

**The Human Right to Water and  
the Responsibilities of Businesses:  
An Analysis of Legal Issues**

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## **INTRODUCTION**

90% of the world's fresh water resources are consumed within the industrial and agricultural sectors.<sup>1</sup> Indicating water's place at the top of the corporate agenda, a recent survey by the Carbon Disclosure Project (CDP) of more than 300 of the 500 largest companies in the world, found that 67% of respondents placed responsibility for water-related issues at the Board or Executive Committee level, 89% have developed specific water policies, and 60% have set water-related performance targets.<sup>2</sup> Significantly, respondents across all sectors identified regulation as one of the key risks in corporate water practices.<sup>3</sup> Part 1 of this paper provides an overview of the international recognition of the human right to water and its current legal scope – the legal framework guiding States' obligations in fully realising the right to water for all, including State liability for businesses' operations. Part 2 examines the mechanisms at both national and international level that are increasingly being used to hold water users and providers to account. Lastly, in Part 3, we attempt to answer why the human right to water is important to businesses by considering the implications of trends around the issue of business and human rights and how these trends can be used as an opportunity to operationalise the right to water within business practices.

### **1. THE LEGAL FOUNDATION OF THE RIGHT TO WATER**

#### **1.1 Evolution of International Recognition of the Right to Water**

2010 has been the most momentous year to date for authoritative confirmation of a human right to water and sanitation. The right to water has been declared at various international conferences since the 1970's, explicitly included in numerous international instruments and regional treaties<sup>4</sup> since the late-1940's, and implicitly derived from the core human rights treaties of the United Nations.

On 28 July 2010, the United Nations (UN) General Assembly (GA) adopted Resolution 64/292 *The Human Right to Water and Sanitation*<sup>5</sup> explicitly recognising “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and

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<sup>1</sup> World Water Council, available at <<http://www.worldwatercouncil.org/index.php?id=25>>

<sup>2</sup> Carbon Disclosure Project, *CDP Water Disclosure 2010 Project* (2010), p.5, available at <<https://www.cdproject.net/CDPResults/CDP-2010-Water-Disclosure-Global-Report.pdf>>

<sup>3</sup> *Ibid*, p13, Figure 5

<sup>4</sup> These include the *African Charter on the Rights and Welfare of the Child* (1990), *European Charter on Water Resources* (2001), *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003).

<sup>5</sup> GA Res 64/292, UN Doc A/RES/64/292, 3 August 2010, available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/479/35/PDF/N0947935.pdf?OpenElement>> (hereafter 2010 GA Res)

all human rights”.<sup>6</sup> The Resolution calls upon States and international organisations to provide financial, capacity, and technological resources to developing countries as part of global efforts to provide “safe, clean, accessible and affordable drinking water and sanitation for all”.<sup>7</sup> GA Resolution 64/292 was quickly followed by Human Rights Council (HRC) Resolution 15/9 of 30 September 2010 *Human rights and Access to Safe Drinking Water and Sanitation*.<sup>8</sup> The resolution recognised the right to water as instrumental to the realisation of other human rights and affirmed that the right is derived “from the right to an adequate standard of living” and 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”. While the GA and HRC resolutions affirm the right to both water and *sanitation*, the latter falls outside the scope of this paper.

Though these resolutions are non-binding, they are nonetheless important indicators of international debate and consensus confirming the human right to water as an autonomous right, as well as one fundamental to the realisation of other human rights contained within several binding human rights treaties. These explicit validations of an autonomous human right to water further puts to rest arguments against the legitimacy of past efforts to extrapolate the right to water from core human rights treaties.

Prior to the 2010 GA and HRC resolutions, the right to water was considered to be implicit in one of the two main human rights treaties, the International Covenant on Economic, Social and Cultural Rights (ICESCR), which entered into force in 1976. Drafted alongside it, the other main human rights treaty is the International Covenant on Civil and Political Rights (ICCPR). Although a number of General Assembly resolutions have been adopted confirming that the rights contained in the two Covenants as interrelated, interdependent and indivisible<sup>9</sup>, it is important to note that whereas States must immediately realise the rights within ICCPR<sup>10</sup> they are only obliged to progressively realise the rights within the ICESCR within the available means and resources of the State.<sup>11</sup>

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<sup>6</sup> *Ibid* para 1

<sup>7</sup> *Ibid* para 2

<sup>8</sup> HRC Res 15/9, UN Doc A/HRC/RES/15/9 6 October 2010, available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/166/33/PDF/G1016633.pdf?OpenElement>>

<sup>9</sup> See GA Res: 32/130 (1977); 40/144 (1985); 41/117 (1986); 42/102 (1987)

<sup>10</sup> *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976, available at <<http://www2.ohchr.org/english/law/ccpr.htm>> (hereafter ICCPR), Art 2

<sup>11</sup> *International Covenant on Economic and Social Rights* GA Res 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976, available at <<http://www2.ohchr.org/english/law/cescr.htm>> (hereafter ICESCR), Art 2

The right to a basic supply of water is also explicitly recognised in Article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which entered into force in 1981.<sup>12</sup> Additionally, Article 24(2)(c) of the Convention on the Rights of the Child (CRC) recognises the State's obligation to provide "adequate nutritious foods and clean drinking-water" to combat disease and malnutrition.<sup>13</sup> More recently, Article 28(2)(a) of the 2010 Convention on the Rights of Persons with Disabilities (CRPD)<sup>14</sup> specifically requires States to "ensure equal access by persons with disabilities to clean water services".

The right to water has also been included in other instruments including Geneva Conventions III and IV and their first Optional Protocol, the Declaration on the Right to Development and the Convention on the Law of Non-navigational Uses of International Watercourses.<sup>15</sup>

## 1.2 Substance of the Right to Water – General Comment 15 *The Right To Water*

In 2002, the U.N. Committee on Economic, Social and Cultural Rights issued General Comment 15 *The right to water* declaring, "the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses".<sup>16</sup> Issued by the Committee, General Comments are not binding and cannot create new obligations under the ICESCR, but they can extrapolate existing obligations from the nature of the Covenant. General Comment 15 (GC 15) is regarded as the authoritative statement on the substance and status of the human right to water, and both the 2010 GA and HRC Resolutions affirm GC 15 when defining the substance of the right to water.<sup>17</sup>

In GC15, the Committee stated that the right to water is implicit in Articles 11(1) and 12 of the Covenant relating to the right to an "adequate standard of living"<sup>18</sup> and the "enjoyment of the highest attainable standard of physical and mental health" respectively.<sup>19</sup> Further, the

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<sup>12</sup> *Convention on the Elimination of all Forms of Discrimination Against Women* GA Res. 34/180, 34 UN GAOR Supp. (No. 46) UN Doc. A/34/46, entered into force 3 September 1981 available at

<<http://www2.ohchr.org/english/law/cedaw.htm>> (hereafter CEDAW), Art 14(2)(h)

<sup>13</sup> *Convention on the Rights of the Child* GA Res 44/25, annex, 44 UN GAOR Supp. (No. 49) UN Doc. A/44/49 (1989); 1577 UNTS 3 entered into force 2 September 1990 available at <<http://www2.ohchr.org/english/law/crc.htm>>

(hereafter CRC), Art 24(2)(c)

<sup>14</sup> *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008, available at

<<http://www2.ohchr.org/english/law/disabilities-convention.htm>> (hereafter CRPD), Art 28(2)(a),

<sup>15</sup> See Annex 1 for a list of relevant international instruments acknowledging or relating to the right to water.

<sup>16</sup> Committee on Economic, Social and Cultural Rights, *General Comment 15*, (2002) E/C.12/2002/11 available at <<http://www2.ohchr.org/english/bodies/cescr/comments.htm>> (hereafter GC 15), para 2

<sup>17</sup> The Committee had also previously recognised water as a human right under Article 11.1 of the ICESCR in its General Comment 6 (1995), and under Article 12.2 in General Comment 12 (1999) regarding the right to health.

<sup>18</sup> The Committee clarified, "use of the word 'including' indicates that this catalogue of rights was not intended to be exhaustive."

<sup>19</sup> See above n16, GC 15, para 3

Committee clarified that priority must always be given to personal and domestic uses of water,<sup>20</sup> as well as to meet minimum essential levels of all other rights within the Covenant.

### 1.2.1 Normative Content of the Right to Water

General Comment 15 states that the right to water consists of freedoms – such as the right to maintain access to an existing water supply and the right to be free from arbitrary disconnection, contamination or other interference – and entitlements – such as the right to a water management system which provides “equality of opportunity” in enjoying the right to water.<sup>21</sup> The primary element of the right to water however is *adequacy*, which, when read in the context of Articles 11(1) and 12 of the ICESCR, changes the focus of water from an economic good to a sustainable<sup>22</sup> social and cultural good. Though overall adequacy can vary according to each State’s needs and capabilities, the minimum standards of *availability*, *quality* and *accessibility*, remain constant in all circumstances.

*Availability* requires continuous, sufficient water for personal and domestic use,<sup>23</sup> with the quantity available for each person stressed by the Committee to conform to World Health Organization (WHO) guidelines.<sup>24</sup> *Quality* requires the water to be safe – free from contaminants such as micro-organisms, chemicals or radiological substances. It must also be “of an acceptable colour, odour and taste for each personal or domestic use.”<sup>25</sup> *Accessibility* of water is further broken down into physical, economic, non-discrimination and information accessibility categories. Physical accessibility requires facilities and services to be within safe reach for all sections of the population. Economic accessibility requires the affordability of water for all that does not compromise the realisation of other Covenant rights. Non-discrimination requires that the most vulnerable or marginalised sections of a society to be included in regulating access to water. Information accessibility refers to the right to know and give information with regard to water issues.

### 1.2.2 States Parties’ Obligations

General Comment 15 made clear that Article 2.1 of the ICESCR “clearly imposes a duty on each State party to take whatever steps are necessary to ensure that everyone enjoys the right to

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<sup>20</sup> See above n16, GC 15, para 6

<sup>21</sup> See above n16, GC 15, para 10

<sup>22</sup> ‘Sustainable’ refers to the insurance of safe, sufficient water for both present and future generations. For examples of measures encouraged for sustainability, see above n16, GC 15, para 28

<sup>23</sup> That is, drinking, personal sanitation, clothes washing, food preparation and personal and household hygiene.

<sup>24</sup> See above n16, GC 15, para 12(a)

<sup>25</sup> See above n16, GC 15, para 12(b)

water, as soon as possible”.<sup>26</sup> According to GC 15, the specific legal obligations of States concerning the fulfillment of the right to water include obligations to *respect, protect* and *fulfill*.<sup>27</sup>

*Respect* obligations prohibit any interference, whether direct or indirect, to the enjoyment of the right to water.<sup>28</sup> *Protect* obligations require the prevention by States of third party interference in the enjoyment of the right to water, encouraging in particular prohibitive legislative and regulatory measures against damaging activities.<sup>29</sup> *Fulfill* obligations requires States to take positive obligations to facilitate, promote and provide. For example, GC 15 encourages States to legislate in support of the full realisation of the right to water, as well as to implement national water strategies and plans of action, ensuring the affordability<sup>30</sup> of water for all and facilitating the sustainable access to water for those in rural or deprived urban areas.<sup>31</sup> Additionally, “to assist in the monitoring process” GC 15 encourages States to include right to water indicators in national water strategies or plans of action. Judicial and other remedies and accountability mechanisms are also cited as necessary by the Committee in fully realising the right to water, so as to make the right justiciable.<sup>32</sup>

States also have international obligations to respect the enjoyment of the right in all other countries, which includes refraining from direct or indirect interference by the State or by third parties within its jurisdiction, as well as facilitating the realisation of the right in other countries if it has the available resources to do so.<sup>33</sup> It also requires the encouragement of the inclusion of right to water issues in international agreements and the lending policies of a State’s financial institutions, and obliges non-state actors and international organisations to cooperate effectively with States to realise the right to water.

### 1.2.3 Violations

By applying the normative content (adequacy in the form of availability, quality and accessibility) of the right to water to State’s obligations (to respect, protect and fulfill) the Committee provides the means to identify violations, which take two forms. *Acts of omission*

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<sup>26</sup> Above n16, GC 15, para 45

<sup>27</sup> Above n16, GC 15, para 20

<sup>28</sup> For examples of potential practices of interference, see above n16, GC 15, para 21

<sup>29</sup> For examples of potential practices of interference, see above n16, GC 15, para 23

<sup>30</sup> Requiring the adoption of low-cost techniques and technologies, free or low-cost pricing policies and income supplements such as the successful introduction of water stamps in Bolivia.

<sup>31</sup> See above n16, GC 15, para 26

<sup>32</sup> Committee on Economic and Social Right, *General Comment 9 Humane treatment of persons deprived of their liberty states* (1998) UN Doc E/C.12/1998/24 states at para 10: “There is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimension.” The Committee clarifies that human rights are further considered “self-executing norms”, which vest legal responsibilities on every party and can be directly transferred into domestic law. Therefore allowing victims of human rights abuses to seek remedies before domestic courts, turning to international procedures once all domestic remedies are exhausted.

<sup>33</sup> See above n11, ICESCR, Art 11.1 and 12

result when a State is “unwilling to use the maximum of its available resources for the realisation of the right to water”.<sup>34</sup> *Acts of commission* result when a State, or third party within it, takes retrogressive measures incompatible with the realisation of the right.<sup>35</sup> As will be discussed below, a violation of the right to water can trigger a range of domestic and international accountability mechanisms.

#### **1.2.4 The Independent Expert**

The international community’s continuing commitment to realising the right to water was further reinforced by the 2008 establishment of the post of the U.N. Independent Expert on the human rights obligations related to access to safe drinking water and sanitation<sup>36</sup> who is guided by the international human rights framework, GC 15 and the U.N. Sub-Commission Guidelines for the Realisation of the Right to Drinking Water and Sanitation. The Independent Expert monitors and reports on States’ implementation of the right to water as well as related violations. In praising the 2010 GA and the HRC resolutions, the Independent Expert emphasised that future attention will now turn to the implementation of the right to water, stating: “The recognition of the right to water and sanitation is a breakthrough, but it is only a first step. The real challenge is to implement this right and turn it into reality for the billions of people who still lack access to water and sanitation.”<sup>37</sup> The Independent Expert will report next to the General Assembly at its 66<sup>th</sup> session on the main challenges to the implementation of the right to water.

## **2. ACCOUNTABILITY MECHANISMS**

### **2.1 Domestic Accountability Mechanisms**

National constitutions and judiciaries are increasingly recognising the duty of states to respect, protect and fulfil the right to water. The right to water has been explicitly recognised in several modern constitutions including South Africa, Kenya, Ecuador and the Democratic Republic of Congo.<sup>38</sup> Moreover, constitutional courts in India and Argentina have impliedly derived a right to water from the constitutional right to life and the environment respectively. Where State constitutions do not recognise the right to water, national legal systems such as those in

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<sup>34</sup> See above n16, GC 15, para 41

<sup>35</sup> See also for a non-exhaustive list of violations identified by the Committee, above n16, GC 15, para 42

<sup>36</sup> Human Rights Council, *Human rights and access to safe drinking water and sanitation*, HRC Res 7/22, (2008) available at <[http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_22.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_22.pdf)>

<sup>37</sup> See Statement by the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation at the 65th session of the General Assembly, 25 October 2010, available at: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10520&LangID=E>>

<sup>38</sup> See Annex 3 for summary of Constitutions explicitly recognising right to water



Belgium are increasingly enacting legislation to recognise and protect the right to water.<sup>39</sup> Jurisprudence from these jurisdictions confirm that the right to water is justiciable and that courts are more and more willing to hold states accountable for protecting, respecting and fulfilling citizens' right to water.<sup>40</sup>

Notably, non-judicial mechanisms such as ombudsman investigations, national human rights commissions and public protests are also being increasingly used to effectively hold states accountable for realising the right to water.<sup>41</sup>

### **2.1.1 A Direct Right to Water – *The Case of South Africa*<sup>42</sup>**

Section 27 of the South African Bill of Rights explicitly recognises that every person in South Africa has the right of access to sufficient water, subject to the Government's practical ability to provide water.<sup>43</sup> Section 7 of the Constitution specifies that the State is required to respect, protect and fulfil the rights contained within the Bill of Rights.

The South African Constitutional Court has made clear that the right to water, like all socio-economic rights, is justiciable and imposes at the very least, a positive obligation on the State to take reasonable measures to seek the progressive realisation of the right.<sup>44</sup> Moreover, in *Bon Vista Mansions v Southern Metropolitan Local Council*,<sup>45</sup> the High Court found that it had a duty to consider international law in interpreting the Constitution and accordingly the constitutional duty to provide sufficient water must be applied in accordance with the ICESCR.<sup>46</sup>

The Constitutional Court reiterated in its 2009 decision of *Mazibuko and Others v City of Johannesburg and Others (Phiri Water)* that its role was to assess the reasonableness of measures undertaken by the Government to fulfill the right to water rather than to establish minimum core standards, for example the minimum quantity of water to be supplied by the government.<sup>47</sup>

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<sup>39</sup> See for example French *Water Act 1992* discussed in Commission of Human Rights, *Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation*, UN Doc E/CN.4/Sub.2/2002/10 (25 June 2002)

<sup>40</sup> Most recently, the Botswana Court of Appeal upheld the right of Kalahari bushmen to extract water from their land, labeling the government's treatment of the tribesmen 'degrading'. See Survival International, 'Victory for Kalahari Bushmen as court grants right to water' (27 January 2011), available at <http://www.survivalinternational.org/news/6925>

<sup>41</sup> Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' *Human Rights Quarterly* 20(81) (1998), p120; See discussion on public accountability in Part 3.0

<sup>42</sup> A summary of relevant South African cases is at Annex 4

<sup>43</sup> Section 27, *South African Bill of Rights* (1996)

<sup>44</sup> Constitutional Court of South Africa: *Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 (11) BCLR 1169 (CC) (Grootboom Judgment); *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28 (Phiri Water) at 50

<sup>45</sup> High Court, Witwatersand Local Division, *Residents of Bon Vistas Mansions v Southern Metropolitan Local Council* 2002(6) BCLR 625 (W) (hereafter *Bon Vista*)

<sup>46</sup> *Bon Vista* at 629

<sup>47</sup> See above n41, *Phiri Water*, at 56-57

The Court noted if it finds the Government's policy unreasonable it can require the Government to take steps to fulfill the right, or to review unreasonable measures.<sup>48</sup>

In *Phiri Water*, the Constitutional Court found that the actions of the government-owned water company in installing pre-paid water meters in Phiri, a township of Soweto, were reasonable. This is because the company did provide a certain quantity of free water, undertook community consultation before installing the pre-paid water meters, provided options to the community with regards to water payment and, most significantly, sought to continually revise its water policy to provide for indigent groups.

*Phiri Water* demonstrates the factors that a Court may consider when evaluating whether water policies or programmes are reasonable. These include whether the relevant policy: is balanced and flexible across the short and long term; has been continually reviewed to ensure progressive realisation of the right;<sup>49</sup> responds to the needs of certain indigent groups;<sup>50</sup> and has unreasonable limitations or exclusions.<sup>51</sup> For example, the High Court recognised in *Bon Vista Mansions* that the disconnection of water supply for non-payment was illegal as it arbitrarily deprived individuals of their rights.<sup>52</sup>

The jurisprudence of the South African Constitutional Court confirms that water users and providers should expect States to regulate the use and supply of water, as part of their duty to prevent third party interference with socioeconomic rights.<sup>53</sup> This would, as demonstrated by South African jurisprudence and policy, extend to the regulation of the amount and quality of water to be supplied to households as well the affordability of the water.<sup>54</sup>

### **2.1.2 Implied Right to Water – *India and the Right to Life***

Although, the Indian Constitution does not directly recognise the right to water, the Indian judiciary has at the national and state level broadly interpreted Article 21 of the Constitution, which recognises the right to life, to include the right to safe and sufficient water. The Indian Constitution safeguards the direct implementation of fundamental rights, which among other

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<sup>48</sup> See above n41, *Phiri Water*, at 67

<sup>49</sup> *Ibid*

<sup>50</sup> See above n42, *Grootboom Judgment*, at 1190-1202

<sup>51</sup> *Ibid*

<sup>52</sup> See above n42, *Bon Vista*, at 629

<sup>53</sup> Barret, Damon and Jaichand, Vinodh, 'The Right to Water, Privatisation Water and Access to Justice: Tackling United Kingdom Water Companies Practice in Developing Countries' 23(3) *South African Journal of Human Rights* (2007) 543

<sup>54</sup> See South Africa *Water Services Act 1997*, Sections 3,4 and 9

civil and political rights include right to life. These fundamental rights are recognised constitutionally as directly justiciable rights.<sup>55</sup>

The implied constitutional right to water was first recognised by the Kerala High Court in 1990 in *Attakoya Thangal v. Union of India*,<sup>56</sup> where the Court observed that, “The right to sweet water and the right to free air are attributes of the right to life, for these are the basic elements which sustain life itself.”<sup>57</sup>

Indian Courts have subsequently held that in realising the right to water, the State has an obligation to protect against the pollution of water and the over use of ground water. In 2004, the Supreme Court of India in *M C Mehta v Union of India*,<sup>58</sup> recognised that groundwater is a social asset and that priority is to be given to the domestic and agricultural uses wherever groundwater is required for these.

The issue of the exploitation of ground water was explored in the dispute between a village in India and Hindustan Coca-Cola Beverages Pty Ltd.<sup>59</sup> In this case, the Perumatty Village Council refused to renew Coca-Cola’s licence, accusing the company of excessive exploitation of ground water leading to acute water scarcity in the area. Coca-Cola challenged the Village Council’s refusal to renew the license in the High Court of Kerala. The High Court considered the question of the over exploitation of ground water as well as the justification for the Village Council’s decision to revoke the license and concluded that the government had a duty to act to “protect against excessive groundwater exploitation and the inaction of the State in this regard was tantamount to infringement of the right to life of the people guaranteed under Article 21 of the Constitution of India.”<sup>60</sup>

Although the High Court ruled that the amount of water extracted by the Coca-Cola plant was illegal, it ordered the Village Council to renew the license. On appeal in 2005, the Divisional Bench of the High Court affirmed that the Village Council was not justified for commercial reasons in canceling Coca-Cola’s license, without further scientific assessment of the impact of Coca-Cola’s production on ground water.<sup>61</sup> While the Village Council did renew the license in

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<sup>55</sup> Raj Kumar C., ‘Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties’ 33 *Denver Journal of International Law and Policy* 33 (2005) 195, at 214

<sup>56</sup> (1990) I K.L.T.580.

<sup>57</sup> See above n53 at 583

<sup>58</sup> *M C Mehta v Union of India* 2004(12) SCC 118 cited in PN Venugopal, *Coca Cola moving out of Plaichimada* (27 January 2006) available at <<http://www.indiatogether.org/2006/jan/env-cokesaga.htm>>

<sup>59</sup> *Perumatty Grama Panchayat v. State of Kerala* High Court of Kerala (16 December 2003) available at <<http://www.elaw.org/resources/text.asp?id=2551>> (22 June 2006) (hereafter Perumatty Grama Panchayat)

<sup>60</sup> See above n56, Perumatty Grama Panchayat, para 34

<sup>61</sup> WaterAid and Right and Humanity, available at <[http://www.righttowater.info/code/legal\\_7.asp](http://www.righttowater.info/code/legal_7.asp)>

2006, it imposed 13 preconditions on the license including preventing the use of ground water in the area for industrial purposes or producing beverages. The Coca-Cola factory has remained closed since 2004 and the legal battle is still ongoing with the case currently on appeal to the Supreme Court.

The Supreme Court has also made explicit the State's duty to protect the pollution of water sources by third parties in *Vellore Citizens Welfare Forum v. Union of India*.<sup>62</sup> In this case, the Court held that several tanneries had violated citizens' right to clean water by dumping untreated effluents into agricultural lands and polluting local water sources. Accordingly, the Court ordered the government to implement the precautionary and polluter-pays principles and to ensure that the compensation reaches the individuals and families affected by the pollution.<sup>63</sup> The Court also ordered the tanneries to set up the pollution control devices and those that refused to do so, were ordered to be closed.<sup>64</sup>

Indian case law recognising right to water is significant for businesses, especially water users, as it confirms that the State has an obligation under Article 21 of the Constitution to respect the right to water by preventing third parties from excessive groundwater exploitation<sup>65</sup> and water pollution.<sup>66</sup> Further, Indian case law affirms the need to prioritise water usage for domestic and agricultural purposes.<sup>67</sup>

### **2.1.3 Implied Right to Water – *Argentina and the Right to a Healthy Environment***

The Argentinian Courts have also held that the right to water is implicit in the right to a healthy environment recognised in Article 41 of the Constitution. Argentinian case-law is significant for both water providers and water users as the courts have held that States are both responsible for protecting people from pollution of their water sources by a third party and for providing a minimum supply of water even where the water provider is a private corporation.

In the case of *Menores Comunidad Paynemil*,<sup>68</sup> the Court held that the State had failed to meet its obligations to realise the right to water by failing to take reasonable measures to prevent the pollution of water sources in the indigenous Paynemill community. The Court ordered the

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<sup>62</sup> (1996) 5 S.C.C. 647 (hereafter Vellore Citizens)

<sup>63</sup> See above n55, Vellore Citizens, at 2726

<sup>64</sup> *Ibid*

<sup>65</sup> *F.K. Hussain v. Union of India* High Court of Kerala (26 February 1990) available at <<http://www.elaw.org/resources/text.asp?ID=1126>> (22 June 2006).

<sup>66</sup> *M.C. Mehta v. Union of India* (1988) 1 S.C.C. 471

<sup>67</sup> See above n54, *M.C. Mehta v. Union of India*

<sup>68</sup> *Neuquen, Sala II, Cámara de Apelaciones en lo Civil: Menores Comunidad Paynemil, Acción de Amparo* (Expte. No. 311-CA-1997, 19 May 1997), cited in Juan Miguel Picolotti *The Right to Water in Argentina* (2003), available at <[http://www.righttowater.info/pdfs/argentina\\_cs.pdf](http://www.righttowater.info/pdfs/argentina_cs.pdf)> (hereafter Menores Comunidad Paynemil) at 13

Government to rectify the situation in the short term by supplying 250 litres of drinking water every day for each person of the community until the water source could be cleaned up.

The Argentinean Court has also held in 2002 in the case of *Quevedo Miguel Angel y Otros c/ Agua Cordobesas S.A.*<sup>69</sup> that supply of a minimum quantity of drinking water must be guaranteed to everyone regardless of their ability to pay. Further, the Court held that the State, rather than the private water provider, was responsible for providing drinking water. Thus, although the Court ordered the water provider company to supply 200 litres of water every day for each family it also stated that the company should reach an agreement with the government to compensate for the cost of supplying water to families incapable of paying for it.<sup>70</sup> The Court reiterated the State's responsibility to provide safe drinking water in *Users and Consumers in Defense against Aguas del Gran Buenos Aires S.A./Injunction (2002)*.<sup>71</sup>

## 2.2 International Accountability Mechanisms

Individuals who believe that their right to water has been violated by a State Party under the ICCPR, ICESCR, CEDAW and/or CRPD may bring a communication to the relevant UN committee, provided that the State has recognised the competence of that committee. Third parties may also bring communications on behalf of individuals.<sup>72</sup>

Before individuals can bring complaints under this mechanism, they are required amongst other things to show that they have exhausted domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement.<sup>73</sup>

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<sup>69</sup> *Ciudad de Córdoba, Juez Sustituta de Primera Instancia y 51 Nominación en lo Civil y Comercial: Quevedo Miguel Angel y Otros c/ Aguas Cordobesas S.A., Acción de Amparo* (8 April 2002) cited in I Winkler, *Judicial Enforcement of the Human Right to Water – Case Law from South Africa, Argentina and India* *Law, Social Justice & Global Development Journal* 2008(1), available at <[http://www.go.warwick.ac.uk/elj/lgd/2008\\_1/winkler](http://www.go.warwick.ac.uk/elj/lgd/2008_1/winkler)> (hereafter *Quevedo Miguel Angel judgment*), at 10

<sup>70</sup> *Ibid*

<sup>71</sup> See above n65, Picolotti, p 14

<sup>72</sup> *Optional Protocol to the International Covenant on Civil and Political Rights* UN GA Res. 2200A (XXI), UN Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force 23 March 1976; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, UN GA Res A/RES/63/117, UN Doc A/RES/63/117, 10 December 2008, opened for signature in 2009; *Optional Protocol to the Convention on the Elimination of Discrimination against Women* UN GA Res 54/4, UN Doc A/RES/54/4, 6 October 1999 entered into force 22 December 2000; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, UN GA Res 61/106, 13 December 2006 entered into force 3 May 2008

<sup>73</sup> Article 5(2) *Optional Protocol to the ICCPR*; Article 3(2) *Optional Protocol to ICESCR*; Article 4(1) and (2) *Optional Protocol to CEDAW*; Article 2 *Optional Protocol to the CRPD*

### **3. IMPLICATIONS AND FUTURE DIRECTIONS**

#### **3.1 Implications for Businesses**

##### **3.1.1 Why do Businesses Need to be Aware of the Right to Water?**

###### **a. States will take action**

States are increasingly taking steps to protect the right to water. This is reflected in the direct and implicit recognition of the right to water in many modern constitutions such as South Africa, Bangladesh, Costa Rica, Nepal, Pakistan and Peru.<sup>74</sup> Many states including Belgium,<sup>75</sup> Germany and Italy have also incorporated the right to water in national legislation and policy, even where the right does not exist in State constitutions.<sup>76</sup> More importantly for businesses, states and civil society organisations have shown that they are willing and able to take legal action against companies for failing to abide by State regulations established to protect against human rights violations.<sup>77</sup>

###### **b. Business operations will be at risk**

Public and state action against businesses that do not respect the right to water can have crippling effects on business productivity and profits. For example, Coca Cola's Kerala plant has not been in operation for over six years due to ongoing litigation over its use of water. Further, in 2000, public revolt in Bolivia over the increase in water prices brought about by the privatisation of water services forced the water provider Bechtel out of the country, resulting in \$50 million lost profit.<sup>78</sup> In fact, over 34 water privatisation contracts have been terminated or

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<sup>74</sup> See John Scanlon, Angela Cassar and Noémi Nemes, Water as a Human Right, *IUCN Environmental Policy and Law Paper* No. 51 (2004), Appendix II

<sup>75</sup> For description of Belgium's regulatory system, see Annex 4

<sup>76</sup> See Human Rights and Access to Water, Comments by the Federal Republic of Germany (2007), available at <<http://www2.ohchr.org/english/issues/water/contributions/germany.pdf>>; International Environmental Law Research Centre, The Right to Water in Italy Briefing Papers on Water (2008) available at <<http://www.ielrc.org/content/f0801.pdf>>; International Environmental Law Research Centre, The Right to Water in Belgium Briefing Papers on Water (2008) available at <<http://www.ielrc.org/content/f0802.pdf>>; See Annex 5 for summary of Belgium position.

<sup>77</sup> For example, Caterpillar, Chevron, Nike and Wal-Mart have all been involved in costly and damaging human rights related litigations. For summary of Caterpillar litigation regarding supply of bulldozer used to kill a peace activist in Gaza, see Centre for Constitutional Rights, Corrie et al. v. Caterpillar, available at <<http://ccrjustice.org/ourcases/current-cases/corrie-et-al.-v.-caterpillar>>; For summary of Chevron lawsuit for alleged complicity in human rights abuses against protestor in Nigeria see Business and Human Rights Resource Centre, *Case profile: Chevron lawsuit (re Nigeria)*, available at <<http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ChevronlawsuitreNigeria>>; For summary of Nike litigation relating to labour conditions see Business and Human Rights Resource Centre, *Case profile: Nike lawsuit (Kasky v Nike, re denial of labour abuses)* available at <<http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/NikelawsuitKaskyvNikeredenialoflabourabuses>>; For summary of Wal-Mart litigation on issue of gender discrimination, see Business and Human Rights Resource Centre, *Case profile: Wal-Mart lawsuit (re gender discrimination in USA)*, available at <<http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/Wal-MartlawsuitregenderdiscriminationinUSA>>

<sup>78</sup> For further information about the Bechtel case, see Food and Water, <<http://www.foodandwaterwatch.org/profiles/bechtel/>>

re-negotiated due to poor service provision.<sup>79</sup>

**c. Businesses reputation may be at risk**

Businesses are being directly targeted by public campaigns when they fail to respect human rights. For example there have been high profile public protests against Bechtel for increasing water prices in Bolivia;<sup>80</sup> Coca Cola for the over extraction of ground water in India;<sup>81</sup> and Biwater for poor water service provision in Ghana.<sup>82</sup> The increasing public demand for socially and environmentally responsible production mechanisms should encourage businesses to keep up with human rights developments in order to protect their business image and their profits. The importance of reputation to business is underlined by efforts by businesses to address their behaviour as water users and providers through corporate water policies and codes of conduct.<sup>83</sup>

**d. Investors may divest their business interests**

Businesses must also have regard for the socially responsible investor who can influence the direction of business by “divesting from companies viewed as irresponsible or by demanding policy changes in order to pre-emptively respond to a threat”.<sup>84</sup> In 2010 for example, shareholders filed resolutions with a number of companies including Caterpillar, Time Warner and Motorola requesting amendment to their human rights policy.<sup>85</sup> Notably, Exxon Mobile shareholders specifically asked the company to create a comprehensive policy articulating the company’s respect for and commitment to the human right to water.<sup>86</sup> The rise of such socially responsible investors provides added weight to the ethical case for businesses to respect, protect and fulfil the right to water.

**3.1.2 A human rights based approach to the right to water**

Recognition of the right to water makes access to clean and affordable water a non-negotiable

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79 For further information, see David Hall, Emanuele Lobina, Violeta Corral, *Replacing failed private water contracts*, A report commissioned by Public Services International (Jan 2010) available at <[http://gala.gre.ac.uk/2761/1/PSIRU\\_Report\\_9823\\_-\\_2010-01-W-Jakarta.pdf](http://gala.gre.ac.uk/2761/1/PSIRU_Report_9823_-_2010-01-W-Jakarta.pdf)>

80 The protests were initially sparked by a 35% increase in water prices by the private consortium which won a contract to provide water in Cochabamba, See CBC Radio, ‘Sell the rain How the privatization of water caused riots in Cochabamba’, Bolivia, 4 February 2003, available at <<http://www.cbc.ca/news/features/water/bolivia.html>>

81 Legal Redress, The Right to Water under the Right to Life: India available at <[http://www.righttowater.info/code/legal\\_7.asp](http://www.righttowater.info/code/legal_7.asp)>

82 For further information about the Biwater protests see <http://www.foodandwaterwatch.org/profiles/biwater-threatens-community-access-and-fails-to-sell-investors/>

83 Proctor and Gamble, General Electrics and Pepsi have begun to implement policies to reduce the impact of their business practices on other water users. Unilever has undertaken research to assess how much water is used to make its products and to suggest how it might reduce its embedded water footprint within its production and consumption cycle.

84 Assadourian, Erik, The State of Corporate Responsibility and the Environment, 18 *Georgetown International Environmental Law Review*, (2005-06) 571, p.574

85 Interfaith Centre on Corporate Responsibility, available at <<http://www.iccr.org/shareholder/trucost/index.php>>

86 *Ibid*

priority for governments and puts the spotlight on the issue of water management. It further underlines the need to move towards a human rights based approach (HRBA)<sup>87</sup> to the use and provision of water. At its core, a HRBA recognises that all individuals are right bearers and that duty holders have certain obligations in regards to these rights. The six key principles of a HRBA are:

1. Universality and inalienability - Human rights are universal and inalienable.
2. Indivisibility - Civil, political and socio-economic rights are indivisible
3. Inter-dependence and inter-relatedness - The realisation of one right may affect another
4. Equality and non-discrimination - All human beings are entitled to their human rights without discrimination of any kind
5. Participation and inclusion - Every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of rights
6. Accountability and rule of law - States and other duty-bearers are answerable for the observance of human rights

A HRBA to the right to water is significant as it challenges the common belief that only governments have obligations to respect, protect and fulfill human rights, making explicit the duties of non-state actors, including businesses.<sup>88</sup> While states do have clear responsibilities to transform key aspects of the right to water into binding legal obligations, under a rights based approach businesses too have duties to rights holders. Among the key actions that water providers and users should adopt as duty holders under a HRBA, are to ensure:

- right holders have a means of participating in the development of policies or programs which may affect their right to water
- particular focus on marginalised, disadvantaged and excluded groups, and
- outcomes and processes are monitored and evaluated using the HRBA.

Such actions help to provide for a more just redistribution of the water resources based on peoples' rights and also helps to empower more individuals especially those who have been marginalised such as the poor, the indigenous peoples, women and children to claim their

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<sup>87</sup> The following summary is based on *The Human Rights Approach to Development Cooperation Towards a Common Understanding among UN* which was adopted by the UN Development Group in 2003, available at [http://www.undg.org/archive\\_docs/6959-The\\_Human\\_Rights\\_Based\\_Approach\\_to\\_Development\\_Cooperation\\_Towards\\_a\\_Common\\_Understanding\\_among\\_UN.pdf](http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf)

<sup>88</sup> Cornwall, Andrea, Nyamu-Musembi, Celestine. Putting the 'Rights-Based Approach' to Development into Perspective, 25(8) *Third World Quarterly*, (2004), pp. 1415-1437



broader rights.<sup>89</sup>

## 3.2 Future Directions for Businesses

### 3.2.1 The Guiding Principles on the 'Protect, Respect, Remedy' Framework

On 22 November 2010, the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises (SRSG), Ruggie proposed draft *Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework*.<sup>90</sup> The Guiding Principles provide concrete recommendations for operationalising the 'Protect, Respect and Remedy' Framework which was unanimously approved by the Human Rights Council in 2008.<sup>91</sup> Consistent with GC15, the Framework consists of three pillars:

1. States' duty to *protect* against human rights abuses by third parties, including businesses
2. Corporate responsibility to *respect* human rights, and
3. Greater access to both judicial and non-judicial *remedies* which are effective for victims.

While the Guiding Principles are designed to be read collectively, those principles relating to corporate responsibility and human rights due diligence are particularly relevant to businesses.<sup>92</sup> Significantly, the Guiding Principles specify that the foundation for embracing human rights responsibility is the establishment of a statement of business policy with respect to human rights. Central to such a policy is the carrying out of human rights due diligence, the mitigation of potential adverse human rights impacts uncovered during due diligence and the tracking of business performance against a human rights framework.

While public submissions and commentary on the Guiding Principles have been mixed,<sup>93</sup> it is likely that the Guiding Principles will be adopted by the Human Rights Council without

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<sup>89</sup> Centre for Human Rights and Global Justice, International Human Rights Clinic of NYU School of Law, Partners in Health, Robert F. Kennedy Memorial Centre for Human Rights, Zanmi Lasante, 'Woch Nan Soley: The Denial of the Right to Water in Haiti' (2008), available at [https://docs.google.com/a/soas.ac.uk/leaf?id=1vLSd1K2bSww0iK171E\\_xX3C5HvYAsQ3X\\_nwRTJOujES33ErY8NliDBMeQI9-&hl=en\\_GB](https://docs.google.com/a/soas.ac.uk/leaf?id=1vLSd1K2bSww0iK171E_xX3C5HvYAsQ3X_nwRTJOujES33ErY8NliDBMeQI9-&hl=en_GB) at p.55

<sup>90</sup> Available at <<http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>> (hereafter General Principles)

<sup>91</sup> This is not the first high-level attempt to codify some form of guide for businesses in every country to understand their human rights duties. The failure of the UN Norms on Transnational Corporations and Other Business Enterprises to be adopted and made legally binding by what was then called the Human Rights Commission (now the Human Rights Council) was one of the main triggers in the creation of the SRSG mandate. The UN Norms fell short of international legal formalisation primarily because by attempting to impose directly on companies, under international law, equal human rights duties held and accepted by States according to the treaties they have ratified, the confusion of roles and responsibilities between companies and States were deemed to be too potentially problematic.

<sup>92</sup> Above n90, General Principles, Principles 12 - 22

<sup>93</sup> Public submissions on the draft Guiding Principles are available at <<http://www.business-humanrights.org/SpecialRepPortal/Home/Submissions>> and public comments are available at <<http://www.business-humanrights.org/SpecialRepPortal/Home/Commentaries/>>

significant change.<sup>94</sup> This means that businesses can expect the Guiding Principles to become the internationally authoritative yardstick against which their compliance to human rights standards will be measured.

### **3.2.2 Due Diligence and Responsible Contracting**

As highlighted above, one of the key activities that businesses should undertake as part of their human rights obligations is to incorporate human rights compliance as part of due diligence checks. This requires companies to take proactive steps to assess both the up and downstream human rights impacts of their operations, with the aim of preventing or mitigating any adverse impacts. Such assessments should extend beyond a business's own operations and include that of business partners, suppliers, distributors and any other entities associated with business activities.<sup>95</sup> Businesses should also pay particular attention to the operating environment of a state to ensure that they are not complicit in any human rights violations.

The concept of 'responsible contracting' provides a way forward for businesses to ensure that all aspects of its operations, including those undertaken by associated business partners, comply with human rights responsibilities. Responsible contracting helps to mitigate any potential complicity in rights violations as well as the risk of legal action. For example, businesses can mitigate risks of complicity in human rights violations by specifying in contracts, standards that all of its suppliers must adhere to in relation to the extraction of water. Further, contracts for the provision of water, for example public private partnerships can help to fulfill the right to water by specifying minimum standards relating to the quality and quantity of water supplied. The need for responsible contracting, particularly by host states is one of the key issues being advanced by the SRSG<sup>96</sup> and increasingly being incorporated into government procurement contracts.<sup>97</sup> The growing acceptance of the concept of responsible contracting demonstrates its usefulness in building greater compliance with human rights obligations amongst duty bearers while also safeguarding against future human rights litigation.

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<sup>94</sup> See the Special Representative's response to criticism of the Guiding Principles, available at <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-response-to-financial-times-article-17-jan-2011.pdf>>

<sup>95</sup> Above n90, General Principles, Principle 15

<sup>96</sup> SRSG, Summary Report of Workshop on Responsible Contracting, 25-26 June 2009, available at <<http://www.reports-and-materials.org/Report-on-Ruggie-responsible-contracting-workshop-25-26-Jun-2009.pdf>>

<sup>97</sup> For discussion of responsible contracting initiatives in the United States see National Employment Law Project, *The Road to Responsible Contracting: Lessons from States and Cities for Ensuring That Federal Contracting Delivers Good Jobs and Quality Services* (June 2009), available at <[http://nelp.3cdn.net/985daceb6c3e450a10\\_pzm6brsaa.pdf](http://nelp.3cdn.net/985daceb6c3e450a10_pzm6brsaa.pdf)>

### 3.3 Recommendations

As one of the single largest users of water resources in the world, businesses can have a potentially significant impact on the realisation of the right to water. The business community's support of improving water practices has for example been demonstrated by the United Nations Global Compact<sup>98</sup> endorsement of the CEO Water Mandate – a joint effort between business leaders and the international community to protect the right to water by assuming responsibility for both the environment and human rights.<sup>99</sup> As indicated by the CDP survey noted at the beginning of this paper, water is increasingly being prioritised by businesses, not only because respecting the right to water is an essential legal obligation, but also because it is seen as an important aspect of risk and profit management. Many businesses in the CDP survey also identified that an increasing awareness and interest in water usage and its associated impacts has created a wide range of water related business opportunities in areas such as wastewater management and water efficiency and reduction.<sup>100</sup>

Given the risks and opportunities associated with the recognition of the right to water, businesses, whether they are water users or providers must take steps to:

1. Familiarise themselves with key aspects of a Human Rights Based Approach to business planning and operations
2. Understand the implications of the Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework, and
3. Incorporate human rights compliance into their due diligence, including to ensure responsible contracting in all aspects of their business relationships.

These three key frameworks provide businesses with the tools to become more responsible corporate citizens and to proactively address actual and potential adverse impacts of their activities on an individual's right to water.

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<sup>98</sup> Schaffer, Richard, Agusti, Filiberto, Earle, Beverley, *International Business Law and Its Environment* (2008) 7th Ed. CENGAGE Learning. p73

<sup>99</sup> See United Nations Global Compact, CEO Water Mandate (2007), available at [http://www.unglobalcompact.org/issues/Environment/CEO\\_Water\\_Mandate/](http://www.unglobalcompact.org/issues/Environment/CEO_Water_Mandate/)  
<sup>100</sup> Above n2, Carbon Disclosure Project, 62% of the respondent corporations identified this opportunity in the CDP report

**ANNEX 1: INTERNATIONAL INSTRUMENTS ON OR RELATING TO WATER**

Name of Instrument	Date adopted	Key information
U.N. Charter	- Adopted 1945	<ul style="list-style-type: none"> <li>• Created the Commission on Human Rights</li> <li>• Set forth one of the purposes of the U.N. as being: <i>“promoting and encouraging respect for human rights and for fundamental freedoms for all.”</i></li> <li>• Created new order of international concern for individuals/peoples that previously exclusively concerned the State.</li> </ul>
<p><b>The Geneva Conventions</b></p> <p>- Geneva Convention III: Treatment of Prisoners of War</p> <p>- Geneva Convention IV: Protection of Civilian Persons in Time of War</p> <p>-Protocol I additional to the Geneva Conventions</p>	- Adopted 1949	<ul style="list-style-type: none"> <li>• The first treaties to <b>explicitly</b> include provisions on the right to water.</li> <li>• Only applicable in situations of armed conflict.</li> <li>• Article 26: <b>“Sufficient drinking water shall be supplied to prisoners of war”.</b></li> <li>• Article 20: <i>“The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention.”</i> Also included provisions for sufficient water for hygiene purposes such as clothes washing and medical attention.</li> <li>• Article 89: <i>“Sufficient drinking water shall be supplied to internees.”</i> Note this applies the transfer of internees.</li> <li>• Article 54 prohibits the attack, destruction, removal or otherwise of <i>“objects indispensable to the survival of the civilian population”</i> including <i>“agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works”.</i></li> </ul>
<p><b>The Declaration on the Right to Development</b> (General Assembly Resolution 41/128)</p>	- Adopted 4 December 1986	<ul style="list-style-type: none"> <li>• Citing both the ICCPR and ICESCR, Article 1 declared: <i>“The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.”</i></li> <li>• Article 8.1: <i>“States should undertake, at the national level, all necessary measures for the realisation of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and</i></li> </ul>

Name of Instrument	Date adopted	Key information
<b>General Assembly Resolution 54/175, The right of development</b>	- Adopted 17 December 1999	<p><i>fair distribution of income.</i></p> <ul style="list-style-type: none"> <li>Adopted to both more widely disseminate the (above) Declaration on the Right to Development, and also to reaffirm that in realising the right to development “<i>the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community.</i>”</li> </ul>
<b>Convention on the Law of Non-navigational Uses of International Watercourses</b>	- Adopted 21 May 1997  - Not yet in force	<ul style="list-style-type: none"> <li>In the event of a conflict in utilisation of international watercourses, requires provision of sufficient water to “<i>sustain human life, including both drinking water and water required for production of food in order to prevent starvation</i>”, giving special regard to what it termed “<i>vital human need</i>” (Article 10.2).</li> </ul>
<b>Protocol on Water and Health</b>	1999	<ul style="list-style-type: none"> <li>Supplements 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (entry into force 1996).</li> <li>Passed by U.N. Economic Commission for Europe (UNECE).</li> <li>Amended in 2003 to allow for adoption by countries out with UNECE area.</li> <li>Article 1 of the Protocol: to “<i>promote the protection of human health and well-being through improving water management</i>”.</li> <li>Article 5.1: “<i>Equitable access to water, adequate in terms of both quantity and quality, should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion</i>”.</li> </ul>

## **ANNEX 2: CONSTITUTIONS DIRECTLY RECOGNISING THE RIGHT TO WATER**

Country	Relevant Article/Section	Text
<b>AFRICA</b>		
Congo	Constitution 2005 – Article 48	<p>[Original Text] Article 48: <i>Le droit à un logement décent, le droit d'accès à l'eau potable et à l'énergie électrique sont garantis.</i></p> <p>[English] ‘The right to an adequate standard of living, portable water and electricity is guaranteed.’</p>
Ethiopia	Const. (1998) Article 90(1)	Article 90(1): Every Ethiopian is entitled, within the limits of the country's resources,

Country	Relevant Article/Section	Text
		to ... clean water.
Gambia	Constitution (1996) Article.216(4)	Article 216(4): The State shall endeavour to facilitate equal access to clean and safe water.
Kenya	Constitution of Kenya Act 2010 Article 43(1)(d)	Article 43(1)(d): Every person has the right—to clean and safe water in adequate quantities
South Africa	South African Bill of Rights (1996) (set out in Constitution) Section 27	Section 27 (1): Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance (2)The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights
Uganda	Constitution (1995) - Article 14	Article14: The State shall endeavour to fulfill the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that... all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, decent shelter, adequate clothing, food, security and pension and retirements benefits.
Zambia	Constitution (1998) – Article 112	Article 112: The State shall endeavour to provide clean and safe water.
<b>AMERICAS</b>		
Equador	Constitution (1998) Article 23	Article 23: <i>Sin perjuicio de los derechos establecidos en esta Constitución y en los instrumentos internacionales vigentes, el Estado reconocerá y garantizará a las personas los siguientes:...</i> 20. <i>El derecho a una calidad de vida que asegure la salud, alimentación y nutrición, agua potable, saneamiento ambiental; educación, trabajo, empleo, recreación, vivienda, vestido y otros servicios sociales necesarios.</i>
Uruguay	Constitution (2004) Article 47	Article 47: <i>El agua es un recurso natural esencial para la vida. El acceso al agua potable y el acceso al saneamiento, constituyen derechos humanos fundamentales.</i>
USA	Massachusetts Constitution Article XLIX	Article XLIX: The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilisation of the agricultural, mineral, forest, water, air

Country	Relevant Article/Section	Text
	Pennsylvania Constitution Section 27	and other natural resources is hereby declared to be a public purpose.  Section 27: The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

**ANNEX 3: SOUTH AFRICAN CASE SUMMARIES (24)**

***Bon Vista Mansions v Southern Metropolitan Local Council 2002 (6) BCLR 625 (W)***

Facts: The residents of Bon Vista claimed that the Council had unlawfully discontinued its municipal water supply and attempts to seek redress through the manager of the premises was unsuccessful.

Held: The High Court held that the Council had prima facie breached its constitutional duty to respect the right of access to water in that it deprived the applicants of pre-existing access. The Court further held that the Water Services Act 1997 must in general provide for reasonable notice of intention to discontinue services; provide for an opportunity to make representations; and must not result in a person being denied access to basic water services for non-payment where that person can prove an inability to pay for such basic services. The Court referred to the need to rely on international law including the International Covenant on Economic, Social and Cultural Rights and commentaries in interpreting the Constitutional right to water.

***Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28***

**Facts:** The applicants in the case were poor residents of Phiri in Soweto, where pre-paid water meters had been installed by Johannesburg Water, a wholly government owned water provider, as part of a new saving water program known as Operation Gcin'amanzi (to save water). Under this new program, the City of Johannesburg supplied 6 kilolitres of free water per

household (25 litres of free water per person per day) after which water supply was cut off if the residents had not pre-purchased credit. The residents claimed, among other things, that the:

- halting of water supply after the exhaustion of the free basic supply constituted unlawful and unreasonable discontinuation
- pre-paid meter system was discriminatory in that residents of Soweto were not given the option of credit meters provided to other residents
- procedure followed by the City to install pre-paid meters was unlawful and unfair, and
- that the City's basic water policy should be set at 50 litres per person per day rather than 25 litres.

The *High Court* determined that the quantity of water required for dignified human existence in compliance with section 27 of the Constitution was 50 litres per person per day. It further held that the forced installation of prepayment water meter system without the choice of all available water supply options unconstitutional and unlawful. As a result, the Court ordered amongst other things that the City provide the residents of Phiri with a free basic supply of 50 litres per person per day of water and the option of installing a metered supply. The City appealed the decision to the Supreme Court.

The *Supreme Court* determined that the quantity of water required for dignified human existence in compliance with section 27 of the Constitution was 42 litres per person per day and referred the formulation of the water policy back to the City to be revised in the light of this determination. The Supreme Court of Appeal also concluded that the City had no authority in law to install pre-paid meters and that the cut-off in water supply that occurs when the free basic water limit has been exhausted constituted an unlawful discontinuation of the water supply.

The applicants appealed the decision, requesting that the decision of the High Court be reinstated and the respondents cross-appealed.

**Held (Constitutional Court):** The Court's role is to determine whether the policy of the state authority in regards to the provision of water is reasonable in all the circumstances.

The Court declined to set a fixed quantity of water, which would constitute the content of the right to water under the constitution as:

- i. The requirement of the right would change over time, and



- ii. It would be institutionally inappropriate for the Court to impose such conditions on the Executive and Legislature.

The Court reiterated that there is a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. In this case, the 6 kilolitre free water policy was not constitutionally unreasonable. This was particularly because the City had continually reconsidered its policy to ensure that the poorest inhabitants of the City gained access to water, including revising its policy so that registered indigent households have access to an additional 4 kilolitres of free water per month. That is, the City has progressively sought to increase access to water for larger households prejudiced by the 6 kilolitre limit.

The Court held that the ceasing of water after the exhaustion of the free water policy constituted a temporary suspension of water rather than discontinuation of services and was therefore not unconstitutional. Rather, it was a temporary suspension of water. The Court further held that the installation of water meters was not discriminatory given the complex policy circumstances surrounding the supply of water to Soweto.

#### **ANNEX 4: EXAMPLE OF DOMESTIC LEGISLATIVE PROTECTION OF THE RIGHT TO WATER – BELGIUM (26)**

Belgium is a Federal State consisting of three regions: the Flemish region, the Walloon region and the Brussels-Capital region. All these three regions have included the right to drinking water and sanitation within its own legislative framework. Businesses who are water providers should take note of the legislation and related innovative water pricing system in the different regions of Belgium, which ensures a minimum supply of water at a reasonable price.

In Flanders, everyone has the right to a minimum supply of 15 cubic metres of free water per person per year. The Flemish regional legislation also encourages water saving in domestic consumption by adopting a progressive water-pricing mechanism. The final tariff depends on consumption because the price of water varies according to the amount used. The water tariff is composed of three elements. Firstly, there is a basic fee covering fixed costs of connection, secondly, free minimal quantity of water supply; and thirdly, there is a variable cost depending on the surplus consumption.

Wallonia has opted for a system of progressive tariffs to ensure that water is affordable for everyone. The tariff structure provides the first 30 cubic metres of water for every household per year at a lower price, which results in discouraging excessive water consumption and better access to minimum water supply for small users.

An innovative progressive water pricing has been adopted in the Brussels-Capital Region as well based on three blocks of water consumption per person, followed by a fourth open block - above 60 cubic metres per person per year - at the highest price. The first cubic metre costs 3.8 times less than the highest priced one. The legality for water disconnection in case of nonpayment depends on the investigation by the welfare centres and on a prior approval by a court. Schools in this region receive a free allocation of one litre of water per pupil per day.

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