

CAN WATER PRIVATIZATION LEAD TO CORPORATE RESPONSIBILITY?

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1. PRELIMINARY CONSIDERATIONS

The right to water can be discerned in the wording of many international human rights covenants and declarations: we cannot imagine an effective “right to life” or define “human dignity” without real access to water. However, the so-called “blue gold” is unfortunately becoming a luxury good for some group of persons and therefore, necessary to take adequate action. Now more than ever, in a world where privatization and pollution matters are in many governments’ agendas, potential violators must consider the right to water as an essential concern.

Although the right to water is explicitly recognized in some international human rights documents, its essence and components is still the object of debate and deliberations. It is dubious if we can defend its status of self-standing right because it is only implicitly derived from rights enshrined in the core conventions. However, the last onrush of resolutions dealing with the protection of this right has increased the consciousness of both states and non-state parties in this regard. Since states have a duty to protect the full enjoyment of the right to water, they must avoid violations of this right by other agents. Thus, businesses are more and more subject to both national and international pressure.

States are primarily responsible for human rights abuses. However, this paper will defend that accountability should not be limited to them. Although, the question whether business entities have international

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personality or not remains open, under many national domestic systems: legal persons can be held responsible. This trend of making corporations liable for violations seems to be affecting the international perspective. New corporate responsibility codes of conduct are leading to the idea that non-state actors should respond for human rights infringements linked to their operations. In relation to water, the question is especially relevant since multinationals and other enterprises leave traces on it as a consequence of their production process, for instance, when they are the water providers.

The paper will begin with a chapter dedicated to the right to water *per se*, including an analysis of the international framework and discussed the concept of right. The second chapter will focus in the possible responsibility of corporations under the right to water. In this latter section, apart from the normative legal system, the duties of businesses under this right and the concept of privatization will be studied, with relevant emphasis in the Cochabamba case. Finally, the third chapter will encompass the proposal of creating a model of corporate responsibility for right to water abuses.

The exploration will include the primary and secondary sources of international law, such as international conventions, treaties, general comments, reports and resolutions; international custom; general principles of law; and also judicial decisions and doctrine of highly qualified publicists. Regarding the national systems, all kind of legal documents will be studied, such as constitutions, jurisprudence and legal academic literature.

2. THE RIGHT TO WATER

2.1. Legislative Framework and Recent Normative Developments

The normative framework of the right to water has been growing exponentially during the last years. Due to the problem of water scarcity in many countries and the question of how to deal with it in an efficient manner, the international community has responded with a series of recent “soft-law” documents. Notwithstanding, several covenants and treaties include this right, either implicitly or explicitly. As it has been implied by human rights experts, “*even the earliest human rights instruments*

imply a right to water because such a right to water is integral to the realization of other human rights."¹

Thus, although the classic covenants and declarations do not recognize an explicit right to water, it is frequently alleged that this right is inherent to many other rights which are concretely defined in their provisions.² Accordingly, Article 25.1 of the Universal Declaration of Human Rights (UDHR) constitutes the "*most likely basis from which to infer the human right to water.*"³ This disposition states that "*everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food...*"⁴ Thus, many scholars have inferred from this provision a universal right to water.

Besides, the International Covenant on Civil and Political Rights (ICCPR) provides a definition in its Article 6 in which the right to water could be subsumed. This guarantee establishes that "*every human being has the inherent right to life.*"⁵ In connection with this guarantee, early General Comment No. 6 established that the right to life "*cannot properly be understood in a restrictive manner*"⁶. In consequence, a broader interpretation of this provision directly leads to the inclusion of several other elements, such as "*health, enjoyment, respect and dignity.*"⁷ On the other hand, the "*second generation rights*" document,⁸ the International Covenant on Economic, Social and Cultural Rights (ICESCR) also infers the right to water⁹. In its Article 11.1, the ICESCR recognizes the right to "*an*

¹ L. Beail-Farkas, *The Human Right to Water and Sanitation: Context, Contours, and Enforcement Prospects*, 30 Wisconsin International Law Journal 761, 772 (2012-2013), available at: http://hosted.law.wisc.edu/wordpress/wilj/files/2014/04/Beail-Farkas_print.pdf, last seen on 12/03/2014.

² UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 15' (2002), E/C.12/2002/11, 20/01/2003, para. 1, 3.

³ M. Fitzmaurice, *The Human Right to Water*, 18 Fordham Environmental Law Review 537, 540 (2007), available at: <http://heinonline.org/HOL/LandingPage?handle=hein.journals/frdmev18&div=23&id=&page=>, last seen on 12/03/2014.

⁴ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art. 25.1.

⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23/03/1976) 999 UNTS 171 (ICCPR), art. 6.

⁶ Committee on the Rights of the Child, 'General Comment No. 06' (2005), CRC/GC/2005/6, 30/04/1982, para. 5.

⁷ Supra 1, at 774.

⁸ S. Salman & S. McInerney-Lankfort, *The Human Right to Water*, Law, Justice, and Development series, The World Bank, No. 30229, 22 (2004).

⁹ T. Kiefer & C. Brölmann, *Beyond State Sovereignty: The Human Right to Water*, 5 Non-State Actors and International Law 183, 185 (2005).

adequate standard of living... including adequate food, clothing and housing, and to the continuous improvement of living conditions”¹⁰ and in Article 12. 1, “*the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*”¹¹ General Comment No. 15, which will be subsequently analyzed, already asserted that the use of the word “including” in Article 11.1 ICESCR indicates that this catalogue of rights is not created to be an exhaustive list.¹²

A thorough study of other conventions and treaties demonstrates that the right is, however, explicitly recognized in many specific documents. For instance, Article 14.2 (h) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), obliges States to “*ensure to such women the right...to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply...*”¹³ Additionally, the Convention on the Rights of the Child (CRC) recognizes the State’s duty to provide “*adequate nutritious foods and clean drinking-water*” to combat disease and malnutrition in Article 24.2(c).¹⁴ Finally, in Article 28.2 (a) of the Convention on the Rights of Persons with Disabilities (CRPD) requires the States to “*ensure equal access by persons with disabilities to clean water services.*”¹⁵ The right to water has also been included in other instruments such as the Geneva Conventions III and IV and their first Optional Protocol,¹⁶ the Declaration on the Right to Development¹⁷ and

¹⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3/01/1976) 993 UNTS 3 (ICESCR) Art. 11.1.

¹¹ Ibid, at art. 12.1.

¹² Supra 2, at para. 3.

¹³ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18/12/1979, entered into force 3/09/1981) 1249 UNTS 13 (CEDAW), art. 14.2(h).

¹⁴ Convention on the Rights of the Child (adopted 20/11/1989, entered into force 2/09/1990) 1577 UNTS 3 (CRC), art. 24.2 (c).

Convention on the Rights of Persons with Disabilities (adopted 8/10/2009, entered into force 3/05/2008) 2515 UNTS 3 (CRPD), art. 28.2 (a).

¹⁶ Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 12/08/1949, entered into force 21/10/1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12/08/1949, entered into force 21/10/1950) 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12/08/1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I) (adopted 8/06/1977, entered into force 7/12/1979) 1125 UNTS 3.

¹⁷ U.N. General Assembly, *Declaration on the Right to Development*, Res. 41/128, Meet. 97, U.N. Document A/RES/41/128, (04/12/1986) available at <http://www.un.org/documents/ga/res/41/a41r128.htm>, last seen on 29/06/2015.

the Convention on the Law of Non-Navigational Uses of International Watercourses.¹⁸

Before the description of the recent “soft-law” developments begins, it should be borne in mind that the resolutions and declarations are *statements of policy that do not possess formal legal enforceability.*¹⁹ In consequence, it is essential to separate the conventions and treaties, which are signed and ratified, and that possess binding force on the states parties.²⁰

Many pioneer international summits and conferences that began to take place during the 1970’s started to seriously address the problems related to the water resources sectors. However, this paper will only focus in recent water developments. It is a well-known fact that the water recognition landmark took place when General Comment No. 15 was issued in the year 2002. This Comment is considered the “*strongest legal foundation for the human right to water*”²¹ because of its direct and explicit attention in the concept and components of this right. Issued by the Committee on Economic, Social and Cultural rights, the Comment establishes that “*the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses*”²² and mandates that States adopt positive measures to implement the right.

The same year, the United Nations hosted the World Summit on Sustainable Development and created the Johannesburg Declaration on Sustainable Development²³ and the Johannesburg Plan of Implementation²⁴; and in 2003, the UN High Level Committee on Programs established UN-Water.²⁵ This latter mechanism was created to

¹⁸ Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21/06/1997, not yet in force) A/51/869.

¹⁹ Supra 8, at 12.

²⁰ Ibid.

²¹ Supra 1, at 778.

²² Supra 2, at para. 2.

²³ Johannesburg Declaration on Sustainable Development, A/CONF.199/20, 4/09/2002.

²⁴ Plan of Implementation of the World Summit on Sustainable Development, A/CONF.199/L.1, 26/06/2002.

²⁵ UN-Water, which was established in 2003 by the United Nations High Level Committee on Programmes, has evolved out of a history of close collaboration among UN agencies. It was created to add value to UN initiatives by fostering greater co-operation and information-sharing among existing UN agencies and

cooperate in the realization of the Johannesburg Declaration objectives and the UN Millennium Development Goals²⁶. Later on, in 2006, the UN Human Rights Committee passed Decision 2/104 Human Rights and Access to Water.²⁷ This document concerned the request that the UN High Commissioner for Human Rights conduct “*a detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.*”²⁸

In consequence, in 2007 the UNHCR issued a report which led to the Resolution 7/22 of 2008, which promoted an in-depth investigation and study of the right, and the appointment of an independent expert on the human rights obligations related to access to safe drinking water and sanitation.²⁹ Catarina de Albuquerque was appointed to the position of independent expert in 2008, and in 2010, a Report on Human rights obligations related to access to safe drinking water and sanitation was issued. This Report included non-State actors’ obligations, as it will be analyzed in further chapters.³⁰ The same year, the UN General Assembly voted to adopt Resolution 64/292, which endorsed the “*right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.*”³¹

Finally, Resolution 15/9 of the UNHRC called upon the States to take all necessary measures to guarantee this right³² and affirmed that the

outside partners, available at <http://www.unwater.org/about-us/en/>, last seen on 20/03/2014.

²⁶ Supra 1, at 779.

²⁷ UN Human Rights Council, *Human Rights and Access to Water*, Decision 2/104, Meet 31, (27/11/2006) available at http://www2.ohchr.org/english/issues/water/docs/HRC_decision2-104.pdf, last seen on 29/06/2015.

²⁸ Ibid, at para. 4.

²⁹ U.N. General Assembly, *Human Rights and Access to Safe Drinking Water and Sanitation*, Res. 7/22, Meet. 41, (28/03/2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_22.pdf, last seen on 29/06/2015.

³⁰ *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, C. de Albuquerque*, U.N. General Assembly, Sess. 15, A/HRC/15/31, (01/07/2010) available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.31.Add.1_en.pdf, last seen on 29/06/2015.

³¹ U.N. General Assembly, *The human right to water and sanitation*, Res. 64/292, Sess. 64, U.N. Document A/RES/64/292, 1, (28/07/2010) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/479/35/PDF/N0947935.pdf?OpenElement>, last seen on 29/06/2015.

³² U.N. General Assembly, *Human rights and access to safe drinking water and sanitation*, Res. 15/9, Meet. 31, 3, (30/09/2010).

“human right to safe drinking water and sanitation is derived from the right to an adequate standard of living” and it is “inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.”³³

Taking into account the amount of legal documents and instruments with references to the right to water, this guarantee can be seen as existing on two planes: as a subordinated or instrumental right and as a self-standing or independent right.³⁴ As it has been previously analyzed, the right to water is needed for the realization of other rights.³⁵ However, it is by no means a far-fetched idea the consideration that water constitutes a right by its own within the international community and at the regional and state level. Accordingly, independent expert Catarina de Albuquerque has affirmed that for the UN, the right to water is “*contained in existing human rights treaties and is therefore legally binding.*”³⁶

2.2. Concept and Normative Content

The previously mentioned General Comment No. 15 established the contours of the right to water, asserting from the beginning of the document that it entitles everyone to “*sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.*”³⁷ Its paragraph 6 provides that water is necessary not only for personal and domestic uses, but also to produce food (right to food), ensure environmental hygiene (right to health) or for securing livelihoods (right to gain a living by work), among others.³⁸ It is especially remarkable that the same paragraph states the idea that priority shall be given, understandably, to the right to water for personal and domestic uses. Additionally, General Comment No. 15 establishes in paragraphs 7 and 8 the importance of guaranteeing “*access to water resources for agriculture to realize the right to*

³³ Ibid, at para. 3.

³⁴ M. Williams, *Privatization and the Human Right to Water: Challenges for the New Century*, 28 Michigan Journal of International Law 469, 479 (2007).

³⁵ L. Watrous, *The Right to Water - From Paper to Practice*, 8 Regent Journal of International Law 109, 118 (2011).

³⁶ *Right to water and sanitation is legally binding, affirms key UN body*, UN News Centre (1/10/2010), available at http://www.un.org/apps/news/story.asp?NewsID=36308#.U1Ejm_1_tD6, last seen on 25/04/2014.

³⁷ Supra 2, at para. 2.

³⁸ Ibid, at para.6; Supra 8, at 151.

adequate food” and the environmental hygiene, which implies the prevention of hazards to health “*from unsafe and toxic water conditions.*”³⁹

Regarding the normative content of right to water, the said Comment asserts that the right to water consists of freedoms and entitlements.⁴⁰ The freedoms include the right to “*maintain access to existing water supplies*” and the right to be “*free from interference.*” On the other hand, the entitlements embrace the right to “*a system of water supply and management*” in order to safeguard the equality of opportunity of people to effectively enjoy the right to water.

The requirements that provide for a real right to water are defined in paragraphs 11 and 12 of the General Comment. First, it is necessary that the components of the right to water be “*adequate for human dignity, life and health*”. While the latter concept is not concretely defined in the Comment, there are three basic features, which are essential for water to become a fully enjoyable right. These are declared in paragraph 12 and refer to water's “*availability, quality and accessibility*”. The first concept means that water supply has to be satisfactory and plentiful so that personal and domestic uses are covered.⁴¹ Regarding the quality, it is required that the water is free from pollution, so that it does not constitute “*a threat to a person's health.*”⁴² Finally, accessibility refers to the availability of the water, which it has to be usable and reachable by all persons without discrimination. This feature has four dimensions, namely, physical accessibility, economic accessibility, non-discrimination and information accessibility.⁴³

Other documents have further discussed the scope and content of safe drinking water and access, such as the relevant OHCHR Report 6/3 of 2007.⁴⁴ This instrument analyzed the essential concepts of General Comment No. 15 which were not extensively studied. Accordingly, the Report analyzes the concept of safe drinking water, including sufficient

³⁹ Supra 2, at paras 7, 8.

⁴⁰ Ibid, at para. 10.

⁴¹ Ibid, at para. 12(a).

⁴² Ibid, at para. 12(b).

⁴³ Ibid, at para. 12(c).

⁴⁴ *Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*, General Assembly, Sess. 6, U.N. Document A/HRC/6/3, (16/08/2007), available at <http://daccess-ddsny.un.org/doc/UNDOC/GEN/G07/136/55/PDF/G0713655.pdf?OpenElement>, last seen on 29/06/2015.

quantity, which requires between 50 and 100 liters of water per person per day; and water quality, meaning potable, fresh and clean water.⁴⁵ In addition, the document discusses the different types of access, focusing in the equitable access (no discrimination),⁴⁶ physical access (available in “reasonable distance”)⁴⁷ and financial access to water (no deprivation because of lack of economic resources).⁴⁸

3. CORPORATE RESPONSIBILITY FOR WATER PRIVATIZATION

3.1. International Legal Framework

Relevant scholars such as Shaw, Clapham, Muchlinsky and Jägers have all defended that there should be protection for all violations of human rights, not only for State abuses.⁴⁹ Shaw has proposed that due to the increasing amount of practice at the international plane dealing with corporations, at least multinationals should possess international personality.⁵⁰ Jägers, for instance, supporting the doctrine of horizontal effect or “third-party effect”, advocates that human right instruments should entail obligations for multinationals.⁵¹ This last theory includes the private obligations of private actors to respect the human rights of one another.⁵² According to Van der Walt, the horizontal application of fundamental rights includes the horizontal relationship between private law subjects or private individuals.⁵³ Obviously, this position would challenge the traditional vision of the whole human rights understanding.

⁴⁵ Ibid, at paras. 13-17.

⁴⁶ Ibid, at paras. 22-24.

⁴⁷ Ibid, at paras. 25, 26.

⁴⁸ Ibid, at paras. 27-29.

⁴⁹ T. Lambooy & Y. Levashova, 'Human Rights and Non-State Actors (Business)', Utrecht University, Lecture of 21/06/2013.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² J. Letnar, *Corporate Obligations Under the Human Right to Water*, 39 *Denver Journal of International Law and Policy* 303, 333 (2011), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=jernej_letnar_cernic, last seen on 10/04/2014.

⁵³ J. Van der Walt, *Blixen's Difference: Horizontal Application of Fundamental Rights and the Resistance to Neocolonialism*, 1 *Law, Social Justice and Global Development Journal* (2003), available at http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/walt/, last seen on 11/04/2014.

However, reality speaks for itself. According to Carbone, “*it is increasingly necessary that the multinational enterprise be directly subjected to some principles of international law concerning human rights protection.*”⁵⁴ Besides, Cassel has asserted that responsibility has deviated from the public to the private sector and especially to multinationals, which in consequence, leads to the fact that “*governments and intergovernmental organizations wield correspondingly less power.*”⁵⁵ Thus, a number of commentators agree that corporations can be held responsible for human rights violations, although other allege that States are the only duty-bearers with regards to human rights.⁵⁶

The basic expectation that society has of businesses is that they will respect the human rights.⁵⁷ Such idea of corporate responsibility in human rights was affirmed in the 2008 Report of John Ruggie, appointed Special Representative in 2005 with a mandate to provide views and practical recommendations on the scope and content of corporate responsibility with respect to human rights.⁵⁸

But the issue had been already discussed earlier in time. The Preamble of the UDHR proclaimed that this instrument is “*a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms.*”⁵⁹ In addition, Article 28 UDHR asserts that “*everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully*

⁵⁴ G. Aguilar, *The Human Right to Water and Sanitation: Going Beyond Corporate Social Responsibility*, 29 *Merkourios - International and European Law: General Issue* 39, 45 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2219188, last seen on 11/04/2014.

⁵⁵ D. Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 *Fordham International Law Journal* 1963, 1984 (1995).

⁵⁶ *Supra* 52, at 331.

⁵⁷ *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, General Assembly, Sess. 14, U.N. Document A/HRC/14/27, 4, (7/04/2008), available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/14/27&Lang=E>, last seen on 29/06/2015.

⁵⁸ E. Chen & S.A. Altschuller, *Corporate Accountability and Human Rights in the Age of Global Water Scarcity*, *Natural Resources & Environment* 9, 12 (2010), available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/nre24&div=43&cid=&page=>, last seen on 15/04/2014.

⁵⁹ U.N. General Assembly, *Universal Declaration of Human Rights*, Res. 217 A (III), 1, (10/12/1948) available at <http://daccess-ods.un.org/TMP/6879093.05095673.html>, last seen on 26/07/2015.

*realized.”*⁶⁰ Accordingly, Henkin affirmed that “*every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.*”⁶¹

Besides, through several “*global voluntary commitments,*”⁶² such as the United Nations Global Compact in 1999⁶³ and the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights of 2003 (the UN Draft Norms)*,⁶⁴ human rights norms that apply directly to corporations have received growing interest.⁶⁵

The UN Draft Norms support the creation of binding, obligatory human rights duties for transnational corporations and other businesses enterprises.⁶⁶ Hence, international human rights law should “*focus adequately on these extremely potent non-state actors.*”⁶⁷ In consequence, it is a reality that the Norms constitute a good basis to protect the right to water under privatization scenarios.⁶⁸ Thus, if business entities were found to have an obligation to protect the human right to water, “*these duties would provide a second line of protection for the right to water in the context of privatization.*”⁶⁹ This is because the UN Draft Norms assert that the obligations of companies augment and do not diminish or replace state responsibilities.⁷⁰

The UN Draft Norms specifically mandate that transnational corporations and other business entities “*contribute to the realization*” and

⁶⁰ Ibid, at art.28.

⁶¹ Supra 54, at 63.

⁶² Supra 30, at para. 23.

⁶³ Global Compact, Principles 1 and 2, 1999, K. Annan.

⁶⁴ *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Draft Norms)*, U.N. Document E/CN.4/Sub.2/2003/12,(26/08/2003) available at <http://daccessddsny.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf?OpenElement>, last seen on 29/06/2015.

⁶⁵ Supra 34, at 488.

⁶⁶ Supra 64.at 1.

⁶⁷ D. Weissbrodt & M. Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 American Journal Of International Law 901 (2003).

⁶⁸ Supra 34, 489.

⁶⁹ V. Petrova, *At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water*, 31 Brooklyn Journal of International Law 612, 613 (2006).

⁷⁰ Supra 64, at para. 19.

“refrain from actions which obstruct or impede the realization” of certain rights, including the right to “adequate food and drinking water” and the right to the “highest attainable standard of health.”⁷¹ Therefore, it can be implied that corporations that entered into privatization agreements to provide water services would be required to meet both positive and negative human rights obligations.⁷² In conclusion, the UN Draft Norms offer the promise of holding private companies responsible for human rights violations, which could diminish reliance on states as the “primary implementers and enforcers of human rights.”⁷³

In this respect, it should be discussed the relevance of the Ruggie Framework, which was issued in response to the lack of certainty on the application of the UN Draft Norms. In April 2008, the UN SRSG advanced three basic principles, namely: States have a duty to protect against human rights abuses by third states, including companies; companies have a responsibility to respect human rights; there needs to be effective access to remedies so that these respective obligations can be enforced.⁷⁴ The second principle means that corporations have to respect, which means, basically, to do no harm. Companies must carry out sufficient due diligence efforts so that they are aware of and thus able to address and prevent any adverse human impacts associated with their operations.⁷⁵

Besides, the UN SRSG established three elements that defined the concept of the due diligence process. Accordingly, it is required an analysis of the country and local context, the impacts that the company will have and “whether and how” a company may contribute to human rights abuses through its relationships with partners, contractors, other non-state actors and state agents.⁷⁶

The previous engagements are enforced through recent “soft-law” documents such as the Guidelines for Multinational Enterprises of the

⁷¹ Ibid, at para. 12.

⁷² S. Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?*, 10 *ILSA Journal of International & Comparative Law* 507 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=630422, last seen on 24/04/2014.

⁷³ Supra 34, at 491.

⁷⁴ Supra 57, at para. 27-103.

⁷⁵ Ibid, at para. 56; Supra 58, at 12.

⁷⁶ Supra 57, at para. 56.

Organization for Economic Cooperation and Development,⁷⁷ the 2011 Guiding Principles on Business and Human Rights⁷⁸ or the 2012 Interpretive Guide regarding the Corporate Responsibility to Respect Human Rights.⁷⁹ These do not create legally binding obligations, but derive their normative force “*through recognition of social expectations by States and other key actors.*”⁸⁰ In conclusion, despite all efforts to attribute responsibility to enterprises for human rights violation, this new-born field still requires further legislative development and implementation.

3.2. Obligations and Duties of Business Entities under the Right to Water

As already stated above, States have been always considered primary responsible for protecting human rights.⁸¹ This means that they and only they cannot violate human rights, as they are obliged by international and regional human rights instruments.⁸² General Comment No. 15 is the main document defining the State’s obligations in relation to the right to water. The Comment imposes on the States general “*obligations to respect, obligations to protect and obligations to fulfill,*”⁸³ but it also contains core obligations, which have to be implemented immediately.⁸⁴

However, non-State actors are constantly cited in this Comment, concretely within the State obligation to protect. This duty consists on preventing “*third parties from interfering in any way with the enjoyment of the right to water.*”⁸⁵ The same paragraph provides a list with the subjects

⁷⁷ Organization for Economic Co-operation and Development (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, available at <http://dx.doi.org/10.1787/9789264115415-en>, last seen on 24/04/2014.

⁷⁸ *Guiding Principles on Business and Human Rights*, General Assembly, U.N. Document HR/PUB/11/04, (16/06/2011), available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, last seen on 29/06/2015.

⁷⁹ *Interpretive Guide regarding the Corporate Responsibility to Respect Human Rights*, General Assembly, U.N. Document HR/PUB/12/02, (2012), available at www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf, last seen on 29/06/2015.

⁸⁰ *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, Sess. 4, U.N. Document A/HRC/4/35, 15, (19/02/2007), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/108/85/PDF/G0710885.pdf?OpenElement>, last visited on 26/09/2015.

⁸¹ *Supra* 58, at 11.

⁸² *Supra* 54, at 44.

⁸³ *Supra* 2, at para. 17-38.

⁸⁴ *Ibid*, at para. 37.

⁸⁵ *Ibid*, at para. 23.

considered “third parties”, including corporations and other entities; and a detailed explanation of the extent of the obligation. According to the wording of the Comment, States have to take effective measures so that these non-State actors restrain from “*denying equal access to adequate water*” or “*polluting and inequitably extracting from water resources.*”⁸⁶

In addition, in a situation where water services are operated or controlled by third parties, States must “*prevent them for compromising equal, affordable, and physical access to sufficient, safe and acceptable water.*”⁸⁷ Indeed, in relation with this last disposition, it can be argued that the obligation to protect manifests a whole link between the human right to water and privatization of water systems.⁸⁸ Accordingly, the significance of this paragraph is twofold.⁸⁹ First, the human rights regime itself foresees and accounts for the possibility that water services may be provided by private corporations or other third parties.⁹⁰ Second, the state parties maintain certain obligations to safeguard the right to water even in the cases of privatization agreements, defining states’ responsibilities, and the way privatization could potentially violate rights and possible steps states should take to mitigate such impact on human rights.⁹¹

Besides, the Comment establishes the types of violations to the right to water, distinguishing between acts of commission, which are the “*actions of States parties or other entities insufficiently regulated by States,*”⁹² and acts of omission or of “*failure to take appropriate steps towards the full realization of the right to water, the failure to have a national policy on water and the failure to enforce relevant laws.*”⁹³ It was a common and traditional belief that the only actor capable of violating rights was the State. However, it is important to consider that in practice, not only States violate human rights.⁹⁴ This applies especially in the right to water, since a private corporation can

⁸⁶ Ibid.

⁸⁷ Ibid, at para. 24.

⁸⁸ Supra 3, at 551.

⁸⁹ Supra 34, at 486.

⁹⁰ Similarly, WHO concludes that the state can privatize water services and user fees may be charged so that everyone can afford essential water (World Health Org., Global Water Supply and Sanitation Assessment, 2000, 1-3, available at http://www.who.int/water_sanitation_health/monitoring/globalassess/en/, last seen 26/04/2014).

⁹¹ *Liberalization of trade in services and human rights*, UN Committee on Economic, Social and Cultural Rights, U.N. Document E/CN.4/Sub.2/2002/9, 23, (25/06/2002)

⁹² Supra 2, at para. 42.

⁹³ Ibid, at para. 43.

⁹⁴ Supra 54, at 44.

easily interfere in the fulfillment of this right an attempt to essential rights, such as life and health.⁹⁵

In 2010, the Report of Catarina de Albuquerque focused on the role and obligations of non-State providers of water and sanitation service.⁹⁶ According to the Report, international human rights law obliges non-State service providers to respect the human right to water and sanitation.⁹⁷ The Report also establishes the three primary challenges, which affect non-State water providers: decision-making, operation of services, accountability and enforcement.⁹⁸ In consequence, non-State service providers have a positive duty to exercise due diligence to identify and prevent negative human rights impacts that their actions may cause.⁹⁹

3.3. Business Entities as Water Providers and Relevant Case Law

Corporations can have an important impact on the right to water. According to Audrey Gaughran, this can occur in three major situations: where businesses are users of water, particularly where water is a limited resource; where businesses activities that are unrelated to water itself affect water sources; and where businesses are involved in the provision of water services.¹⁰⁰ In addition, the Institute for Business and Human Rights has argued that businesses have three potential responsibilities concerning water: as users or consumers (over-abstraction or pollution), as enablers of access to water and as providers or distributors of water.¹⁰¹ Having in mind these two classifications, which I believe they complement each other, this section will focus in the corporations as providers of water services and the problems of privatization.

Many States have introduced the right to water into their laws and tried to use privatization in order to guarantee water for all citizens.¹⁰² However, privatization of water is a much debated issue, involving not only political and economic matters, but also important

⁹⁵ Ibid.

⁹⁶ Supra 30, at para. 14-17.

⁹⁷ Ibid, at para. 22-28.

⁹⁸ Ibid, at para. 32-60.

⁹⁹ Ibid, at para. 26.

¹⁰⁰ A. Gaughran, *Business and Human Rights and the Right to Water*, 106 American Society of International Law Proceedings 52, 53 (2012).

¹⁰¹ Supra 52, at 317.

¹⁰² Supra 35, at 123.

human rights. There are two main ways of involvement of the private sector in the water supply services: complete privatization and Public-Private-Partnerships (the PPP).¹⁰³ According to Fitzmaurice, the last mechanism implies that “*water services remain in the hand of a monopoly provider, with some of them outsourced to private companies*”.¹⁰⁴

When water is privatized, the pertinent corporation modifies the “*natural flow of water*” within a community: this can negatively affect a community's access to water and lead to individuals drinking unclean water or having to pay for it.¹⁰⁵ Taking into account that almost a billion people do not have access to clean and safe water, it can be argued that corporations can become violators of the right to water “*where their activities deny access to water or where water prices increase without warning*.”¹⁰⁶

However, according to McAdam, although privatization is often blamed for disregarding human rights and encouraging profit oriented strategies; other measures are frequently liable for the lack of economic growth.¹⁰⁷ This author states that while in some countries privatization has led to positive growth, lack of competition between private businesses in some developing countries has led to provide poor services.¹⁰⁸ An example of this last situation can be found in some States in South America, where “*illegal private enterprises that provide services of very poor quality are neither regulated by a State nor competed against*.”¹⁰⁹

The case of Cochabamba, Bolivia, offers a very interesting study since it shows how privatization can lead to disaster in a State. In 1998, the World Bank coerced the Bolivian state to open the water system up to the private sector as a condition for guaranteeing a million dollar loan to enhance the water system's infrastructure.¹¹⁰ In consequence, the international consortium Aquas del Tunari was granted a concession to

¹⁰³ Supra 3, at 558.

¹⁰⁴ Ibid.

¹⁰⁵ Supra 35, at 123.

¹⁰⁶ Supra 52, at 303; supra 54, at 42.

¹⁰⁷ K. C. McAdam, *The Human Right to Water - Market Allocations and Subsistence in a World of Scarcity*, *The Interdisciplinary Journal of Study Abroad* 59, 67 (2003), available at <http://files.eric.ed.gov/fulltext/EJ891474.pdf>, last seen on 25/04/2014.

¹⁰⁸ Ibid, at 35.

¹⁰⁹ Supra 3, at 561.

¹¹⁰ R. Glennon, *Water Scarcity, Marketing, and Privatization*, 83 *Texas Law Review* 1873, 1890 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=762604, last seen on 27/04/2014.

supply drinking water to the city of Cochabamba in September 1999.¹¹¹ Once the negotiations concluded, water in lakes and rivers “*ceased to be a collectively owned resource and became a privately owned commodity*”, thereby depriving people of its use.¹¹² Indeed, tariffs increased by 200-300 percent in many cases.¹¹³ This meant that many workers had to spend between twenty and twenty five per cent of their monthly income in water bills.¹¹⁴ Unable to survive under the burden of the new water prices, public protests started to take place in February 2000.¹¹⁵ The whole situation led to the so-called “Water war”, which resulted in numerous arrests, some injuries and the death of a 17-year-old boy.¹¹⁶ Finally, the Bolivian government terminated the contract and Aguasdel Tunari was substituted by a cooperative, which does not possess the sufficient capital to enhance or expand the infrastructure.¹¹⁷ Although it may be slowly increasing access to water to the poor sector of the population, inadequate service and corruption still flood the system.¹¹⁸

This analysis has shown that privatization in this particular State failed to provide low-cost water supply. The new system was implemented too quickly and the rise of prices resulted in an asphyxiation of the poor population. Privatization did not include everyone in the market for water.¹¹⁹ Besides, the citizens did not believe in the Bolivian State protecting them if the negative effects of the private water supply could not be sustained on a household level.¹²⁰ Thus, privatization conditioned the access to water, and therefore to life, on wealth, in a district overpoweringly known for its poverty.¹²¹

¹¹¹ *Bolivia: The water war to resist privatization of water in Cochabamba* (#157), Global Water Partnership, available at <http://www.gwp.org/en/ToolBox/CASE-STUDIES/Americas--Caribbean/Bolivia-The-water-war-to-resist-privatisation-of-water-inCochabamba-157/>, last seen on 16/04/2014.

¹¹² *Supra* 3, at 565.

¹¹³ *Water Privatization Case Study: Cochabamba*, Bolivia, Public Citizen, p. 3

¹¹⁴ W. Finnegan, *Letter from Bolivia: Leasing the Rain*, available at http://www.newyorker.com/archive/2002/04/08/020408fa_FACT1, last seen on 28/04/2014.

¹¹⁵ *Supra* 113, at 3.

¹¹⁶ *Supra* 3, at 565.

¹¹⁷ *Supra* 110, at 1891.

¹¹⁸ *Supra* 34, at 498.

¹¹⁹ *Supra* 107, at 39.

¹²⁰ *Ibid*, at 40.

¹²¹ E. Strother, *On Water Scarcity and the Right to Life: Bolivia*, Council on Hemispheric Affairs (27/06/2013)

There exist many reasons to argue that converting water into a commodity, a marketable item, can have dangerous consequences. Accordingly, privatization leads to rate increases, water quality undermining, accountability only to shareholders and not consumers, corruption fostering, reduction of local control and public rights, and denial of access to clean water to the poor, *inter alia*.¹²² In the Cochabamba case, the hazards provoked to society as a consequence of privatization amounted to clear human rights violations. However, the right to water's lack of binding regulation linked to the fact that water is frequently considered as an economic, social and cultural right, usually leads to the perception that the right to water cannot be strictly violated. This is because ESC rights are progressive rights, unlike the civil and political ones, which require an immediate implementation.¹²³ Notwithstanding this reality, it can be alleged that a privatization process can violate the right to life in cases where access to water is flagrantly impeded.

Apart from the Cochabamba case, there have been many other examples where privatization has led to many failures, bringing water stress among the poor populations and causing people to drink polluted water, endangering their right to health.¹²⁴ For instance, in Canada, at least seven people died in Ontario after A&L Labs had privatized water testing; in Morocco, consumers saw the water price increase threefold after the service was privatized in Casablanca.¹²⁵

However, and just to put the tin lid on it, privatization is not always necessarily negative. It is true that many States have tried to remedy their water problems through the World Bank or other monetary institutions loans, which usually include a clause obliging the State to privatize its water system.¹²⁶ Although this can lead to terrible consequences, the truth is that privatization can help developing the existent water infrastructure provided of course that the context and situation of the country permit it. This means that in order to analyze the situation in

¹²² *Top 10 Reasons to Oppose Water Privatization*, Water for All, Campaign to Keep Water as a Public Trust, available at [http://hesomagazine.com/Top_10_\(PDF\).pdf](http://hesomagazine.com/Top_10_(PDF).pdf), last seen on 25/04/2014.

¹²³ *Supra* 3, at 556.

¹²⁴ D. Van Overbeke, *Water Privatization Conflicts*, available at <http://academic.evergreen.edu/g/grossmaz/vanovedr/>, last accessed on 25/04/2014.

¹²⁵ *Ibid*.

¹²⁶ *Supra* 1, at 765,766.

Cochabamba or elsewhere, “*one must know the state of affairs before the private company arrived.*”¹²⁷

When a company is conferred the management of the water service supply and invests millions in reforming a devastated infrastructure to ameliorate the water accessibility of the poor communities, “*it quite justifiably expects the return of its capital and a reasonable profit.*”¹²⁸ When the water provision is led by the “*full cost recovery*” principle, water supply can become only accessible to wealthy sectors in society, creating obvious inequities and risking the fulfillment of their basic needs.¹²⁹

Accordingly, the issue at stake raises concerns and tensions. Glennon reflects this debate quoting a conversation between Gilda Pedinoce de Valls (an opponent of privatization), who argued that: “*water is a gift from God*” to what Oliver Barbaroux (President of Vivendi's water business) replied: “*Yes... but he forgot to lay the pipes.*”¹³⁰ Thus, the privatization can bring good results, but requires good governance and the correct institutional framework in the State in question.

4. MOVING TOWARDS A MODEL OF BUSINESS RESPONSIBILITY

Although privatization of water services might have the ultimate goal of providing water access to the poorest and most marginal regions in a state, the process needs to be carefully regulated and endowed of their necessary safeguards. Otherwise, the situation can unleash serious human rights abuses. Accordingly, these potential violations by the private sector must be punished in order to increase consciousness amongst corporations. Business entities eagerness to economic profiting cannot outweigh peoples' right to drinkable water.

Taking into account the efforts made by the UN SRSG Ruggie to promote greater reporting, and considering that access to water must be

¹²⁷ Supra 110, at 1891.

¹²⁸ Ibid.

¹²⁹ E.B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 Ecology Law Quarterly 957, 962, 963 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1367759, last seen on 27/04/2014.

¹³⁰ J. Tagliabue, *As Multinationals Run the Taps, Anger Rises Over Water for Profit*, *The New York Times* (26/08/2002), available at <http://www.nytimes.com/2002/08/26/world/as-multinationals-run-the-taps-anger-rises-over-water-for-profit.html>, last seen on 26/07/2015.

provided without discrimination, it is clear that “*private water entrepreneurs should be obliged to report how much they are paying for access to water and how much they in turn charge the public for it.*”¹³¹ Disclosure is necessary since it leads to transparency, and transparency, to accountability.¹³² It is clear that companies should be held accountable for the impact of their activities on water access. This can be achieved through a wide variety of judicial and non-judicial mechanisms that enable the individuals the possibility of holding the corporations accountable.¹³³

The dilemma is how to make corporations respond of abuses to the right to water. As it has been previously analyzed, it is not possible to affirm that companies possess international personality with the respective rights and duties. Besides, even if the international framework conferred capability to the corporations, the lack of definition of the human right to water would impede accountability for a violation to the said right. Notwithstanding the foregoing, it is known that three levels of sources establish corporate obligations: national legal orders, international level and unilateral voluntary commitments by the corporations themselves.

Therefore, my proposal is to approach the question at the national level until the international system creates a monitoring mechanism to deal with the corporations’ responsibility under the right to water. The implementation of the right to water in the domestic regulation of states would lead to adjust the policies and to create enforcement mechanisms to execute the measures taken. It is known that several countries already have explicitly recognized the right to water in their Constitutions, including South Africa¹³⁴, Kenya¹³⁵, Ecuador¹³⁶ and the Democratic Republic of Congo.¹³⁷ Where the right is only implicitly recognized in the Magna Carta, some countries such as India have broadly interpreted Article 21 of the Constitution, which recognizes the right to life, to encompass the right to safe and sufficient water.¹³⁸ Other states, instead, are developing their national legislation to protect the right to water,

¹³¹ Supra 58, at 13.

¹³² Ibid, at 14.

¹³³ Ibid.

¹³⁴ Constitution of South Africa (1996) s. 27.

¹³⁵ Constitution of Kenya (2010) a. 43.1(d).

¹³⁶ Constitution of Ecuador (1998) a. 23.

¹³⁷ Constitution of the Democratic Republic of the Congo (2005) a. 48.

¹³⁸ N. Chowdhury et al., *The Human Right to Water and the Responsibilities of Businesses: An Analysis of Legal Issues*, SOAS University of London 10 (2011), available at http://www.ihrb.org/pdf/SOAS-The_Human_Right_to_Water.pdf, last seen on 28/04/2014.

such as Belgium.¹³⁹ Some authors have already defended that the domestic incorporation of international human rights law is the best approach for the enforcement of human rights, since it “*commits the States to compliance and provides opportunities for redress in case of violation.*”¹⁴⁰ According to Bruce Pardy, “*a right to water that is unenforceable does not exist.*”¹⁴¹

Then, it would be necessary to create the essential scheme in order to make private corporations accountable for abusive conducts. It is known that many states have enacted legislation on corporate responsibility for the right to water. However, there is no homogeneity among the domestic laws in the definitions and scope of this concept.¹⁴² This problem, however, can be approached by introducing a uniform national law identifying the obligations and responsibilities of corporations in relation to human rights, including the right to water.¹⁴³ Hence, in order for the system to work, all private sectors should be bound to act transparently to respect the human right to water effectively. Naturally, the compliance monitoring procedures should be strengthened or even created when necessary, and publicized to permit individuals to claim entitlement.¹⁴⁴

Concretely, it has been proposed that states should consider creating a monetary penalty for corporations.¹⁴⁵ When private corporations raise the price to an extent which is economically unsustainable or when due to a negligent process of water cleansing, they end up providing polluted water; main recognized rights are manifestly violated. In consequence, with the imposition of fines, the funds obtained could be used then to provide water to the poor sectors, which do not have access to potable water.¹⁴⁶

¹³⁹ Ibid, at 9.

¹⁴⁰ Supra 1, at 797.

¹⁴¹ B. Pardy, *The Dark Irony of International Water Rights*, 28 Pace Environmental Law Review 907, 915 (2011), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1678&context=pehr>, last seen on 28/04/2014.

¹⁴² Supra 52, at 307.

¹⁴³ Ibid.

¹⁴⁴ Supra 1, at 767.

¹⁴⁵ Supra 35, at 127.

¹⁴⁶ Ibid.

5. CONCLUSION

Kok and Langford noted, “*The measure of neglect of the right to water in international and national jurisprudence stands in contrast to the severity of the plight of the millions without proper access to water.*”¹⁴⁷ This quote clearly refers to a problem that has its origins in the lack of proper regulation of an essential right with the natural consequence of lack of enforcement and its correspondent troubles.

Water needs to be protected and respected. Given the fact that access to water is *conditio sine qua non* for the fulfillment of many other rights, and taking into account the essential role of enterprises in this respect, it is crucial to find a way of making companies responsible for their violations. As it has been previously analyzed, corporate responsibility is gaining ground in the national arenas, while at the international level there has been a notable soft-law development. The role and impact of enterprises in the right to water is huge and the new policies taken in the frame of their activities evidence the growing consciousness of many businesses. However, the precedent in the human right field demonstrates that it is necessary to have a binding law, with an enforcement mechanism, which permits the individual to initiate proceedings against a company. In the frame of the right to water, enterprises are becoming even more important than the State itself, especially when the water system is privatized. Notwithstanding, there is not yet an international mechanism to deal with this kind of violations.

Thus, it has been argued that the first step is managing the claims of individuals at the domestic level when enterprises directly infringe the right to water, knowing that corporate responsibility does not prejudice to the states responsibilities. This is by no means a far-fetched scenario, since in many countries the government itself does not provide solutions to such critical situations where the lives of thousands of people are at stake.

¹⁴⁷ A. Kok & M. Langford, *The Right to Water*, in *Constitutional Law of South Africa*, 208 (2005).