbitration Rules were amended to increase third party participation.[206] The aforementioned case of Biwater v Tanzania was the first case where the tribunal allowed NGOs and other stakeholders to make submissions during the ICSID procedure.[207] With over half of such requests being granted throughout the years,[208] we can expect issues with third party involvement in the ICSID procedure to soon be a thing of the past.[209]

IV. Regional Human Right Obligations of Corporations

Corporations can also be granted human rights obligations through regional mechanisms.

1. Europe

a) EU Non-Financial Reporting Directive (2014/95/EU)

This directive entered into force in 2014, obliging certain large companies operating abroad to submit non-financial statements.[210] More specifically, the report should "include information on the prevention of human rights abuses",[211] describe "policies pursued… including due diligence processes implemented",[212] and even highlight human right risks related to their operations and how the risks are being managed.[213] Almost all major PWCs come from EU States,[214] and it is unquestionable that this directive applies to them, considering their size and public interest,[215] therefore requiring them to publish non-financial statements, the first one being due just last year. However, since this directive is in "an incipient phase, assessing its impact on the extent to which businesses respect human rights will take some

[203] *Chazournes,* p.223.
[204] *Chazournes,* p.223.
[205] *Thielbörger,* p. 165.
[206] ICSID Convention, Regulations and Rules of 10/4/2006, Arbitration Rule 37(2).
[207] ICSID, *Biwater Gauff Ltd. and United Republic of Tanzania,* ICSID Case No. ARB/05/22, Amicus Curiae Submission (26 March 2007).
[208] *ICSID,* About ICSID Amendments, https://icsid.worldbank.org/en/amendments/Pages/About/about.aspx (last accessed 29/10/19).
[209] *Arden,* (fn 1), p. 783.
[210] Directive (EU) 2014/95/EU of 22 October 2014 regarding disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330/1, 15/11/2014, preamble 6, (NFR Directive).
[211] NFR Directive, (fn 210), preamble 7.
[212] NFR Directive, (fn 210), Art. 19(a)1.(b).
[213] NFR Directive, (fn 210), Art. 19(a)1.(d).
[214] E.g.: Suez, Veolia Environment, Saur, ACEA, Biwater PLC, Thames Ltd. Aguas de Barcelona, REW AG.
[215] NFR Directive, (fn 210), Art. 19, Art. 27.

time".[216] Nevertheless, this directive will force PWCs to at least consider the impacts to the HRtW while operating, and hopefully deter them from conducting activities in violation of the HRtW.

b) Council of Europe's recommendations to implement the GP

After the GP was published, the Council of Europe (CoE) declared their "strong support for the implementation of the UN Guiding Principles by member States", on grounds that corporations have a responsibility toward the realisation of human rights, and that the GP is "essential to ensure respect for human rights in the business context".[217] States were called to "take appropriate steps to protect against human rights abuses by business enterprises", adopt policies ensuring that corporations "respect human rights throughout their operations, within and beyond their national jurisdiction", provide effective remedies and develop a National Action Plan (NAP) to implement the GP.[218] Subsequently, the CoE interestingly suggested States "give due consideration to statements, general comments… provided by competent monitoring bodies, relating to the human rights provisions of relevant international and regional conventions".[219] This indicates that, even if the State is not party to the ICESCR, the CESCR's general comments about corporate human right obligations ought to be considered when States amend their domestic law to implement the GP. Since the CESCR's comments are human rights centred, they could influence States to expand national human rights protections to account for corporate abuse. PWCs operating in or incorporated into CoE member States would be bound by domestic laws implementing the GP, which in turn imposes corporate human right obligations on PWCs.

c) EU Action Plan

Despite its endorsement of the GP years prior, the EU has largely failed to implement it.[220] According to the European Parliament Working Group on Responsible Business Conduct (RBC), considering the EU's global economic and political influence, it "carries a particular responsibility to prove leadership in the promotion and protection of human rights against business-related human rights abuses".[221] Therefore, in 2019, the RBC recommended an EU

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[216] *Zamfir,* Towards a binding international treaty on business and human rights, http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630266/EPRS_BRI(2018)630266_EN.pdf (last accessed on 29/10/19).

[217] Committee of Ministers, Declaration on the UN Guiding Principles on business and human Rights, 16 April 2014, 1197th meeting of Ministers' Deputies, pts. 6, 9 and 10.

[218] Committee of Ministers, (fn 217) pt. 10.

[219] Council of Europe Recommendation on human rights and business, 2 March 2016, CM/Rec (2016)3, pt. 4.

[220] *Responsible Business Conduct Working Group,* Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU, https://responsiblebusinessconduct.eu/wp/wp-content/uploads/2019/03/SHADOW-EU-Action-Plan-on-Business-and-Human-Rights.pdf (last accessed 29/10/19)

[221] ibid.

Action Plan be taken, which would establish the necessary steps toward a standardised application of the GP to all corporations domiciled or operating in the EU.[222] The RBC published the Shadow Action Plan,[223] which is a mere template, and it is for the Commission and EEAS to eventually develop the actual EU Action Plan. Such a plan would be invaluable as it would ensure uniformity across EU businesses, all of which would have direct human rights obligations as suggested by the GP. Right now, uncertainty regarding the content of the proposed EU Action Plan, if it even ever materialises, remains, and it ought to be revisited in the future.

d) Green Card Initiative

This initiative demands "a duty of care towards individuals and communities whose human rights…have been affected by the activities of EU-based companies."[224] This would impose direct obligations on corporations to respect human rights wherever they operate, including PWCs and the HRtW, which would be revolutionary. Disappointingly, although 8 EU member States are in favour of such an initiative, the European Commission expressed that it has "no plans to adopt further legislation at this stage".[225]

One thing is certain – the EU and its members have displayed awareness of the need and readiness to regulate their corporations' human right violations, which is, very promising.

2. Americas

a) Antigua Declaration and Action Plan

Sparked by concern stemming from "the mass privatisation of public services" which has led to widespread human rights abuses,[226] the Network of National Human Rights Institutions of the Americas adopted an action plan[227] which set out objectives for National Human Rights Institutions (NHRIs) to promote "business and human rights… and the strengthening of legal frameworks on business and human rights".[228] However, few improvements were subsequently made by NHRIs,[229] with the UN Working Group later reporting that the region was deficient in terms of "corporate acquaintance with the Guiding Principles".[230] Whilst the Network's indirect acknowledgement of the problems with water privatisation was significant, the fact remains that this action plan failed to trigger any substantial improvements – a disappointing outcome.

[222] ibid.
[223] ibid.
[224] *Zamfir,* (fn 216).
[225] *Zamfir,*(fn 216).
[226] *Rivera,* L'Observateur des Nations Unies, 35/2013, p.54, 75.
[227] Network of National Human Rights Institutions of the Americas, Antigua Declaration and Action Plan (November 11, 2011)
[228] *Rivera,* (fn 226), p. 75.
[229] ibid.
[230] ibid.

b) Endorsing the GP

In the Americas, the Organization of American States (OAS) endorsed the GP, encouraging member States "to foster constructive dialogue among business, government and civil society and other social stakeholders, for application of the Guiding Principles".[231] In reference to CSR, the OAS adopted a resolution encouraging member States to advocate for businesses in their State to apply relevant voluntary CSR initiatives, such as the GP, and to encourage cooperation between the private sector and legislative bodies.[232] A similar sentiment was expressed by the OAS in 2014, which called for the continued promotion and application of the GP.[233] However, Rivera accurately identified that, in comparison to Europe, the OAS "has taken much slower steps" in introducing corporate human rights obligations.[234] Nonetheless, its endorsement of the GP is progress, albeit one that has yet to materialise.

3. Asia

Due to the total absence of regional human rights organisations or Conventions, attributing corporate human rights obligations in Asia is difficult.[235] The problem becomes evident when examining the NAPs on business and human rights in Asia. Despite the Working Group and others' years of insistence for governments to develop NAPs,[236] till now, only one Asian country, Indonesia, has published a NAP.[237] This is exacerbated by the fact that none of the regional organisations have any specific mandate regarding human rights,[238] and all human rights mechanisms "remain toothless and lack independence".[239] Regarding businesses and human rights, "the region is lagging behind others, especially Europe".[240] The Working Group persuasively asserts that Asia's regional organisations "should play a bigger and more prominent part in promoting implementation of the Guiding Principles and ensuring that focus on

[231] OAS GA, *Promotion and Protection of Human Rights in Business* of 4/6/14, AG/Res 2840 (XLIV-O/14), pt 3.
[232] OAS GA, *Promotion of Corporate Social Responsibility in the Hemisphere* of 4/6/12, AG/Res. 2753 (XLII-O/12).
[233] OAS GA, *Draft Resolution on promotion and protection of human rights in business* of 4/6/14, AG. Doc. 5452/14 rev.1.
[234] *Rivera,* (fn 226), p.55.
[235] *Friends of the Earth Asia Pacific,* Can Asia (and the UN) hold corporations accountable?, https://thediplomat.com/2018/10/can-asia-and-the-un-hold-corporations-accountable/ (last accessed 29/10/19)
[236] UN Human Rights Council, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on the Asia Forum on Business and Human Rights* of 30 May 2016, UN Doc. A/HRC/32/45/Add.2., para. 21.
[237] *Business & Human Rights Resource Centre,* National Action Plans, https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans (last accessed 29/10/19).
[238] i.e. the Association for Southeast Asian Nations, the South Asian Association for Regional Cooperation, the Asia Cooperation Dialogue and the Cooperation Council for the Arab States of the Gulf.
[239] *Middleton/Pritchard,* Corporate Accountability in ASEAN: A Human Rights-Based Approach, 2013, p. 78.
[240] UN Human Rights Council, (fn 236), para. 21.

economic growth does not ignore human rights".[241] However, there is nothing to suggest that these regional organisations are willing or intend to do so. A more promising route toward progress can be found elsewhere – a handful of Asian countries have plans to develop NAPs, with India already publishing a zero draft.[242] Until they are adopted, it is unlikely that much change will be made toward attributing corporate human right obligations in the region.

4. Africa

Human rights issues in Africa are governed by the Constitutive Act of the African Union. Unfortunately, this Act does not impose upon corporations' human rights obligations.[243] When considering the heavy reliance of many African States on investment by foreign corporations to develop, "this makes the regulation of corporations extremely difficult"[244] and unlikely, so as to not deter foreign investors. Unsurprisingly, no African country has adopted a NAP.[245] Due to the dependent relationship between many African countries and foreign investors, developments in the area of business and human rights remain, as of now, implausible.

V. National Obligations of Corporations

National laws also have the potential to impose obligations on PWCs to ensure that they protect the HRtW. Cernic even asserts that corporate obligations regarding the HRtW "derive primarily from national legal orders and only secondarily from the international level".[246]

1. Horizontal Application of Human Rights under National Laws

Certain jurisdictions such as South Africa, Ireland, Germany and India allow for the direct horizontal application of human rights.[247] This would mean that PWCs there could have direct human right obligations regarding the HRtW. While this is seemingly straightforward, the State would first have to recognise the HRtW, either under national law or through the ratification of the ICESCR; there are not many States that satisfy the 2-step process required for the HRtW to have direct horizontal application binding PWCs, hence, this approach is not widely used.

[241] UN Human Rights Council, (fn 236), para. 89.
[242] *Business & Human Rights Resource Centre,* (fn 237).
[243] *Aguirre,* (fn 104), p. 253.
[244] ibid.
[245] *Business & Human Rights Resource Centre,* (fn 237).
[246] *Cernic,* (fn 21), p. 318.
[247] *Cernic,* (fn 21), p. 333; South African Constitution Bill of Rights, 1996, s9; Irish Constitution, BVerfGe, *Lüth,* 7 198, 15 January 1958; Supreme Court of India, *MC Mehta v Union of India and Others,* 1987 SCR(1) 819, 20 December 1986.

2. National laws protecting the HRtW

Many States have national laws directly recognising and protecting the HRtW, and PWCs operating in such States are bound by them.[248] Confirming this, an expert legal panel on corporate complicity "found that in a number of countries, domestic constitutional or human right provisions do provide for a direct cause of action against…companies".[249] Some States grant the ICESCR constitutional status,[250] and some States recognise the HRtW directly under domestic laws,[251] with some even granting it constitutional status.[252] There, PWCs can be held liable for violating the HRtW, as protected under national law, even if such standards are not explicitly included in their concession contract.[253] For example, some national laws require water pricing to be made "public, proportionate, equitable and reasonable",[254] and some national courts have considered the disconnection of water for non-payment a violation of the HRtW protected under national law.[255] However, even where there are domestic laws protecting the HRtW, they are badly enforced.[256] For example, although South Africa's constitution recognises the HRtW, its protection remains relatively poor, with Baer even labelling it an "empty gesture".[257] Similarly, even in Canada, failures to enforce environmental laws that protect the HRtW are frequent.[258] Nevertheless, the significance of incorporating the HRtW into national legislation is widely recognised;[259] doing so grants individuals legal redress should the HRtW be violated.[260] For example, in reference to the South African constitutional recognition of the HRtW, Mirosa and Harris noted that it "enabled activists to have their case heard in the highest court, generating the momentum required…to eventually make policy changes"[261]. For States with privatised water, having national laws protecting the HRtW would impose direct human right obligations on the PWCs, ensuring the realisation of the HRtW.

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[248] *Cernic,* (fn 21), p. 319, 323.
[249] *Cernic,* (fn 21), p. 319, 321.
[250] Federal Constitution of Argentina, 1994, Art. 75; Constitution of Colombia, 1991, Art. 93.
[251] *Bohoslavsky/ Martin/ Justo,* (fn 84), p. 74; *Cernic,* (fn 21), p. 319, 322.
[252] For examples, see Constitutions of Ecuardor, Bolivia, Uruguay, South Africa and India.
[253] *Bohoslavsky/ Martin/ Justo,* (fn 84), p. 75; UN OHCHR, (fn 18), p. 31.
[254] *Bohoslavsky/ Martin/ Justo,* (fn 84), p. 79.
[255] *Bohoslavsky/ Martin/ Justo,* (fn 84), p. 80.
[256] *Baer,* (fn 75), p. 356; *Karunananthan,* (fn 19), p. 246; *Collins,* Rev. Eur. Comp. & Int'l Envtl. L., 19/2010, p. 351, 361.
[257] *Baer,* (fn 75), p. 356.
[258] *Collins,* (fn 256), p. 361.
[259] *ACF,* (fn 13), p. 67; *Karunananthan,* (fn 19), p. 246; *Cernic,* (fn 21), p. 310.
[260] *ACF,* (fn 13), p. 67.
[261] *Karunananthan,* p. 246, see also *Mirosa/Harris,* Antipode, 33/2012, p. 932, 940.

VI. Self-Regulation (Private Codes of Conduct)

Corporate private codes of conduct ideally work in tandem with national and international regulations to protect human rights.[262] Such codes are completely voluntary and if correctly implemented, could "promote awareness and accept international responsibility and end abuse", effectively "foster[ing] an environment conducive for human rights protection, which is a step in the right direction".[263] Recognising their responsibility to those affected by their operations,[264] these codes are corporate policies that delineate the "ethical standards of conduct to which a corporation adheres to".[265] They differ per industry, for example, the International Federation of Private Water Operators, in its code, encourages members to operate in a way that promotes ethical practices "supporting and respecting international human rights".[266]

The driving force behind the adoption of such codes is external pressure.[267] Consumers, financial institutions and investors are increasingly interested in the human rights records of a company.[268] Observation of human rights through their operations protects a company's reputation,[269] which is crucial to the prosperity and even the survival of the corporation; evidence has proven that "exposure of a corporation's egregious social or environmental record to public attention is often followed by brand image deflation, which results in drop in sales… a drop in share prices… difficulties in attracting investment, possible law suits" and more.[270] Therefore, corporations nowadays see value in adopting codes of conduct, imposing human rights obligations on themselves, so as to remain appealing to the masses and their demands. As recognised by General Electric, "these times will not allow for companies to remain aloof and prosperous while the surrounding communities decline and decay".[271]

Whilst it is accepted that a voluntarist regime offers flexibility, hence is able to be responsive to even the most complex challenges,[272] it has significant disadvantages that cannot be ignored.

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[262] *Aguirre,* (fn 104), p. 254.
[263] *Aguirre,* (fn 104), p. 255.
[264] *Bantekas,* (fn 32), p. 311; *Lynch,* Corp. Governance L. Rev., 1/2005, p. 402, 405; *Cernic,* (fn 21), p. 329; *Aguirre,* (fn 104), p. 239.
[265] *Bantekas,* (fn 32), p. 322.
[266] AquaFed International Federation of Private Water Operators, Code of Ethics of 09/12/2011, s 1.
[267] *Bantekas,* (fn 32), p. 323; *Zenkiewicz,* (fn 125), p. 123; *Dias,* (fn 18), p. 505; *Lynch,* (fn 264), p. 407; *Cavallo,* (fn 24), p. 53; *Aguirre,* (fn 104), p. 244; *Alston*, p. 317.
[268] *Aguirre,* (fn 104), p. 246; *Bantekas,* (fn 32), p. 330-340
[269] *Alston*, p. 317.
[270] *Bantekas,* (fn 32), p. 340; see also *Aguirre,* (fn 104), p. 246; *Dias,* (fn 18), p. 507; *Lynch,* (fn 264), p. 407; *Zenkiewicz,* (fn 125), p. 123; *Alston*, p. 317; *Cavallo,* (fn 24), p. 50.
[271] *Aguirre,* (fn 104), p. 245.
[272] *Paul,* in: Singh (ed.), p. 167, 175; *Dias,* (fn 18), p. 506; *Pitts,* (fn 11), p. 378; *Alston*, p. 174.

Despite its benefits, the fact remains that the majority of MNCs "remain neutral or simply inactive" in terms of voluntary codes.[273] This is possible because of their voluntary nature, which was described by the former US labour secretary as "incomplete", "weak" and "optional" in contrast to mandatory rules.[274] Many have cited the lack of incentives to adopt voluntary initiatives as its root cause.[275] However, as discussed previously, times are changing; there is a proven correlation between a company's prosperity and their human rights impact that companies are now aware of, acting as strong incentives to adopt voluntary codes. Regardless, some argue that voluntary codes alone are inadequate,[276] and strongly believe that public policy and regulations are needed to provide incentives and support voluntary codes in all aspects.[277]

Additionally, one of the main drawbacks of voluntary codes is that the public often neither have the means of assessing a corporation's compliance to the code, nor do they have enforcement opportunities.[278] "Self-regulation only works if the corporation has a monitoring or enforcement mechanism",[279] however, as Ruggie observed, they currently remain "underdeveloped",[280] therefore, the effectiveness of such codes is doubtful. This scepticism has been proven accurate on multiple occasions, such as when both Coca-Cola and Microsoft partnered with criminal actors in Myanmar despite their corporate policies specifically prohibiting such relationships.[281] With corporations often failing to put adopted codes into practice,[282] treating them as "mere window-dressing",[283] the director of the International Labour Rights Fund was right to label it as "ridiculous" to believe a corporation's sincerity in adopting voluntary codes.[284] Consequently, the argument that voluntary codes alone are insufficient[285] is convincing; there is a need for independent monitoring mechanisms and a way to enforce voluntary codes.

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[273] *Dias,* (fn 18), p. 507.
[274] Robert Reich, cited in *Pitts,* (fn 11), p. 376; see also *Ballentine/Haufler,* Enabling Economies of Peace, 2005, p.32.
[275] *Lynch,* (fn 264), p. 417; John McFarlane, cited in '*Lynch,* (fn 264), p. 417'; *Ballentine/Haufler,* (fn 274), p.32.
[276] *Aguirre,* (fn 104), p. 264.
[277] *Ballentine/Haufler,* (fn 274), p.32.
[278] *Dias,* (fn 18), p. 508; *Cernic,* (fn 21), p. 330; *Bantekas,* (fn 32), p. 324; *Ruggie,* (fn 88), p. 836; *Russell,* (fn 37), p. 8.
[279] *Paul,* (fn 272), p. 175; see also *Lynch,* (fn 264), p. 418; *Pitts,* (fn 11), p. 376.
[280] *Russell,* (fn 37), p. 8.
[281] *ICRC,* Business and International Humanitarian Law, 2006, p. 26.
[282] *Pitts,* (fn 11), p. 376; *ICRC,* (fn 281), p. 32.
[283] *Pitts,* (fn 11), p. 374.
[284] *Pitts,* (fn 11), p. 376.
[285] *Ballentine/Haufler,* (fn 274), p.32; *Ruggie,* (fn 88), p. 836; *Bantekas,* (fn 32), p. 324; *ICRC,* (fn 281), p. 26.

G. Corporate Obligations in Conflict Situations

Corporate human right abuses are also increasingly relevant in conflict situations.[286]

I. International Humanitarian Law (IHL)

IHL regulates conduct in armed conflicts to reduce its adverse effects.[287] IHL is "particularly applicable to water resources because contaminated water and the lack of water can be more deadly than a whole array of weapons".[288] The International Committee of the Red Cross (ICRC) has confirmed that IHL standards bind "all actors whose activities are closely linked to an armed conflict",[289] which could easily include corporations.

Corporations bound by IHL have "an obligation to respect and ensure respect" for IHL.[290] Although IHL does not expressly account for the HRtW,[291] IHL is considered complementary to human rights.[292] Therefore, the HRtW is arguably protected by IHL,[293] and restricting access to or contaminating water in conflict situations, in breach of the HRtW, could be considered a violation of IHL. This argument is convincing – the purpose of IHL is to protect civilians and since they are dependent on water for survival, it is only logical to also safeguard its sources, quality, and access to it.[294] Most relevant is IHL's prohibition of starvation of civilians as a means of warfare.[295] "The importance of water for avoiding starvation is obvious",[296] therefore, attacking, destroying, removing or rending useless water installations and supplies could constitute a war crime.[297] Businesses and/or their representatives can be held criminally liable provided they "commit or knowingly assist violations carried out by others",[298] ensuring that corporations are held responsible for their complicity.[299]

Unfortunately, IHL rules do not apply to all conflict situations, since not all States have ratified the Geneva Conventions or their Additional Protocols. However, now, many IHL standards, such as the prohibition of starvation, have transformed into customary international law, and

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[286] *ICRC,* (fn 281), p. 26.
[287] *Jorgensen,* (fn 12), p. 59; *ACF,* (fn 13), p. 28.
[288] *ACF,* (fn 13), p. 58; see also *Jorgensen,* (fn 12), p. 64.
[289] *ICRC,* (fn 281), p. 14; see also *UN Working Group on Business and Human Rights,* (fn 161), p. 2.
[290] *ACF,* (fn 13), p. 29.
[291] *ACF,* (fn 13), p. 58; *Jorgensen,* (fn 12), p. 59.
[292] *ACF,* (fn 13), p. 58; *UN Working Group on Business and Human Rights,* (fn 161), p. 2; *Russell,* (fn 37), p. 7; *Jorgensen,* (fn 12), p. 91.
[293] *ACF,* (fn 13), p. 57.
[294] *ACF,* (fn 13), p. 59.
[295] Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 1125 UNTS 3 of 7/12/1978, Art. 54; Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609 of 7/12/1978, Art. 14.
[296] *ACF,* (fn 13), p. 61.
[297] *Jorgensen,* (fn 12), p. 70.
[298] *ICRC,* (fn 281), p.15.
[299] *ICRC,* (fn 281), p. 15, 26.

are therefore applicable to all States regardless.[300] IHL safeguards the HRtW by imposing on MNCs obligations, indirectly prohibiting PWCs from restricting access to water in times of conflict. Although "there is no effective international authority to apply these laws… the ICC offers significant hope for the future in this regard",[301] which will be discussed below.

II. Human Rights Law

Human rights law continues to exist during conflict situations and runs parallel to IHL, providing "complimentary and mutually reinforcing protection",[302] as repeatedly confirmed by the ICJ.[303] Essentially, in conflict zones, "IHL governs, but it can be complemented by…international human rights law".[304] Therefore, in conflict situations, while corporations have additional responsibilities under IHL, their obligations under human rights law continue to apply.[305] If operating in an ICESCR ratifying State pertinently, the ICESCR has no derogation clause, therefore, corporations there have an obligation to respect the HRtW even during conflict.[306]

III. GP Applicable in Conflict Situations

The GP explicitly accounts for the heightened risk of corporate human rights abuses in conflict zones.[307] It recognises the tragic reality that relying solely on a host State to protect human rights during conflict is inadequate and unreliable, since such States may lack "effective control" or "itself be engaged in human rights abuses".[308] Hence, it calls on home States to aid both businesses and host States in ensuring corporate respect for human rights during conflict.[309] Furthermore, considering the elevated human right risks in conflict zones, the GP demands for corporations operating in conflict situations to "undertake 'enhanced' human rights due diligence",[310] to protect human rights. Considering the widespread international, regional and national endorsement of the GP as discussed previously, it could prove to be effective in ensuring that PWCs respect the HRtW even when operating in conflict areas.

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[300] *ACF,* (fn 13), p. 62.
[301] ibid.
[302] *UN Working Group on Business and Human Rights,* (fn 161), p. 2.
[303] ICJ, *Legality of the threat or use of nuclear weapons,* Advisory Opinion [1996] ICJ Rep. 226, para 25; ICJ, *Legality of the threat or use of nuclear weapons and the legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion [2004] ICJ Rep. 131, para 134, 137; ICJ, *DRC v Uganda,* Advisory Opinion, [2005] ICJ Rep 116, para 119.
[304] *Jorgensen,* (fn 12), p. 92.
[305] *Russell,* (fn 37), p. 7.
[306] UN Economic and Social Council 29th session, (fn 6), Para. 40; UN OHCHR, (fn 18), p. 38; *ACF,* (fn 13), p. 31.
[307] *UN Working Group on Business and Human Rights,* (fn 161), p. 3.
[308] ibid.
[309] ibid.
[310] *UN Working Group on Business and Human Rights,* (fn 161), p. 9.

IV. National Obligations for MNCs Operating in Conflict Zones

Certain States have legislation regulating a corporation's behaviour in conflict situations.[311] For example, the US Dodd-Frank Act requires corporations to "report their due diligence in relation to the sourcing and use of conflict minerals from the Democratic Republic of Congo" to ensure that companies are not contributing to the conflict.[312] While this provision does not directly relate to water, it suggests that it is very possible to require PWCs operating in conflict zones to publish due diligence reports to ensure their respect for the HRtW.

Despite the national, regional and international obligations for corporations operating in conflict zones, they are still arguably insufficient; there is "a lack of a comprehensive and clear approach in relation to fresh water in armed conflicts, a lack of norms in non-international armed conflicts and a lack of protection of water for its value relating to the environment".[313]

H. Enforcement Against Corporations

For human rights and IHL to be respected, it is undeniable that enforcement mechanisms are imperative;[314] "regulations are toothless without access to judicial accountability and restitution".[315] Knowing that water privatisation often results in violations of the HRtW, it is necessary for PWCs be able to be held legally accountable should they violate the right;[316] "for the HRtW to be effective, it must be enforceable not only against public service providers, but also against private ones".[317] Unfortunately, "holding corporations accountable remains highly challenging, and many judicial barriers exist in both home and host States".[318]

I. Enforcement in Host State

Under human rights law, a host State has a duty to protect, meaning that national authorities have an obligation to criminalise abuses of human rights and IHL, to prosecute before national courts,[319] and provide remedies at the national level.[320] This obligation exists even in conflict situations; according to the ICRC, "all States have an obligation to investigate and

[311] *UN Working Group on Business and Human Rights,* (fn 161), p. 6; Dodd-Frank Wall Street Reform and Consumer Protection Act, 21/7/2010, Foreign Corrupt Practices Act, 19/12/1977, Bribery Act 2010, 1/7/2011.
[312] Dodd-Frank Wall Street Reform and Consumer Protection Act, (fn 311), s1502; *UN Working Group on Business and Human Rights,* (fn 161), p. 6.
[313] *Jorgensen,* (fn 12), p. 59; see also *Ballentine/Haufler,* (fn 274), p.28.
[314] *Baer,* (fn 75), p. 356; *McMurry,* (fn 20), p. 253; *Winkler,* (fn 11), p. 14; *Chazournes,* p. 194.
[315] *Paul,* (fn 38), p. 498.
[316] *Petrova,* (fn 38), p. 593; *Moyo,* (fn 20), p. 818; *Winkler,* (fn 11), p. 14; *Chazournes,* p.194.
[317] *Thielbörger,* p. 145; see also *Moyo,* (fn 20), p. 818; *Chazournes,* p.162.
[318] *van Dorp,* p. 18.
[319] *ACF,* (fn 13), p. 33; *Chesterman,* (fn 94), p. 314; *McMurry,* (fn 20), p. 253; *UN Working Group on Business and Human Rights,* (fn 161), p. 6; *Alston*, p. 151.
[320] *McMurry,* (fn 20), p. 253.

prosecute certain war crimes".[321] Alternatively, the ICRC reiterated that businesses operating in conflict zones could incur civil liability for damages.[322] "Civil liability allows victims to seek compensation…and is a viable way of redressing violations of IHL by businesses, because civil cases can be brought directly by individual victims and the standard of proof is lower than that required in a criminal trial."[323] Either way, PWCs can be held legally accountable in the host State's national court, should they violate the HRtW. However, owing to political and economic pressures, States are occasionally unable or even unwilling to adequately regulate human right breaches.[324] In such instances, "it might be appropriate to seek redress in other jurisdictions".[325]

II. Enforcement in Home State

When corporations violate human rights, in some cases, it is possible to bring a claim to the home State. Various human rights treaty bodies and even the GP have stressed the significant role home States play,[326] recommending they actively take measures to prevent extraterritorial corporate human rights abuses. For example, the CESCR called upon States to "prevent their own citizens and companies from violating the right to water…in other countries".[327] National courts also can rely on domestic tort law or national legislation for jurisdiction.[328] For example, "UK courts have made clear that an English based company can be sued in England for the acts of foreign based subsidiaries if it is shown that the foreign forum is unable to provide the environment to ensure that substantive justice can be done."[329] Similarly, the US Alien Tort Claims Act (ATCA) grants US courts' jurisdiction over any tort committed in violation of international law, including human rights law, and applies equally to private actors.[330] The ATCA has increasingly been used by victims and activist groups for corporate complicity in human rights abuses.[331] The ATCA has "unique potential to deter future

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[321] *ACF,* (fn 13), p. 29; *ICRC,* (fn 281), p. 26.
[322] *ICRC,* (fn 281), p. 26.
[323] ibid.
[324] *McMurry,* (fn 20), p. 253; *Chesterman,* (fn 94), p. 308, 315; *UN Working Group on Business and Human Rights,* (fn 161), p. 4.
[325] *Chesterman,* (fn 94), p. 315.
[326] UN Committee on the Convention on the Rights of the Child, General Comment 16, *State obligations regarding the impact of business on children's rights*, 17 April 2013, UN Doc. CRC/C/GC/16, para. 50; UN Economic and Social Council 29th session, (fn 6), Para. 33; Ruggie, *Guiding Principles on Business and Human Rights,* 21/3/2011*,* UN Doc. A/HRC/17/31, para. 6.
[327] UN Economic and Social Council 29th session, (fn 6), Para. 33.
[328] *Alston*, p. 152.
[329] *Alston*, p. 153; see also: UK House of Lords, *Lubbe v Cape Plc,* 2000 UKHL 41, 20 July 2000.
[330] *Alston*, p. 153.
[331] *International Alert,* p. 126; US Court of Appeals for the 9th Circuit, *Doe v Unocal,* 395 F.3d 932, 18 September 2002; US District Court for the Eastern District of New York, *Bodner v Banque Paribas,* 114 F. Supp. 2d 117, 31 August 2000.

abuses" and "hopefully this will motivate corporations to ensure that abuses are not committed on their projects."[332]

However, the ability to exercise extra-territorial jurisdiction like UK and US courts have done depends solely on the will of national authorities to enact relevant legislation, since it is not a legal obligation of home States.[333] Unfortunately, this will is weak and lacking. Largely owing to their fear of driving corporations away, home States are hesitant to regulate a company's overseas activities.[334] Therefore, the extra-judicial jurisdiction of national courts remains "very controversial",[335] "incomplete and flawed".[336] Currently, in many cases, bringing a claim in the home State is not an available option, which is disappointing, considering the significant impact MNCs have on the HRtW and the often inaccessible legal redress in host States.

III. Corporate CSR Obligations under National Law

There is increasing pressure toward legally requiring corporations to make CSR reports,[337] and States have responded. For example, the UK Corporate Responsibility Bill provides for "extraterritorial application regarding all major CSR areas of concern, demanding that corporations consult with stakeholders, further imposing a duty to prepare and publish reports."[338] Similarly, in France, the Nouvelles Regulations Economiques requires all nationally listed corporations to report on their relations with the local community, the environment and others.[339] In March 2017, France also adopted a law requiring large French companies to "assess and prevent the negative impacts of their activities and of those of their subsidiaries, suppliers and subcontractors on the environment and on human rights"; failing to report could result in a fine.[340] With major PWCs incorporated in the UK and France, such as Thames and Suez, having such national laws would force them to be publicly accountable, leading to greater consideration for the HRtW. Considering the rising demand to hold corporations accountable, "it is likely that further jurisdictions will join those requiring greater transparency and public reporting",[341] a trend that will undoubtedly result in greater corporate regard for the HRtW.

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[332] *Herz,* (fn 22), p. 268, 269.
[333] *McMurry,* (fn 20), p. 250; *Russell,* (fn 37), p. 4.
[334] *Russell,* (fn 37), p. 23.
[335] *McMurry,* (fn 20), p. 250.
[336] Ruggie, (fn 156), para 87.
[337] *Pitts,* (fn 11), p. 418; *Bantekas,* (fn 32), p. 327.
[338] *Bantekas,* (fn 32), p. 326; see also Corporate Responsibility Bill, Bill 129 53/2 of 19 June 2003, Art. 2.
[339] *Bantekas,* (fn 32), p. 327; see also Nouvelles Regulations Economiques of 15/5/2001.
[340] *Zamfir,* (fn 216).
[341] *Pitts,* (fn 11), p. 418.

IV. Enforcement in the International Legal Sphere

Another option is to enforce corporate obligations toward the HRtW at the international level.[342]

1. Bringing the Case to the International Court of Justice (ICJ)

For breaches of international law, claims can possibly be brought to the ICJ.[343] However, there are some challenges. Firstly, only States can be party to the proceedings,[344] and claims cannot be directed against corporations but rather, against the State allegedly breaching their obligation to protect the HRtW. Secondly, only States, not individuals, can bring claims to the ICJ,[345] and it is unlikely to find States bringing such claims due to the political and economic interests at stake. As such, relying on the ICJ to hold corporations accountable for the violation of the HRtW is ineffective and problematic; alternatives must be explored.

2. Bringing the Case to the International Criminal Court (ICC) for War Crimes

The jurisdiction of the ICC is limited to certain crimes, the most relevant here being war crimes;[346] the ICC is only pertinent to cases in conflict situations. Prosecution of a war crime could unfold in an international arena, which is wholly against a company's interest, thereby undoubtedly an effective tool for the protection of the HRtW in conflict zones. Previous ICC cases indicate that individuals such as business representatives, as opposed to the corporation on a whole, tend to be the parties to ICC cases regarding corporate violations.[347] For example, in the Farben case, 12 key officials of the company were convicted of plunder and slavery;[348] the individuals were held accountable, rather than the corporation. However, Chesterman recognises the "[practical] difficulties of establishing individual guilt", concluding that "the ICC could not create international criminal liability for employees, officers and directors of corporations in reality".[349] Considering the challenges in attributing criminal responsibility to an individual, finding the corporation liable instead "may be more appropriate", and corporate liability is arguably also more efficient in protecting the HRtW; the complex corporate structure of many MNCs could allow liability to be shifted onto individuals who are completely innocent, something that must be avoided.[350] Additionally, while the Nuremberg trials only prosecuted individuals, not corporations, Weissbrodt strongly argues that "this did not

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342 *Chesterman,* (fn 94), p. 308.
343 Statute of the International Court of Justice, of 18/4/1946, Art. 36.
344 Statute of the International Court of Justice, of 18/4/1946, Art. 34(1).
345 ibid.
346 Rome Statute of the International Criminal Court, A/CONF. 183/9 of 17/7/1998, Art. 5.
347 ICC, *IG Farben Case*, ICC Database Record No. 347082, 30 July 1948; ICC, *The Zylon B Case,* ICC Database Record No. 238289, 1947; see also *Chesterman,* (fn 94), p. 325.
348 ICC, *IG Farben Case*, (fn 347).
349 *Chesterman,* (fn 94), p. 328.
350 *Chesterman,* (fn 94), p. 326.

mean that corporate entities were not and could not be held liable”.[351] This route, while currently uncertain, ought to be explored further by the international community.

3. Bringing the Case to the CESCR

The Optional Protocol to the ICESCR (OP) grants individuals and groups standing to lodge complaints to the CESCR regarding non-compliance of the ICESCR.[352] However, claims can only be brought against States party to the OP,[353] thereby limiting its effectiveness. Additionally, the prerequisites for complaints are exceptionally demanding,[354] leading to the dismissal of many legitimate claims.[355] While the OP is able to pressure States to hold corporations accountable for their human right violations, the limited scope of the OP bars the CESCR from holding PWCs directly responsible, an avenue crucial toward the realisation of the HRtW.

V. Regional Enforcement Mechanisms

In Europe, the Americas and Africa, there are regional human right courts where individuals can turn to, to lodge a claim. However, in Asia, there is a total absence of a regional human rights system; ergo there is no regional enforcement mechanism available there.

In the Americas, the Inter-American Court of Human Rights (IACtHR) has, in multiple cases,[356] indirectly recognised the HRtW, determining that “sufficient and safe water are indispensable elements to guarantee a decent life”,[357] treating it as a condition under the right to life. However, even in cases stemming from corporate violation, applicants are only able to make a claim against States, as opposed to the corporations. This is by no means useless – for example, regarding the Belo Monte project, the IACtHR requested Brazil to immediately suspend existing licenses and halt construction work until the relevant standards, such as water conditions, were satisfied.[358] While the influence of the IACtHR should not be undervalued, this system is not ideal because water companies are not held directly accountable and can ‘hide’ behind a State.

In Europe, individuals or groups can seek redress at the European Court of Human Rights (ECtHR). The ECtHR has read into the European Convention on Human Rights (ECHR), the

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[351] *Weissbrodt*, U.Cin.L.Rev. 74/2005, p. 55, 56; see also *Wallace,* p. 307.

[352] UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Res 63/117, 5/3/2013, Art. 1. (Optional Protocol)

[353] ibid.

[354] Optional Protocol, (fn 352), Art 3(1), 3(2)(a), 4.

[355] *Langford*, N.T.f.M., 27/2009, p. 1, 23.

[356] Inter-American Court of Human Rights (IACtHR), *Case of Yakye Axa Indigenous Community v* Paraguay, Merits, [2005] IACHR Series C No 125; IACtHR, *Case of the Saramaka People v* Suriname, Merits, [2008] IACHR Series C No 185; IACtHR, *Case of the Xakmok Kasek Indigenous Community v* Paraguay, Merits, [2010] IACHR Series C No 214.

[357] *Chazournes,* p.229.

[358] *Chazournes,* p.230.

HRtW, mainly through the right to privacy and family life (Art. 8) and has invoked Art. 8 to deal with water deprivation cases.[359] Importantly, ECtHR case law indicates the ECtHR's willingness to exercise extra-territorial jurisdiction.[360] However, similar to the IACtHR, applicants can only bring a claim against States. Therefore, as argued previously, while the ECtHR is crucial in protecting the HRtW, the system is insufficient regarding corporate accountability.

In Africa, individuals can submit human right abuse allegations to the African Court of Human and Peoples' Rights (AfCHPR). Since it was only established 10 years ago, the AfCHPR is relatively underdeveloped; it has only had 238 cases thus far,[361] and has not dealt with any cases related to the HRtW. Regardless, based on regional treaties and the purpose of the African Charter, Bulto asserts that the AfCHPR will likely accept cases related to the HRtW despite the African Charter not explicitly protecting it;[362] only time will tell. Nevertheless, the African system faces the same problem as that in Europe and the Americas – claims can only be brought against States, which, as previously illustrated, is flawed and lacking.

It is evident that existing regional enforcement mechanisms, albeit vital in securing the HRtW, are all inadequate in attributing corporate responsibility and enforcing corporate obligations.

I. Problems with Enforcement Against MNCs

In addition to the weak existing enforcement mechanisms available, there is a plethora of obstacles one will face with regards to MNCs and enforcing their human right obligations.

I. Lacking Domestic Accountability

Before even considering a corporation's legal compliance, there must be functioning regulations in place, imposing corporate obligations to protect the HRtW.[363] Unfortunately, in many developing States, public policies and laws inadequately protect the HRtW.[364] Such States are unable or unwilling to govern effectively, leading to the frequent violation of the HRtW when water is privatised.[365] Sadly, it is such States that attract investors, like PWCs; corpora-

[359] ECtHR, *Hatton and Others v The United Kingdom*, App. No. 36022/97, 8 July 2003, para. 96 ff.; ECtHR, *Guerra and Others v Italy*, App. No. 14967/89, 19 February 1998, para 57 ff.; ECtHR, *Taskin and Others v Turkey*, App. No. 46117/99, 30 March 2005, para 113, ff.; *Smets,* Envtl. Pol'y & L., 30/2000, p. 248, 249

[360] ECtHR, *Soering v The United Kingdom,* App. No. 14038/88, 7 July, 1989; ECtHR, *Tatar v Romania*, App. No. 67021/01, 27 January 2009.

[361] *African Court on Human and Peoples' Rights,* Statistical Summary, http://en.african-court.org/index.php/cases (last accessed 29/10/19).

[362] *Bulto,* (fn 93), p. 367.

[363] *van Dorp,* p. 15; see also *Institute for Human Rights and Business,* From Red to Green Flags, 2011, p. 3.

[364] *Bohoslavsky/ Martin/ Justo,* (fn 84), p. 78.

[365] *Ballentine/Haufler,* (fn 274), p.15; *Zenkiewicz,* (fn 125), p. 126.

tions would then be "subject to less stringent health and safety laws", to their undeniable benefit,[366] thereby resulting in PWCs' perpetual HRtW violations, a vicious cycle that will not end if the appropriate and effective domestic regulations are not introduced.

However, even States with the necessary national regulations are often lacking domestic accountability since existing laws are often not being enforced.[367] A regulation is obviously useless if not properly enforced. For example, in Nelspruit, Nkokobe, Lukhanji and Amahati, the authorities tasked to regulate and monitor privatisation contracts "lacked the requisite expertise to do so".[368] Similarly, in Niger Delta, the government failed to hold the MNC legally accountable, despite their blatant disregard for local law.[369] Bohoslavsky noted that "it was common, during the last two decades of expansion in private water services, to see how developing or even developed States did not oblige companies to comply with the contracts and legal frameworks available", essentially allowing PWCs to continue to violate the HRtW.[370]

II. Lack of Information

Another major obstacle with regard to enforcement against MNCs is the general lack of information. Despite the Rio Declaration emphasising the need for access to information to ensure the HRtW,[371] when water is privatised, "seldom do rights holders…exercise the right to know".[372] For example, Guaghran blames the extensive and persistent HRtW abuses in the Niger Delta on the lack of data.[373] Access to information is fundamental for communities to hold the State and the PWCs accountable,[374] without which, HRtW abuses would continue.

III. Lack of Participation

The right to participation is a procedural requirement of the HRtW. As Albuquerque explained, this right requires duty-bearers, such as States or corporations, to ensure that those most affected by policies be "granted every opportunity to participate meaningfully in decisions that affect their lives, livelihoods and ability to enjoy their human rights".[375] For example, when water is privatised, communities must have a say in determining water manage-

[366] *Barrett; Jaichand,* (fn 2), p. 546.
[367] *Paul,* (fn 272), p. 179; *Guaghran,* (fn 36), p. 54; *Bohoslavsky/ Martin/ Justo,* (fn 84), p. 82; *International Alert,* p. 6; *Winkler,* (fn 11), p. 26; *Russell,* (fn 37), p. 23; *Moyo,* (fn 20), p. 817.
[368] *Moyo,* (fn 20), p. 817.
[369] *Guaghran,* (fn 36), p. 53.
[370] *Bohoslavsky/ Martin/ Justo,* (fn 84), p. 82.
[371] UN Sustainable Development, United Nations Conference on Environment & Development Rio de Janerio, Brazil, Agenda 21, 14/6/1992, Principle 10.
[372] *Paul,* (fn 272), p. 179.
[373] *Guaghran,* (fn 36), p. 54.
[374] *Winkler,* (fn 11), p. 14.
[375] *Karunananthan,* (fn 19), p. 252.

ment policies.[376] The Cochabamba Water War demonstrated the importance of meaningful citizen participation toward the fulfilment of the HRtW;[377] "without community involvement, we cannot manage water wisely".[378] Despite its importance, water privatisation agreements are notorious for completely excluding the voice of the communities it affects, denying them their right to participate.[379] Water is too fundamental to be considered a purely economic good, and governments are aware of the competing interests at stake when privatising water.[380] Therefore, States often opt to keep water privatisation negotiations closed-door and secret, to avoid backlash from citizens.[381] However, this effectively means that "many agreements in the water arena are formed without any input from the citizens",[382] disregarding their right to participate, which could very possibly lead to violations of the HRtW and ultimately might result in a repeat of the Cochabamba Water War. Especially when PWCs are involved, this right to participate must be respected before the HRtW can be enforced and realised.

IV. Gap in International Law

Despite the soaring numbers of water privatisation worldwide, there exist only inadequate international enforcement mechanisms holding PWCs accountable. As Paul rightfully notes, this gap in international law is "glaring", and international enforcement against MNCs "remains a paper tiger".[383] In truth, in the international arena, claims of HRtW violations can only be brought against States for their failure to protect, rather than against the PWCs committing the abuse.[384] For example, citizens of Cochabamba had no direct actionable claim against Aguas del Tunari at the international level; their only option was to claim against the Bolivian government.[385] This detachment allows corporations to "hide behind the State 'veil'", enabling PWCs that violate the HRtW to push the blame onto the State and remain unaccountable.[386] Having the primary concern of international human rights law be State conduct not only ignores the significant impact corporations have on human rights worldwide,[387] but also overlooks the reality that corporations strongly influence State policies; this system "no

[376] *Winkler,* (fn 11), p. 14.
[377] *Baer,* (fn 75), p. 354.
[378] *Bakker,* (fn 44), p. 441.
[379] *O'Neill,* (fn 38), p. 360; *Paul,* (fn 38), p. 473; *Petrova,* (fn 38), p. 590; *Herz,* (fn 22), p. 265; *Baer,* (fn 75), p. 354.
[380] *O'Neill,* (fn 38), p. 360.
[381] *Petrova,* (fn 38), p. 590; *Herz,* (fn 22), p. 265.
[382] *O'Neill,* (fn 38), p. 360; see also *Paul,* (fn 38), p. 473.
[383] *Paul,* (fn 272), p. 180.
[384] *McMurry,* (fn 20), p. 254; *O'Neill,* (fn 38), p. 381; *Barrett; Jaichand,* (fn 2), p. 546; *Vandenbogaerde,* p. 212; *Bantekas,* (fn 32), p. 310.
[385] *O'Neill,* (fn 38), p. 376.
[386] *Bantekas,* (fn 32), p. 310.
[387] *Barrett; Jaichand,* (fn 2), p. 552.

longer appropriately regulates the international community"[388] and must be updated to hold PWCs directly accountable for their HRtW violations.

V. Companies Can Hide Behind the Corporate Veil

Another difficulty stems from the complex corporate structures MNCs have; due to their separate legal personalities,[389] "a parent company is generally not legally liable for wrongs committed by a subsidiary".[390] Even where a parent company contributed to the human right abuse, piercing this corporate veil is known to be extremely difficult,[391] and they will most likely remain largely unaccountable. In addition to the need to clarify the legal responsibilities between parent and subsidiary company,[392] holding parent companies accountable when they played a role in the human right violation is undeniably crucial to end the cycle of abuse and will force MNCs to consider their human rights impacts more seriously.

VI. Corporations are More Powerful than States

It is a fact that many MNCs are more financially powerful than States,[393] and the leading PWCs fall into this category. Corporations of this magnitude are highly politically and economically influential;[394] in the water sector, many PWCs "have outgrown the ability of individual States to regulate them effectively… [and] are capable of determining national policies and priorities".[395] Thanks to water privatisation, many PWCs now "have more control over the individual than the State".[396] In effort to attract foreign investors, States often water down national legislation imposing corporate obligations, preferring to adopt a laissez faire approach.[397] Unfortunately, in terms of human rights, this results in a race to the bottom.[398] An advertisement by the Philippine government illustrates the problem best: "to attract companies like yours…we have felled mountains, razed jungles and filled swamps, moved rivers and relocated towns…all to make it easier for your business here".[399] The extent States are willing to go to attract foreign investors and deregulate fosters an environment where the human rights are neglected for economic gain. Furthermore, when water is privatised, the

[388] *Aguirre,* (fn 104), p. 248.
[389] *Bilchitz,* (fn 22), p. 208.
[390] *Ruggie,* (fn 88), p. 824; see also *Vandenbogaerde,* p. 262; *Barrett; Jaichand,* (fn 2), p. 553.
[391] *Vandenbogaerde,* p. 262; *Alston*, p. 147; *Barrett; Jaichand,* (fn 2), p. 554; *Bilchitz,* (fn 22), p. 208.
[392] *Russell,* (fn 37), p. 8.
[393] *Dias,* (fn 18), p. 496; *Zenkiewicz,* (fn 125), p.124; *Moyo,* (fn 20), p.816; *Bantekas,* (fn 32), p.313; *Alston*, p.142.
[394] *Zenkiewicz,* (fn 125), p. 124.
[395] *Moyo,* (fn 20), p. 816.
[396] *Barrett; Jaichand,* (fn 2), p. 552.
[397] *Bantekas,* (fn 32), p. 310; *Aguirre,* (fn 104), p. 248; *Moyo,* (fn 20), p. 816; *Williams,* (fn 72), p. 501; *Paul,* (fn 272), p. 178; *Zenkiewicz,* (fn 125), p. 125; *Chesterman,* (fn 94), p. 308.
[398] *Zenkiewicz,* (fn 125), p.125.
[399] ibid.

sheer power and influence PWCs have makes it difficult, if not impossible, for States dependent on their investment to hold PWCs accountable for their abuse of the HRtW.[400]

A State's reliance on MNCs is exacerbated in post-conflict situations, where development of the State is wholly dependent on foreign investment. For example, when South Sudan found independence, 97% of their national budget came from foreign MNCs.[401] Unsurprisingly, human right abuses were rampant. Since the government had to prioritise development over human right protection, they had no choice but to close one eye to the national decline in human right standards caused by the foreign investors.[402]

J. Recommendations

The gaps in the national, regional and international legal systems must be addressed to rectify and prevent the widespread violations of the HRtW committed by PWCs.

I. BIT Considerations

To rectify the aforementioned imbalance between investor and State under BITs and arbitration, Ruggie proposes that States should introduce into BITs a provision allowing States to "maintain adequate domestic policy" to protect human rights, while still maintaining appropriate investor protection standards.[403] This new-generation of BITs ought to account for socially responsible principles, such as "the protection of the environment and the health and safety of the public",[404] which would permit States to intervene when PWCs are disregarding the HRtW, without it being considered expropriation. Without this provision, PWCs will continue to have the upper-hand and get compensated despite violating the HRtW. Additionally, considering the importance of public participation in such cases, coupled with the fact that, as observed in prior ICSID cases, relying on the investor's voluntariness is ineffective, a clause automatically permitting third party participation in certain investor-State arbitration cases, such as in public interest matters, is recommended.[405] This recommendation is feasible and possible seeing as some new BITs have provisions generally allowing third party participation.[406]

II. Include Human Rights in Concession Contracts

Another compelling suggestion is to include considerations of the HRtW into concession agreements between States and PWCs, permitting the termination of contract should the

[400] *Alston*, p. 142, 144; *McMurry,* (fn 20), p. 249.
[401] *Lubett/Akhtarkhavari,* J. Hum. Rts. & Env't, 5/2014, p. 49, 65.
[402] *Lubett/Akhtarkhavari,* (fn 401), p. 53, 65.
[403] Ruggie, (fn 326), para. 9; *Russell,* (fn 37), p. 7.
[404] *Miles,* (fn 11), p. 70.
[405] *Thielbörger,* p. 166.
[406] United States-Singapore Free Trade Agreement, 01/01/2004, Art/ 15.19.3.

PWC violate the HRtW.[407] Jenks justly declared that “we must regard the public interest as the overriding consideration”;[408] Cavallo expanded on this notion, asserting that “services of public interest like the provision of safe water should allow States to reverse prior decisions on water services to ensure universal access of the population to basic human needs”.[409] For example, per the investor-State contract for the Baku-Tbilisi Ceyhan (BTC) pipeline project, investors agreed to “not assert claims under the contract in relation to new host State human right measures”.[410] However, currently, most concession contracts wholly neglect to account for the HRtW, and are instead solely focused on safeguarding the interests of PWCs.[411] Fortunately, due to the failures of water privatisation projects worldwide, States are now more aware of the risks at stake, and will hopefully make improvements by implementing provisions protecting the HRtW into concession contracts, in a similar fashion to that in the BTC contract. This would even out the power inequality and provide substantial protection of the HRtW.

III. Avoid Heavy Reliance on Voluntary Mechanisms/Soft Law, Need Hard Law

Many NGOs, academics and even politicians have expressed doubt with respect to the effectiveness of soft law and voluntary mechanisms toward the policing of corporate activity as noted above.[412] The former US labour secretary demands hard law, contending that it “is the only thing that will work”.[413] However, it must not be misunderstood – voluntary mechanisms are not completely useless. They outline the legitimacy corporate human right obligations, and should an international treaty arise containing similar responsibilities, companies will not be able to refuse to comply since they are principles that “they have, for years, committed to respect”.[414] Nevertheless, “corporations cannot be trusted to police themselves”,[415] therefore, there remain strong demands for the establishment of binding international norms to police corporate conduct.[416]

Considering the ever-increasing imbalance between investor and State, the significant influence and impact PWCs have on the HRtW, the move toward water privatisation and the ex-

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[407] *Thielbörger,* p. 163; *Cavallo,* (fn 24), p. 48; *Russell,* (fn 37), p. 7; *McMurry,* (fn 20), p. 250; *The Global Compact,* (fn 25), p. 16.
[408] *Jenks,* in: Friedmann/ Henkin/ Lissitzyn (eds.), p. 71, 81.
[409] *Cavallo,* (fn 24), p. 49; see also *Thielbörger,* p. 164.
[410] *Miles,* (fn 11), p. 73.
[411] *Miles,* (fn 11), p. 74.
[412] *Moyo,* (fn 20), p. 820; *Pitts,* (fn 11), p. 376; *Petrova,* (fn 38), p. 605, 611; *Ruggie,* (fn 88), p. 834; *Wallace,* p. 194; *Cavallo,* (fn 24), p. 53.
[413] Robert Reich, cited in *Pitts,* (fn 11), p. 376.
[414] *Cavallo,* (fn 24), p. 53; *Pitts,* (fn 11), p. 431.
[415] *Herz,* (fn 22), p. 264.
[416] *Pitts,* (fn 11), p. 376; *Petrova,* (fn 38), p.611; *Wallace,* p. 193; *Zenkiewicz,* (fn 125), p.143; *Guaghran,* (fn 36), p. 55.

tent of the global water crisis, a solution in the international arena is warranted and imperative.[417] Although regional and domestic strategies are essential,[418] the operations of MNCs transcend borders; only international law could appropriately encapsulate the role MNCs play today[419] and "ensure proper multinational accountability".[420] However, the current lack of political will to have an international treaty imposing binding human right obligations on corporations,[421] as evidenced by the failure of the Norms, makes it unlikely that such a treaty will be adopted soon. Furthermore, even if it were adopted, concerns still exist. According to Ruggie, firstly, such a treaty would take years to craft, unable to respond to the challenges of businesses and human rights that demand immediate and urgent attention.[422] Secondly, it remains unclear how such a treaty would be enforced.[423] Currently, these questions are dealt with by the Working Group, who deliberate the "content, scope, nature and form" of the possible international treaty.[424] Before adoption, this proposal received objections from States who described it as "polarising" and "counterproductive".[425] Regardless, with 20 for, 14 against and 13 abstentions, the resolution did get adopted, signalling hope for a binding international treaty regulating corporate human right impacts in the future. However, the resolution was only adopted by a small margin, "displaying a good lack of enthusiasm for the proposal".[426] Consequently, while optimism is encouraged, one must also be realistic. Hence, the assertion that the Working Group will develop such an instrument remains doubtful.

IV. Administrative law

Human right obligations of PWCs can be further secured by enacting a national administrative law modelled after the South African Promotion of Administrative Justice Act (PAJA) (2000). Most domestic administrative laws are only binding on States, however, the PAJA imposes human rights obligations on both States and private corporations that exercise public power.[427] As summarised by Paul, the PAJA requires administrators, including private corporations performing public roles, such as PWCs, to "follow certain procedures when making decisions, give adequate reasons for decisions upon request, inform individuals of their rights to review and appeal administrative decisions and allow individuals to challenge

[417] *Wallace,* p. 352; *Petrova,* (fn 38), p. 612.
[418] *Pitts,* (fn 11), p. 431.
[419] *Wallace,* p. 352.
[420] *Alston*, p. 154.
[421] *Jägers,* in: Deva/Bilchitz (eds.), p. 294, 326; *Pitts,* (fn 11), p. 423; *Zenkiewicz,* (fn 125), p. 147.
[422] *Ruggie*, Treaty road not travelled, https://www.business-humanrights.org/en/pdf-treaty-road-not-travelled (last accessed on 29/10/19).
[423] *Ruggie*, (fn 422); see also *Zenkiewicz,* (fn 125), p.127; *Jägers,* (fn 421), p. 326.
[424] UN Human Rights Council Res. 26/9, (fn 164).
[425] *van Dorp,* p. 18.
[426] *Abrams,* Counting Votes at the UN Human Rights Council, https://www.cfr.org/blog/counting-votes-un-human-rights-council (last accessed 29/10/19).
[427] *Paul,* (fn 38), p. 500.

administrative actions".[428] Such an administrative law ensures respect for the community's right to participation and promotes transparency and accountability, even when water is managed by a PWC.[429] The PAJA "reinforces the HRtW with procedural requirements" and "legitimises decisions to privatise".[430] Coupled with its unique nature of applying to private corporations, the PAJA is a worthy exemplar of administrative law that strengthens the human right obligations of PWCs.

V. Guides for PWCs operating in Conflict Areas

States should also introduce policies guiding corporations operating in conflict zones, to ensure that they do not contribute to ongoing violence,[431] with Dorp contending that "companies should be aware of their ability to create and exacerbate conflict and develop mitigation measures to minimise negative impacts".[432] Such policies would require corporations to conduct risk and impact assessments,[433] conduct due diligence assessments,[434] cooperate with international and domestic NGOs,[435] comply with national and international law,[436] and remain in communication with the relevant stakeholders.[437] The voluntary initiative, the Kimberley process, outlines similar principles but is specific to the diamond sector;[438] there remains nothing comparable in the water industry. Moreover, as emphasised before, there ought to be a move away from voluntary mechanisms and corporate human right obligations must be solidified in hard law. Therefore, in the water sector, adopting a binding, mandatory policy applying to PWCs operating in conflict area, with the aforementioned principles, is an option worth considering. However, there remains nothing to suggest that this will happen soon.

VI. Public Pressure

Many assert that an effective way to spark improvement in enforcement mechanisms is through public pressure.[439] Companies worldwide are now aware of the power the public holds as consumers and investors, from organising boycotts to creating corporate codes of conduct;[440] even shareholders now are demanding operations fulfil human right standards.[441]

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[428] ibid.
[429] *Paul,* (fn 38), p. 502.
[430] *Paul,* (fn 38), p. 503.
[431] *Russell,* (fn 37), p. 7; *Ballentine/Haufler,* (fn 274), p.22; *Shift,* (fn 161), p.3.
[432] *van Dorp,* p. 16.
[433] *van Dorp,* p. 16; *The Global Compact,* (fn 25), p. 15.
[434] *The Global Compact,* (fn 25), p. 31; *Shift,* (fn 161), p.3.
[435] *The Global Compact,* (fn 25), p. 21.
[436] *The Global Compact,* (fn 25), p. 15.
[437] ibid.
[438] *Kimberley Process,* What is the Kimberley Process, https://www.kimberleyprocess.com/en/what-kp (last accessed 29/10/19).
[439] *Zenkiewicz,* (fn 125), p. 123; *Barrett; Jaichand,* (fn 2), p. 562; *Dias,* (fn 18), p. 518; *Lynch,* (fn 264), p. 423; *O'Neill,* (fn 38), p. 376; *Russell,* (fn 37), p. 27.
[440] *Dias,* (fn 18), p. 518.
[441] *Barrett; Jaichand,* (fn 2), p. 562.

For example, animal activists were responsible for stopping cosmetic companies, such as Revlon and Proctor and Gamble, from conducting animal testing.[442] However, although Dias believes that respecting human rights standards and profit-making are no longer mutually exclusive,[443] recent research suggests that there is "a difference between what consumers say and what consumers do", "economic consumption and investment is often valued over ethical consumption and investment ultimately".[444] Nevertheless, the ability of the public to force change is undeniable and evidence proves that a company's reputation, economic stability and community relations do correlate with their human right standards.[445] Even in conflict areas, companies that ignore IHL and human rights standards by adopting a 'business as usual' approach "have suffered widespread condemnation…culminating in boycotts or lawsuits",[446] effectively pressuring them to appropriately alter the way they operate. The strength the public has to improve the relationship between businesses and human rights is a good first step to take to effect change.

VII. Improve Available Information

Considering the importance of making relevant information available especially when water is privatised, and its current state of inadequacy, as illustrated above, some argue that new legislation is necessary to improve the data and its accessibility,[447] to ensure compliance with the HRtW. One feasible option is to introduce sunshine laws, such as the US' Freedom of Information Act, or South Africa's Promotion of Access to Information Act. Established sunshine laws must apply to government contracts with private companies that perform public functions, such as PWCs, granting affected communities legal authority to demand transparency and the relevant information for them to participate meaningfully.[448]

VIII. Improve Communication with All Stakeholders

Taking into account the current disregard of the public's right to participate especially when water is privatised, as highlighted previously, there are strong demands for improvements.[449] Even the EU has confirmed that "there is no doubt that the success results from the inclusive approach of a process where States, business actors and civil society were fully associat-

[442] *Lynch,* (fn 264), p. 423.
[443] *Dias,* (fn 18), p. 518.
[444] *Lynch,* (fn 264), p. 423.
[445] *Russell,* (fn 37), p. 27.
[446] *International Alert,* p. 125.
[447] *Harder,* (fn 9), p. 7; *Paul,* (fn 38), p. 493; *Jägers,* (fn 421), p. 327.
[448] *Paul,* (fn 38), p. 494.
[449] *Lynch,* (fn 264), p. 420; *Chazournes,* p.161; *Pitts,* (fn 11), p. 416; *Schroering,* (fn 11), p. 2; *Shift,* (fn 161), p.18.

ed".[450] One idea proposed by Lynch is to introduce "market indices and certification programs which can transmit information about social and environmental corporate conduct in a fast, easily accessible, market-friendly way".[451] He turns to examples of the UK's FTSE4Good Index and the US' Dow Jones Sustainability Index aimed to measure corporate conduct that satisfy globally recognised human right standards, helping investors and consumers identify 'good' companies.[452] Alternatively, as explained before, an administrative law reminiscent of that of the PAJA will foster dialogue between parties, increasing transparency and accountability. Improving communication between PWCs and all stakeholders ensures that a fairer balance between the interests of the investor and that of the public will be struck.

K. Conclusion

As demonstrated, there is a global trend toward water privatisation despite the significant risks it entails regarding the HRtW. However, the international, regional and national legal systems are wholly inadequate in addressing corporate violations of the HRtW, both generally and in conflict situations. The existing ineffective enforcement mechanisms against PWCs and total absence of binding corporate human right obligations necessitates changes to tackle challenges, deter abuse of the HRtW and reflect the increasingly powerful status of MNCs. Thankfully, States, NGOs, academics and even the public are increasingly aware of the high risks of water privatisation and the disastrous effects should it fail, which will hopefully trigger much needed improvements, such as the recommendations proposed in this paper. Right now, we ought to remain hopeful and continue demanding for binding corporate obligations and corporate accountability, in order to protect the HRtW from further neglect.

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[450] EU Permanent Delegation to the UN Office and other international organisations in Geneva, *EU Comments on the draft Guiding Principles for the implementation of the UN 'Protect, Respect and Remedy' Framework,* 31 January 2011, D(2011) 700 246.

[451] *Lynch,* (fn 264), p. 421.

[452] ibid.

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