

884 million  
people in the world  
do not  
have access  
to safe  
drinking  
water

**More Than a Resource:  
Water, Business and  
Human Rights**



Institute for  
**Human Rights and Business**

Shaping Policy • Advancing Practice • Strengthening Accountability

**The Institute for Human Rights and Business** is dedicated to being a global centre of excellence and expertise on the relationship between business and internationally proclaimed human rights standards. The Institute works to raise corporate standards and strengthen public policy to ensure that the activities of companies do not contribute to human rights abuses, and in fact lead to positive outcomes.

# **More than a Resource**

Water, Business and Human Rights

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**About this report**

This report is the result of consultations and convenings involving representatives of business, government, UN agencies, civil society, academia and other experts organised by the Institute for Human Rights and Business (IHRB) on three continents. Each focused on the links between human rights and the right to water and the responsibilities of the private sector, in particular concerning water management and use. IHRB gratefully acknowledges the contribution of Liz Umlas, who prepared the initial draft of this report, drawing on the Institute's previous work. IHRB also wishes to thank Surabhi Chopra as well as Nobonita Chowdhury, Basak Mustu, Haley St. Dennis and Melanie Wan-Yen Yap, from the Human Rights Clinic at the School of Oriental and African Studies, University of London, for helpful research and background papers which are listed in the bibliography.

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# Executive Summary

## **Business and water: human rights matter**

This report clarifies the relationships between business, human rights and water and answers some of the key questions that arise when they are considered together. It makes the case for integrating human rights considerations, including those relating to water, into the policies and practices of business. Given the international political consensus that has developed, more generally about the responsibility of companies to respect human rights, and specifically about water as a human right, the report anticipates that governments and intergovernmental organisations will increasingly call on businesses to be transparent and accountable for their impacts in relation to water, in human rights terms.

Most businesses do not yet consider water to be a social issue, and the great majority do not explicitly assess the human rights impacts of their policies and operations in this area. Current policy approaches have tended to distinguish the responsibilities of corporate water users (i.e. all businesses) from those of private water service providers (utilities that directly manage water services). This distinction is evidently relevant, but it has meant companies have tended to overlook the complexity of the policy challenges that arise in a range of sectors – from mining, oil and gas, via water technologies, to manufacturing processes - where water provision is crucial, though not the primary focus of the enterprise. Partly as a result, some businesses recognise the right to water while others take a broader rights-based approach. The report highlights differences between the two approaches, making clear that each has relevance to all businesses, regardless of their function or geographic location.

That the private sector has a role to play in water policy is evident, given its influence and the scale of its water consumption, and also because some businesses provide or process water for public use. The report presumes that the obligations and expectations placed on business should not be framed ideologically (either from a free market perspective or in anti-business terms, for example) but should examine the positive and negative impact that private investments will have on human rights, and in particular on the rights of those who are most marginalized and vulnerable. From this perspective, businesses have much to offer as partners of governments and civil society, particularly in regions where water is scarce and poverty widespread. This should be the foundation of public-private partnerships in this area, and also dialogue about the role of business at the 2012 United Nations (UN) Conference on Sustainable Development in Brazil, and efforts to meet the UN Millennium Development Goals by 2015. There is a business opportunity for responsible companies on issues relating to water and sustainable development. But companies also need to be more accountable and transparent about the impact of their activities, and to provide adequate remedies for victims of abuse.

## Frequently Asked Questions

*In what ways is water a social as well as environmental issue?*

Water has always been a social issue and remains one for communities around the world. It frequently has deep cultural and religious significance. When businesses engage with communities on water issues, they need to understand the relationship between access to water and human survival and dignity. Water is linked to the right to life, and other human rights such as the right to health and the right to food. In many societies, traditional water practices need to be understood and respected.

*What do the rights to water and sanitation mean for business?*

Access to clean and safe drinking water and to adequate sanitation are now internationally recognised human rights, which businesses must respect regardless of their size, sector or geographic location. Most businesses understand that they have a responsibility to ensure that their activities and impacts do not infringe rights. With regard to water, they can do harm or good in many ways. Due diligence is especially required wherever water is scarce or of poor quality, or where business activity affects the water supply of vulnerable or marginalized communities.

If a business provides water or sanitation services, its responsibility to respect human rights raises additional issues with regard to tendering, negotiation of terms, the content of contracts, and post-contract operations.

*What is meant by a “rights-based approach” to water?*

Companies that take a rights-based approach to water consider all human rights (civil, political, economic, social, and cultural) when they set or implement water-related policies. In addition, the approach values certain principles when decisions are made and applied: these include non-discrimination and equality; participation and empowerment; and accountability and transparency.

*Do the responsibilities of water service providers differ from those of water users?*

Both water users and water service providers have a duty to respect all human rights. In relation to water, they must consider their impact on other water users, including their right to water and sanitation. The steps that businesses are expected to take in order to respect these rights will nevertheless vary, across business sectors and in different countries. Water service providers, who play a key role in providing access to water and sanitation, have specific additional responsibilities and their due diligence requirements are consequently more extensive.

*What are the responsibilities of businesses that are engaged both in using and providing water?*

Some industries provide water as a by-product of their activities and others consume large quantities of water. Some do both. Mining companies, for example, often provide water to communities located close to their operations as an act of corporate responsibility (even though they may not have a legal obligation to do so), because they also use large volumes of water in their operations. Agriculture, the oil industry, and many manufacturing operations (from the production of silicon chips to the washing of cotton in garment production) are also heavy water-users. Businesses that focus on water technologies (filtration, pumps, desalination equipment, piping) also influence the provision of water. Policy makers have not sufficiently considered the due diligence responsibilities of companies that provide water or influence its provision as a secondary function of their operations; these companies can have a significant impact on access to water and sanitation.

*What is the international legal status of the right to water and to sanitation, for States and for businesses?*

It is important to distinguish between international legal enforceability and international recognition. Where States have ratified international instruments, such as the UN Covenant on Economic, Social and Cultural Rights, or incorporated the right to water in their national legal systems, they have a legal obligation to respect, protect, and fulfil the right.

Not all States have bound themselves legally by treaty to respect the right to water, but, unsurprisingly given its strategic importance and the fact that water is necessary for survival, there is virtually no opposition in principle: the right to access safe clean drinking water and adequate sanitation is now an internationally recognised right and very broadly endorsed.<sup>1</sup>

Companies are not bound directly by international treaties, which States sign, though it is part of a state's obligation to ensure that companies respect human rights and comply with domestic legislation. Both companies and governments, however, increasingly recognise that all business enterprises have a responsibility to respect human rights, and in some degree to promote and protect them. The most recent statement of responsibility, the UN Guiding Principles on Business and Human Rights, was endorsed by consensus at the UN Human Rights Council in June 2011, having obtained the consent of a large number of companies during a long process of detailed consultation. The principles apply to all businesses and cover all 'internationally recognised' rights.

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1 The most recent UN vote took place in July 2010, when 122 States supported a UN General Assembly resolution (64/292) that recognised the right to water and sanitation. No state opposed the resolution, which was subsequently endorsed by the UN Human Rights Council (A/HRC/15/L.14) in September 2010, again without opposition.

Given this level of affirmation, it is appropriate for all governments, businesses, intergovernmental organisations, trade unions, and civil society organisations to take account of the right to water and sanitation wherever the corporate responsibility to respect human rights is discussed or evaluated.

*What implications are there for the relationship between business and government?*

Governments are primarily responsible for the fulfilment of human rights. However, businesses can make a specific and valuable contribution, including to the provision of water and sanitation. The relationships between businesses and government reflect this. A company's due diligence procedures should ensure that it considers all its human rights impacts when it negotiates, drafts or signs Supplier Agreements, Customer Service Contracts, Joint Venture Agreements or Public Private Partnerships.

*What responsibilities do businesses have when governments are unwilling or unable to fulfil the right to water or protect against human rights abuses?*

Businesses must take enhanced due diligence measures when operating in contexts where human rights risks are high because of conflict, acute poverty, natural disasters or corruption. If a state cannot fulfil its human rights duties, it cannot delegate the legal obligation to a private actor, such as a company, although it may delegate the task of delivery to a company, while retaining the obligation to regulate its conduct. Furthermore, businesses are expected, and in some circumstances required, to take positive steps to ensure that they do not become complicit in human rights abuses, including of the right to water and sanitation.

*What obligations do businesses have with regard to women, children, indigenous peoples and other groups at risk?*

States have a duty to protect vulnerable groups, including their access to water and sanitation.<sup>2</sup> Such groups should also be included in decision-making. Women and children fetch most of the water used by households in rural areas and this work often prevents them from attending school or working at a job.<sup>3</sup> On average, women and children in Africa and Asia walk six kilometres (3.7 miles) a day in search of water and carry heavy loads (up to 20 litres), yet women are under-represented in most community and state-based decision-making mechanisms that influence water use and management. Indigenous peoples, also enjoy specific protections, including of traditional methods of water management.<sup>4</sup> In situations of conflict, civilians have specific rights under international humanitarian law, which protect their access to water, regardless of land or property ownership.

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2 See for example, Article 14 of the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and Article 24 of the UN Convention on the Rights of the Child (CRC).

3 At: [http://www.who.int/water\\_sanitation\\_health/waterforlife.pdf](http://www.who.int/water_sanitation_health/waterforlife.pdf).

4 See for example Article 25 of the UN Declaration on the Rights of Indigenous Peoples.

*What are the obligations of signatories of the UN Global Compact?*

The UN Global Compact<sup>5</sup> states that signatories should “support and respect the protection of internationally proclaimed human rights” and “make sure they are not complicit in human rights abuses”. Since the right to water and sanitation is internationally recognised, companies that endorse the UN Global Compact should take account of the right and report on it in their annual reports on progress. Though all businesses are expected to demonstrate respect for human rights by ensuring that their due diligence procedures follow the guidelines set out under the UN Protect, Respect, Remedy Framework on Business and Human Rights, companies that have endorsed the UN Global Compact have created a heightened expectation because they have voluntarily and publicly undertaken to support and respect human rights.

*What are the obligations of companies that endorse the CEO Water Mandate?*

By definition, companies that endorse the UN-supported CEO Water Mandate are signatories of the UN Global Compact and therefore committed to support and respect the right to water and sanitation.<sup>6</sup> Some differences of perspective between members have delayed the progress of what, in other respects, is a leadership group on issues of water policy and practice. The Mandate’s support of a strong regulatory framework for water-related public policies is nevertheless encouraging, as are its recognition of important principles, such as inclusiveness, accountability and transparency, and the role of the public as well as the private sector.

Water has become a ‘social licence to operate’ issue for business. Communities and private individuals will lay claim to freshwater resources even if they have no access to them, or they will assume such resources are for the common good. A business developing new access to this water, or using large amounts of it, will need to demonstrate that it is doing so legitimately. Creating access to water will inevitably encourage rights-holders to claim their human rights in relation to water, even if it is not the duty of a company to provide this. This is the central human rights dilemma for business in relation to water, and one which requires much more due diligence in approach and greater transparency by business generally.

5 The UN Global Compact, launched in 2000, is the world’s “largest corporate citizenship initiative”. It is a voluntary programme that fosters adoption by the private sector of ten principles (relating to human rights, labour, environment and corruption). At: <http://www.unglobalcompact.org>.

6 The CEO Water Mandate is a public-private initiative launched in 2007. It assists companies to develop policy and practice on sustainable water management. Open to UNGC members, it covers six areas, including operations, the supply chain, watershed management and public policy. Members are required to produce annual progress reports. At: [http://www.unglobalcompact.org/issues/Environment/CEO\\_Water\\_Mandate/](http://www.unglobalcompact.org/issues/Environment/CEO_Water_Mandate/).



# 1. Introduction

## The global water challenge

Meeting the world's water and sanitation needs has become an urgent challenge. There has been progress: according to the United Nations (UN), since 1990 some 1.7 billion people have gained access to safe drinking water. Four regions (Northern Africa, Latin America and the Caribbean, Eastern Asia, and South-Eastern Asia) have met or are on track to meet UN Millennium Development Goal targets for access to clean water by 2015; Sub-Saharan Africa is the major exception. Despite this progress, nevertheless, nearly half the developing world – over 2.5 billion people – continues to lack improved sanitation facilities, and close to 900 million people still use sources of drinking water that are unsafe. Women spend over 200 million hours per day collecting water for domestic use.<sup>7</sup> Up to half the world's population (over 3 billion people) still lack adequate access to clean drinking water and adequate sanitation.

The First Preparatory Committee<sup>8</sup> for the 2012 UN Conference on Sustainable Development has signalled that water scarcity is one of the key global challenges the Summit will address. In his report, the Chair stated:

*Many highlighted water availability as a pressing concern due to the increasing scarcity of water resources, combined with ever increasing demands for water from multiple sectors. Though a range of efforts have been initiated, further action is imperative, especially considering the multiple drivers on water usage and the added complication of climate change impacts through the water cycle.*

About the role of business, the report said:

*Some countries stressed the importance of the private sector for achieving sustainable development goals, and highlighted the role of public-private partnerships for delivering positive social and environmental outcomes, as well as the role of Corporate Social Responsibility in this regard.*

Indeed, in 2010, nearly two thirds of the top 500 companies in the FTSE Global Equity Index Series were surveyed by the Carbon Disclosure Project<sup>9</sup> – on behalf of 137 investors with assets of US\$16 trillion. The 2010 report on Water Disclosure concludes that companies are giving increasing importance to the role water plays in an organisation's "license to operate", particularly in areas that are water-stressed or that are likely to become so. However, human rights receive scant mention in this and other corporate reports relating to water which are still dominated almost completely by the environmental paradigm.

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<sup>7</sup> At: <http://water.org/learn-about-the-water-crisis/facts/>.

<sup>8</sup> Prep. Comm 1, 17–19 May 2010, New York.

<sup>9</sup> Carbon Disclosure Project, *CDP Water Disclosure 2010: Global Report*, written by ERM, London. At: <https://www.cdproject.net/CDPResults/CDP-2010-Water-Disclosure-Global-Report.pdf>.

Significant developments with respect to water can also be noted in the field of international human rights. In 2010, the UN General Assembly and Human Rights Council both recognised in separate resolutions that the right to water and sanitation is a human right, an important step towards giving this right the highest level of international legitimacy.<sup>10</sup>

In the same year, the UN independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation (hereafter the Independent Expert) issued a number of important policy reports.<sup>11</sup> These clarified state and non-state actor responsibilities in this area.

Finally, in June 2011 the UN Human Rights Council unanimously endorsed Guiding Principles for States and businesses to implement the UN-endorsed *Protect, Respect, Remedy* policy framework on business and human rights. This document provides authoritative guidance that has explicit relevance to water and sanitation issues.

### **Universal recognition of water as a human right**

The right to water is considered a treaty obligation because it is included under the right to health and the right to food. The UN Committee on Economic, Social and Cultural Rights made this clear in a General Comment (2002) on the right to water. The right to water is therefore legally binding on States that have ratified the International Covenant on Economic, Social and Cultural Rights.

Not all States have bound themselves legally by treaty to respect the right to water, but unsurprisingly, given its strategic importance and the fact that water is necessary for survival, there is virtually no opposition to it in principle. Given the UN vote in July 2010, when 122 States, with none opposed, supported a UN General Assembly resolution (64/292) that recognised the right to water and sanitation, which was subsequently endorsed by the UN Human Rights Council (A/HRC/15/L.14 ) in September 2010, again without opposition, the right to access safe clean drinking water and adequate sanitation is now an internationally recognised right, very broadly endorsed, even if the right is not legally enforceable in every jurisdiction.

For example, a speech given by a senior representative of the United States (US) State Department in March 2011 underscored the importance of economic, social and cultural

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10 UN General Assembly (2010), Resolution 64/292 of 28 July 2010; UN Human Rights Council (2010), Resolution A/HRC/15/L.14 of 24 September 2010.

11 UN Human Rights Council (2010), Report of the Independent Expert on the issues of human rights obligations related to access to safe drinking water and sanitation, Catharina de Albuquerque, Human Rights Council, 15th Session, 29 June 2010 (A/HRC/15/31); UN General Assembly (2010), *Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, Report of the Independent Expert on the issues of human rights obligations related to access to safe drinking water and sanitation, General Assembly, 65th Session, 6 August 2010 (A/65/254). At: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/477/84/PDF/N1047784.npdf?OpenElement>.

rights.<sup>12</sup> The US Government has signed but not ratified the UN Covenant on Economic, Social and Cultural Rights and has made clear that as a signatory, it is committed to not defeating the object and purpose of the treaty, which, as has been noted, includes the right to water as part of the rights to health and food. It should also be noted that as a participating member of the United Nations and its human rights procedures, the US government recognised the right to water because it acknowledged the UN resolutions adopted in 2010. Finally, international humanitarian law also confers universal responsibility with regard to water in situations of armed conflict. International legal experts contend that parties to the conflict have specific obligations to ensure that civilians access goods that are indispensable to their survival, including drinking water.

### **Linking water and sanitation**

Some business initiatives have distinguished water from sanitation. It is therefore important to consider why global policies link water and sanitation and why corporations should do so too.

It is evidently logical to link water and sanitation because adequate sanitation is clearly an impossible goal without access to safe, clean water. In addition, other human rights, such as the right to an adequate standard of living and the right to health, both underpin the right to water and sanitation, and depend on water and sanitation for their achievement. Reflecting this, and numerous efforts around the world to improve hygiene and prevent disease, the targets set by the UN Millennium Development Goals in 2000 combined water and sanitation.<sup>13</sup> The Committee on Economic, Social and Cultural Rights subsequently adopted a single General Comment in 2002 on the right to water and sanitation.<sup>14</sup> When the UN Human Rights Council created a UN Independent Expert in 2008, she was similarly asked to explore both issues.<sup>15</sup> Finally the 2010 UN resolutions on the right to water also addressed sanitation.

Progress towards halving the number of people without access to safe, clean drinking water has nevertheless far outstripped progress on sanitation.<sup>16</sup> For example, 26 African nations are currently on track to reduce by half the number of people without sustainable access to clean drinking water by 2015. Yet only five countries in Africa are expected to

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12 Speech given on 24 March 2011 by Michael H. Posner, Assistant Secretary, Bureau of Democracy, Human Rights and Labor, US Department of State, "The Four Freedoms Turn 70", Washington, DC. At: <http://www.uspolicy.be/headline/assistant-secretary-posner-%E2%80%9Cfour-freedoms-21st-century%E2%80%9D>.

13 MDG Goal 7 on Environmental Sustainability contains the following Target (7.C): "Halve by 2015 the proportion of the population without sustainable access to safe drinking water and basic sanitation". UN Millennium Development Goals. At: <http://www.un.org/millenniumgoals/environ.shtml>.

14 UN Committee on Economic, Social & Cultural Rights, 2002: UN ESCOR, 29th Session, Agenda item 3, UN Doc. E/C.12/2002/11, 2003.

15 UN Human Rights Council, Resolution 7/22 of 28 March 2008, *Human Rights and Access to Safe Drinking Water and Sanitation*. 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).

16 WHO and UNICEF (2010), *Progress on Sanitation and Drinking Water*, Geneva/New York, April 2010. At: [http://www.unwater.org/downloads/JMP\\_report\\_2010.pdf](http://www.unwater.org/downloads/JMP_report_2010.pdf).

attain the MDG target on sanitation.<sup>17</sup> There are many reasons for this. Most are linked to lack of resources and poor access to relevant technology. However, the stigma associated with defecation also hinders the development of public policy. In many cultures, it is difficult, even taboo, to discuss the disposal of human waste. Behaviour and attitudes need to change as well as sanitation facilities, which takes time.<sup>18</sup>

When businesses engage in human rights issues, water and sanitation should be understood as a single imperative, part of a wider societal and public health agenda which, if not addressed, has the potential to harm their operations. It may be more difficult for companies that are not directly engaged in the provision of water and sanitation services to identify their impacts on water supply and sanitation. Nevertheless, sensible efforts can be made to assess risk and evaluate impact, both in markets and around operating facilities. Issues that might deserve examination include workplace hygiene, access to sanitation facilities, and wider community concerns that are relevant not only to the health of employees and their families but to communities that are touched by company activity.

Section Two outlines the human rights responsibilities of business enterprises relating to water, including the relevance of the UN *Protect, Respect, Remedy* framework. It explores the value of applying a rights-based approach to water use and provision of water and sanitation, and recommends that a company should embrace principles of non-discrimination, participation, accountability and transparency when it engages with stakeholders on water issues.

Section three sets out baseline responsibilities that all businesses have with regard to water use. It describes human rights due diligence procedures that companies should put in place, covering policy, impact assessment, integration, performance monitoring, and provision of remedies. It also discusses issues that need to be considered when companies operate in areas of poor governance, and wider public policy considerations with regard to responsible water use.

Section four focuses on companies that provide water and sanitation services, and their human rights due diligence obligations across their operations.

The concluding section offers a number of recommendations that address all companies that are water users as well as companies that provide water and sanitation services, and those that participate in international multi-stakeholder initiatives that are relevant to water.

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17 UN Environment Programme (2010), *Africa Water Atlas*, Division of Early Warning and Assessment (DEWA) United Nations Environment Programme (UNEP), Nairobi, Kenya.

18 For more on the policy obstacles to sanitation reform, see *Overcoming the sanitation stigma: An interview with author Rose George*, Circle of Blue, 24 November 2008. At: <http://www.circleofblue.org/waternews/2008/world/africa/overcoming-the-sanitation-stigma-an-interview-with-author-rose-george/>.

## 2. Business responsibilities relating to human rights and water

### **The UN Protect, Respect, Remedy framework on business and human rights**

In 2008, the UN Human Rights Council unanimously welcomed a policy framework developed by the UN Special Representative on business and human rights, Professor John Ruggie.<sup>19</sup> This marked the first time that a UN intergovernmental body had taken a substantive position on the issue of business and human rights. The *Protect, Respect, Remedy* framework sets out state duties and corporate responsibilities in regard to human rights and affirms that both States and businesses need to provide access to effective remedies for victims of human rights abuse.

The UN framework requires companies to avoid infringing the human rights of others and to address adverse impacts that result from their policies or operations. The responsibility to respect human rights exists independently of a state's obligations under international human rights law. It is a norm that applies to businesses whatever States do or fail to do. The corporate responsibility to respect also applies to all internationally recognised human rights, regardless of the size of the company, its origin, or the context in which it operates. The framework, in addition to being endorsed by the Human Rights Council, has been widely welcomed by States, civil society, trade unions and the business community. The International Chamber of Commerce, the International Organisation of Employers and the Business and Industry Advisory Committee to the OECD were among the many business organisations that issued supportive statements, in addition to individual companies and national employers' organisations.<sup>20</sup>

### **The UN *Protect, Respect, Remedy* framework on business and human rights**

The framework rests on three pillars that are mutually supportive:

- The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
- The corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and
- Provision of effective judicial and non-judicial remedies for victims.

19 Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

20 UN Human Rights Council (2009), "Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework", Report of the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Geneva (A/HRC/11/13), 22 April 2009.

## The United Nations Guiding Principles

In 2008 the UN Human Rights Council requested the Special Representative to develop guiding principles that would operationalise the *Protect, Respect, Remedy* framework. In June 2011 the Human Rights Council unanimously endorsed the Guiding Principles put forward by the Special Representative. Their acceptance marked an important step towards defining the nature and extent of business responsibilities with regard to human rights. They also shed light on the duties of States and the responsibilities of business in relation to water and sanitation.

A number of the Guiding Principles are directly relevant to water service management (including sanitation). For example, the Commentary to Guiding Principle 5 (relating to States) says:

*States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights.*

Guiding Principles 11-24 cover the corporate responsibility to respect human rights and set out a policy and due diligence framework which businesses should use to assess risks, impacts and report. All are directly relevant to due diligence in relation to water use, and to the specific responsibilities of water service providers. Section Three looks more closely at these Principles and explores how they apply to the use of water by business enterprises.

Guiding Principles 25-31 set out principles that should underpin judicial and non-judicial mechanisms that provide remedies for abuses involving business enterprises. They are directly relevant to companies whose activities affect the access of individuals or communities to water and sanitation.

## Rights-based approaches to water and sanitation

According to the Office of the UN High Commissioner for Human Rights (OHCHR), a human rights-based approach “is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.”<sup>21</sup> OHCHR points out there are two main rationales for applying a human rights-based approach to development challenges: one intrinsic (it is the “right thing to do”), the other instrumental (it “leads to better and more sustainable human development outcomes” and helps resolve conflicts among stakeholders). In practice, both motives are usually in play.

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21 United Nations Office of the High Commissioner for Human Rights (OHCHR), *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, 2006. At: <http://www.ohchr.org/Documents/Publications/FAQen.pdf>.

Adopting a rights-based approach also strengthens policy formation and performance by defining roles and responsibilities clearly, setting minimum standards, and encouraging the participation and involvement of all those who have a legitimate interest.<sup>22</sup> For all these reasons, it has value for States and businesses alike.

Although originally intended primarily for governments, a rights-based approach sets out principles that can assist companies in assessing the legitimacy of their policies and practices. In particular, they clarify how a business should relate to other stakeholder groups. A rights-based approach will help ensure that:

- Companies integrate all internationally recognised human rights in their policies and their activities, and consider every human being to be a ‘rights-holder’.
- States (which have the primary responsibility to respect, protect and fulfil human rights) prevent corporations from abusing or undermining human rights, and hold them accountable if they are involved in abuses.
- Adequate, accessible and appropriate remedies are made available to every victim of corporate human rights abuse.

At least one government has already sought to apply a rights-based approach to issues of water and sanitation. The following are seen as being particularly relevant in this context:<sup>23</sup>

### **Non-discrimination and equality**

As part of their responsibility to respect human rights, businesses should consider how women, children and marginalised groups are or may be affected by business activities, and forms of social discrimination. With respect to water, concerns may include water collection, hygiene, and access to sanitation.

### **Participation and empowerment**

Decision-making processes relating to water and sanitation (for example, the setting of tariffs), should be “open to participation at different levels and within formalized structures”.<sup>24</sup> This may require assisting or enabling poor and marginalized individuals and communities to engage effectively.

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22 GTZ and German Federal Ministry for Economic Cooperation and Development, *The Human Right to Water and Sanitation: Translating Theory into Practice* (December 2009), pp. 12-13. At: <http://www.gtz.de/en/dokumente/gtz2009-human-right-to-water-and-sanitation.pdf>.

23 The following paragraphs are based on the German Government publication listed in footnote 22.

24 *Ibid.*, p. 6.

### Accountability and transparency

Transparency helps to ensure “overall integrity” by increasing the private sector’s accountability to stakeholders.<sup>25</sup> It is particularly relevant to the contracting and reporting relationships between businesses and States (see Sections Three and Four). Effective accountability implies the possibility of legal redress before a court or other adjudicator for those whose rights are compromised. The remedy principles within the UN *Protect, Respect, Remedy* framework are also highly relevant here.

Neither States nor businesses should consider a rights-based approach to water and sanitation to be a political or box-ticking exercise. It is designed to create conditions in which human rights are integrated within policies on water use and provision in a manner that protects the entitlements of those who are poorest and most disadvantaged.

### The right to water and sanitation

The July 2010 UN General Assembly resolution on the right to safe and clean drinking water and sanitation makes clear this is a human right that is essential for the full enjoyment of life and all human rights.<sup>26</sup> A UN Human Rights Council resolution of September 2010 also referred to international human rights instruments (including the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities) which set out state obligations with regard to safe drinking water and sanitation. These resolutions built in part on the general comment by the UN Committee on Economic, Social and Cultural Rights in 2002 (see Text Box below).<sup>27</sup>

The Human Rights Council resolution on access to safe drinking water and sanitation<sup>28</sup> acknowledged that States may opt to involve non-state actors in the provision of safe drinking water and sanitation services and have an international duty when doing so to ensure that businesses (and other non-state actors) meet their human rights responsibilities. Specifically, the resolution makes clear that States to ensure that non-state actors:

- *Fulfil their human rights responsibilities across the range of their activities, not least by engaging proactively with the State and stakeholders to detect potential human rights abuses and find solutions to address them;*
- *Contribute to the reliable provision of safe, acceptable, accessible, and affordable drinking water, and provide sanitation services of good quality and sufficient quantity;*

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<sup>25</sup> *Ibid.*, p. 7.

<sup>26</sup> UN General Assembly (2010), Resolution 64/292 of 28 July 2010.

<sup>27</sup> General Comment 15, UN Doc. E/C 12/ 2002/11.

<sup>28</sup> UN Human Rights Council Resolution A/HRC/15/L.15 of 24 September 2010.

- *Integrate human rights into impact assessments as appropriate;*
- *Develop effective organisational-level grievance mechanisms for users, and refrain from obstructing access to state-based accountability mechanisms.*

International human rights law applies to States, which are the signatories of human rights treaties. Governments are obliged *to respect* human rights (refrain from denying or limiting the access of any person to them); *to protect* them (ensure others do not harm human rights, and adopt legislation or take other measures to ensure access is not discriminatory), and *to fulfil* them (take affirmative steps to ensure their effective realization). After ratifying a treaty, States are expected to pass domestic legislation to give effect to their provisions. With respect to companies, this means that States become obliged to ensure that companies respect human rights, that contractual arrangements with companies reflect human rights, and that the activities of companies are regulated in accordance with human rights norms. Companies themselves have few direct obligations under international human rights law, but they are responsible for their human rights conduct, when they act at their own initiative or on behalf of other parties including the State or when other parties act on their behalf.

The resolutions of 2010 on water and sanitation do not create direct obligations for companies. Nevertheless, it is prudent for companies to ensure that their conduct is consistent with UN General Assembly and Human Rights Council resolutions and the recommendations of special rapporteurs and independent experts, because it is recognised that these set or monitor internationally legitimate standards against which the performance of businesses and other actors in society may be assessed.

The right to drinking water and sanitation does not appear explicitly in either the Universal Declaration of Human Rights (1948), or in the two Covenants - on Civil and Political Rights and on Economic, Social and Cultural Rights (1966) - which together are commonly referred to as the 'International Bill of Human Rights'. However, following formal recognition of the right in 2010, it may be considered one of the "internationally-recognised" standards that companies are obliged to respect.

The 2010 UN resolutions create a foundation on which binding law for States may be developed in the future. As a paper by the human rights law clinic at the University of London School of Oriental and African Studies (SOAS) notes, "the direct inclusion of the right to water in many modern Constitutions, as well as the implicit recognition of the right in many other Constitutions". It also lists recent examples of its incorporation in national law, where constitutions do not recognize the right to water and sanitation.<sup>29</sup> At both international and national levels, therefore, movement towards making the right to water and sanitation legally binding can be discerned.

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<sup>29</sup> SOAS International Human Rights Clinic Paper, *The Right to Water and Responsibilities of Business: An Analysis of Legal Issues*, 2011, p. 14.

### The right to water and sanitation<sup>30</sup>

Enjoyment of this right can be evaluated against several criteria:

- *Availability*

The human right to water requires a supply of water for each person that is sufficient for his or her personal and domestic use. Sufficient sanitation facilities should also be available.

- *Quality*

Water must be safe to consume and for other uses, and must not pose a threat to public health. Sanitation facilities must be hygienic and technically safe. Water for cleaning and hand washing must be available.

- *Acceptability*

Sanitation facilities must be culturally acceptable. This will often require gender-specific facilities, constructed to ensure privacy, safety and dignity, and avoid risk of violence.

- *Accessibility*

Water and sanitation services must be continuously accessible to all members of the household (or business or school) or those in the vicinity. They must provide physical security, notably to women and children who are at risk of violence, including sexual violence, when they access facilities.

- *Affordability*

The cost of accessing water and sanitation must not compromise the ability of users to pay for other essential needs guaranteed by human rights, such as food, housing and health care.

The UN Independent Expert, Catarina de Albuquerque, has tackled some of the immediate questions that need to be addressed, now that the right to water and sanitation has been affirmed internationally.<sup>31</sup> For example, she has provided guidance on the minimum quantity of water required to realize the right.<sup>32</sup> States are not required to provide piped water or a flush toilet to everyone, when other solutions are more appropriate; nor are States “obliged to provide access to water and sanitation free of charge”. However, States must ensure access to services that comply with certain standards, and services must “not compromise the realization of other human rights”. She also notes that human rights

30 United Nations (2010), *The Human Rights to Water and Sanitation: Legal Obligations with Tangible Benefits*. At: [http://www.ohchr.org/Documents/Issues/Water/Water\\_Tangible\\_benefits.pdf](http://www.ohchr.org/Documents/Issues/Water/Water_Tangible_benefits.pdf).

31 United Nations (2010), *The Human Right to Water and Sanitation: Frequently Asked Questions*. At: <http://www.ohchr.org/Documents/Issues/Water/FAQSanitationAndHR.pdf>.

32 Specifically, twenty litres per capita per day “is a minimum quantity required to realize minimum essential levels of the right”; but States “should aim for at least 50 to 100 litres per person per day” to avoid health concerns. *Ibid*.

law does not prescribe a “particular model of service provision”. Private provision is not excluded, though States must uphold their fundamental duty to ensure that human rights are not violated.<sup>33</sup>

The recommendations of the Independent Expert outline what States must do to translate international human rights law into domestic policy and legislation. They “must develop a national plan ... to progressively achieve the full realization of the rights to water and sanitation”, and “should ensure that ... the rights to sanitation and water are justiciable before national courts and other accountability mechanisms”. For example, she suggests that States should adopt laws that require service providers to conduct human rights impact assessments. This is an illustration of the types of steps States can make to clarify for corporations what they need to do to respect the right.<sup>34</sup>

Through their membership in the UN Global Compact (UNGC), 6,000 companies have already voluntarily undertaken to respect the right to water and sanitation, since UNGC members pledge to respect all internationally recognized human rights when they join. Since companies that endorse the CEO Water Mandate (71 in mid-2011) are Global Compact members, they too have committed themselves to respect the right to water and sanitation, independently of States’ progress in implementing the right. This does not mean companies have responsibilities that States do not have. Nor does it imply that States may transfer their own duties to private companies. It does point to the fact that the connections between company and state policy are crucial. Sections 4 and 5 explore these in more detail.

Further, business enterprises have certain specific responsibilities with respect to water and sanitation, which arise independently of state policy and its effects on companies. These are also explored in the remainder of this paper.

### **Differences between rights-based approaches and the corporate responsibility to respect the right to water**

The normative and political developments discussed above raise several questions for companies that seek to respect human rights, including the right to water and sanitation. Within companies, one issue that has provoked discussion is whether it is preferable to adopt a *rights-based approach* to water and sanitation or a strategy that focuses explicitly on the specific right to water. In reality, businesses should include both approaches. It would be wrong to overstate differences between them, since their contents overlap and they differ mainly in their emphasis. The following table illustrates areas of difference and complementarity.

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<sup>33</sup> *Ibid.*

<sup>34</sup> UN Human Rights Council (2010), Report of the Independent Expert on the issues of human rights obligations related to access to safe drinking water and sanitation, Human Rights Council, 15th Session, 29 June 2010 (A/HRC/15/31), pp. 20-1.

<b>Business approaches to rights, water and sanitation</b>	
<i>A rights-based approach</i>	<i>Focus on the specific right</i>
Relevant to the full range of water use and sanitation issues and therefore to all businesses that have an environmental or social impact on water use, regardless of the sector or issue.	Relevant to all business sectors, but particularly those that provide water and sanitation services.
The rights-based approach is relevant to all areas of business: it puts key principles in place and emphasises the importance of considering every human right.	Defines specific entitlements in relation to drinking water and sanitation, and provides guidance on specific needs (quantity and quality of water for domestic use, etc.).
Provides a clear baseline: the fundamental principle is that companies should not infringe on the human rights of others.	Though companies do not have a legal duty to fulfil the right to water and sanitation, where a state is unable or unwilling to fulfil its duty, businesses must be attentive to the implications of governance gaps (see below).
Highlights dilemmas that arise when balancing the duties and interests of companies and States, for example the need to balance water use for agricultural purposes (commercial exports, right to food) and water use for other purposes (industry, personal consumption).	The responsibility of business is to provide access to water and ensure that human rights criteria are applied when monitoring the delivery of water (in the case of service providers) and its consumption (during production for example, etc), and that individuals' access to water is not compromised in either case.
A rights-based approach is not legally enforceable under international law, although it has been adopted by some UN agencies, governments and NGOs. <sup>35</sup>	The right to water and sanitation is now an internationally recognised human right, but not all States have ratified it.

35 United Nations (2003), *The Human Rights-Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies*. 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).

Requires businesses to be highly transparent and accountable.	Requires businesses to be highly transparent and accountable, specifically with regard to the remedies set out in the 2010 UN Human Rights Council resolution on the right to water and sanitation and the UN Guiding Principles on Business and Human Rights.
Non-discrimination and gender are central in all processes; the approach also focuses on vulnerable and marginalised groups. <sup>36</sup>	The right should be realised for all, in particular the one in six of the world's population currently denied the right, many of whom are women and children.
Communities and individuals should be empowered to participate in all decision-making processes that concern them.	Participation is an important means for improving the acceptability, accessibility and affordability of services provided in support of the right.

It would be reasonable to assume that companies that manage water and sanitation services have more responsibilities with regard to the human right to water and sanitation. However, this is not necessarily always the case. All business sectors need to ensure due diligence procedures take account of the right. It is now widely accepted that a rights-based approach to development provides tools that help to address serious violations of economic, social and cultural rights. Since the right to water and sanitation has been internationally recognised, it is therefore recommended that all businesses, regardless of their sector, apply a rights-based approach in their operations, while continuing to give specific attention to the particular demands of public and individual entitlement to clean water and sound sanitation.

### **The boundary between State Duties and Business Responsibilities**

The UN *Protect, Respect, Remedy* framework confirms that a state's obligations with regard to human rights are fundamentally different from the relationship to human rights that businesses, or other non-state actors have. This is underlined by Guiding Principle 5, noted previously, which reaffirms that States cannot relinquish their international human rights obligations when outsourcing the delivery of water or other services. Principle 5 is balanced by a clear understanding that the private sector has a role to play in the provision of water and sanitation services, provided that human rights and other considerations are met. Human rights-related risks and impacts associated with business-related water use need to be assessed as carefully as those associated with private service

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<sup>36</sup> For example, women and men often have different roles and responsibilities with regard to water, which need to be taken into account to avoid increasing the vulnerability of women and their children.

delivery. Human rights considerations should also be appropriately reflected in the contracts covering water use and provision that States and businesses sign.

At the same time, in numerous instances States continue to be unable or unwilling to fulfil their human rights duties, including their responsibility to regulate the behaviour of third parties, such as businesses. Although a state cannot abdicate its duties under international human rights law, the reality is that in many instances state performance fails to conform to international norms. Natural disasters, extreme poverty, poor or criminal governance, and armed conflict are all cited as causes. Businesses need to be particularly sensitive when operating in such contexts. With respect to conflict situations, the Institute for Human Rights and Business recently published a report, *From Red to Green Flags*, which outlines the steps companies should take when they operate in zones of high risk.<sup>37</sup> These steps build on those developed to address international crimes.<sup>38</sup> Access to safe, clean drinking water is particularly vital when populations are made vulnerable by conflict, because they cannot move freely or are forcibly displaced from their homes and therefore lack access to water and sanitation.

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37 Institute for Human Rights and Business (2011), *From Red Flags to Green Flags: The Corporate Responsibility to Respect Human Rights in High Risk Countries*. At: [http://www.ihrb.org/pdf/from\\_red\\_to\\_green\\_flags/complete\\_report.pdf](http://www.ihrb.org/pdf/from_red_to_green_flags/complete_report.pdf).

38 See the suggestions in *Red Flags: Liability Risks for Companies Operating in High-Risk Zones*. At: <http://www.redflags.info/>.

## 3. Human rights due diligence and water use

This section provides an overview of the human rights due diligence process set out in the UN Guiding Principles on Business and Human Rights adopted in June 2011 and considers their implications with respect to corporate water use.

### Human Rights Policy Statements

The UN Guiding Principles on Business and Human Rights state that businesses should declare how they intend to integrate human rights into their processes and procedures, and should monitor and report on their impacts and risks. Though over 5,000 companies have made commitments to respect human rights in the context of the UN Global Compact, far fewer have formally affirmed that they are progressing with human rights integration, including through the adoption of a human rights policy statement. Now that the Guiding Principles have been endorsed internationally, it may be hoped the number will increase significantly. Companies that have signed up to the CEO Water Mandate seem to be well represented in this regard. Two thirds reported in a 2010 survey that they had formal policies on human rights, and one third had specifically addressed the right to water.<sup>39</sup>

A statement of human rights policy should: be approved at the highest level; be informed by the advice of relevant experts; and specify the company's expectations of business partners. It should also be communicated to all relevant stakeholders and reflected in operational policies and procedures to ensure integration throughout the company.<sup>40</sup>

The Guiding Principles also affirm that the corporate responsibility to respect human rights includes all internationally recognised human rights;<sup>41</sup> is applicable across company operations and through its relationships with third parties; and applies to all enterprises.<sup>42</sup>

In view of the fact that the right to drinking water and sanitation was formally recognised in 2010, all businesses should take account of this right when they implement human rights due diligence procedures and develop a human rights policy statement as called for in the *Protect, Respect, Remedy* framework.

### Human Rights Due Diligence

The UN framework calls on businesses to show how they are respecting human rights. In addition to developing a human rights policy, they should put in place due diligence

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39 CEO Water Mandate (2010), *The Human Right to Water: Emerging Corporate Practice and Stakeholder Expectations* (White Paper), November 2010.

40 Guiding Principle 16.

41 This refers, at a minimum, to the International Bill of Human Rights and the ILO core conventions.

42 The Guiding Principles "apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure".

procedures that will enable them to assess risk and evaluate their impacts. They should integrate human rights into all relevant processes, track performance, and finally report on progress.<sup>43</sup>

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- a. Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- b. Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- c. Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.<sup>44</sup>

In any due diligence process, adequate remedies should be available to victims of human rights abuse. These should include grievance mechanisms established by the business itself. The Institute for Human Rights and Business conducted research in 2010 with 24 international companies, which showed that a human rights due diligence process is operable in a broad range of business sectors and locations.<sup>45</sup>

Section Two explored the value of applying rights-based approaches to water use and water and sanitation provision and noted that businesses should embrace principles of non-discrimination, participation, accountability and transparency when engaging with stakeholders. With this approach and these principles in mind, the rest of this section proposes a human rights due diligence approach to water use.

### Identification of human rights impacts

Companies are increasingly expected to identify and evaluate “actual and potential adverse human rights impacts” of their activities and relationships. They are called on to consult experts, use other resources, and engage meaningfully with relevant

43 Guiding Principle 17.

44 See report of the Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, A/HRC/17/31, 21 March 2011, Guiding Principle 17, p. 16.

45 Institute for Human Rights and Business (2010), *The ‘State of Play’ of Human Rights Due Diligence: Anticipating the next five years*. At: [http://www.ihrb.org/pdf/The\\_State\\_of\\_Play\\_of\\_Human\\_Rights\\_Due\\_Diligence.pdf](http://www.ihrb.org/pdf/The_State_of_Play_of_Human_Rights_Due_Diligence.pdf).

stakeholders, including those who might be affected.<sup>46</sup> For example, companies need to ensure that they consult not just community leaders, who tend to be men, but also women and others who may not be in positions of authority.

It is vital to engage with communities and other stakeholders when defining the scope and nature of impacts. While companies will need to define priorities, and certain issues and rights will be more pertinent in some business sectors and locations than others, it would be problematic for a company to limit the scope of its analysis without taking account of external opinions, especially the opinions of people who are directly affected by its activities. If water use or sanitation are found to be an issue of concern, then other rights are also likely to be, including the rights to health, housing and food, and perhaps the rights to information, freedom of expression and privacy.

In relation to water use, a number of key issues will need to be considered.

#### *Water resource management*

Effective water resource management is an essential component of any human rights approach to business responsibility. It should be standard practice to set transparent targets that reduce the amount of water used and take steps that prevent pollution of water systems. In conducting human rights due diligence, companies should understand the likely impact their operations will have on public access to water for domestic use. Businesses can do this, for example, by studying access patterns by gender to ensure that women and men are equally able to access water.

#### *The value of data*

In many cases, reliable data will not be available on water access, quantity, or use. To assess its own impact, a company needs to understand this larger picture. Where credible information is not available, risks to civil society, companies and government increase. To mitigate these risks, all the parties in a given area should work to establish agreed data on water availability, using credible baseline studies, so that the current situation is known and a benchmark established to assess future impacts. Breaking data down - disaggregating by gender, for example - will help to ensure that a company can detect any increase in the vulnerability of particular groups.

#### *Human rights impact assessments*

A legitimate debate continues about whether a ‘human rights impact assessment’ (HRIA) (defined as a process to identify, evaluate and manage the human rights impacts of a business operation or project<sup>47</sup>) is required in addition to other forms of environmental and social impact assessments. In its *State of Play* report on due diligence, the Institute

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<sup>46</sup> UN Guiding Principle 18 notes that this engagement should be undertaken “as appropriate to the size of the business enterprise and the nature and context of its operations”.

<sup>47</sup> International Business Leaders Forum, International Finance Corporation and UN Global Compact (2010), *Guide to Human Rights Impact Assessment and Management*. At: <https://www.guidetohriam.org/welcome>.

for Human Rights and Business concluded that the answer depends on whether existing approaches include sufficient human rights content. Content should be measured not in terms of referencing human rights, but using rights-based approaches to evaluate policies and practice.

Businesses should benchmark their methodologies against the best available practice and seek to address gaps where these appear. In many cases, they will need to integrate human rights concerns into existing risk and impact assessments. This said, where human rights risks are very high, a specific ‘human rights impact assessment’ may indeed be required.<sup>48</sup> Developing clear criteria for such decisions will take time, but some multi-stakeholder initiatives have developed sound methodologies (notably for the oil and gas industry<sup>49</sup> and internet services<sup>50</sup>).

When a company decides to integrate human rights into existing impact assessment methodologies, or carry out a stand-alone HRIA, the decision should be informed by internal or external human rights expertise and made known.

### Effective Integration of Human Rights into Business Practice

When they identify potential or actual adverse human rights impacts, companies should prevent or mitigate them by applying their impact assessment findings to their operations. This implies assigning clear lines of responsibility within the company to address the impacts in question, and the introduction of effective oversight, decision-making and budgetary mechanisms.

#### *Prioritizing action*

The UN Guiding Principles acknowledge that, to address adverse human rights impacts, companies may need to prioritize their interventions. Where this is so, businesses “should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable”.<sup>51</sup>

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48 While there is no single standardised approach to HRIA, organisations are testing methodologies. For example, the Nomogaia Foundation has posted an online draft version of its HRIA methodology, which gathers data on project and context, prepares lists of rights affected, engages rights holders, and rates impacts. See Nomogaia Foundation, *A Methodology for Human Rights Impact Assessment*, draft version, no date. At: [http://www.nomogaia.org/HRIA/Entries/2011/1/1\\_A\\_Methodology\\_for\\_Human\\_Rights\\_Impact\\_Assessment\\_files/A%20Methodology%20for%20Human%20Rights%20Impact%20Assessment.pdf](http://www.nomogaia.org/HRIA/Entries/2011/1/1_A_Methodology_for_Human_Rights_Impact_Assessment_files/A%20Methodology%20for%20Human%20Rights%20Impact%20Assessment.pdf). Nomogaia also summarises sample HRIAs it has conducted of selected company operations. The International Business Leaders Forum (IBLF), International Finance Corporation (IFC), and the UN Global Compact have produced an online interactive *Guide to Human Rights Impact Assessment and Management*, based on a seven-stage approach to HRIA. This web-based guide discusses the merits of stand-alone HRIAs versus the integration of human rights in other forms of impact assessments and will include tools for human rights identification, due diligence mapping and management systems. At: <https://www.guidetohriam.org/welcome>.

49 See, for example, the Voluntary Principles for Security and Human Rights ([www.voluntaryprinciples.org](http://www.voluntaryprinciples.org)) and Extractive Industries Transparency Initiative ([www.eitransparency.org](http://www.eitransparency.org)).

50 See, for example, the Global Network Initiative ([www.globalnetworkinitiative.org](http://www.globalnetworkinitiative.org)).

51 Guiding Principle 24.

It is therefore important to consider under what circumstances the right to drinking water and sanitation might take primacy over efforts to respect other human rights or manage other business considerations. Clearly, when people cannot access clean water, their health will rapidly be compromised, as will their right to life. Businesses should clearly avoid becoming complicit where abuse or neglect of rights is likely to have such grave consequences. The particular responsibilities of water and sanitation providers are discussed in the next section, but the issue of prioritization is relevant to any business engaged in water use. It implies that companies should take special precautions when working in areas of water scarcity, poor water quality or where water is not easily available to some individuals or to the public more generally. In no circumstances should corporate water users deny to others their entitlement to water and sanitation. In situations where States are unwilling or unable to realise their human rights obligations, business should take particular care (see ‘Special Considerations’ below).

#### *Developing internal expertise and capacity*

Effective integration of human rights by corporations will take time; arguably no company in the world has yet fully achieved it. Nevertheless, instances of progress can be reported. Companies are following a number of different approaches, some led by public affairs or corporate responsibility teams, others by business ethics or legal officers. No single approach dominates. More important is the end goal: the full integration of human rights into corporate culture, and all policies and operations. Some companies have suggested health and safety procedures (itself a human rights issue) as an example of how integration should look in practice. Over time, health and safety concerns have been absorbed into the DNA of employee behaviour in many leading companies. Managements are increasingly setting clear performance targets. Companies are now in a position to consider how respect for human rights can be integrated into day-to-day behaviour in other areas.

Community and political perceptions are often key when problems arise over water use. A company may retain its ‘social licence to operate’ if stakeholders and the public believe it acts fairly, or is truly committed to human rights. This requires companies to act transparently, not only in terms of reporting (see below) but also in their engagement with human rights. If a community is to become an active partner in this process, the company may have to enhance its own competence, and also the capacity of the community.

#### *Community investment aligned with human rights considerations*

Continued and coordinated private investment in water and sanitation is required in order to reach very poor or marginalised groups of people. Many companies are already making valuable contributions to efforts to expand access to water and sanitation in developing countries.<sup>52</sup> However, the value of these efforts could be enhanced greatly

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<sup>52</sup> Examples of good practices can be found in the CEO Water Mandate (2010), *Guide to Responsible Business Engagement with Water Policy*, November 2010.

if they were combined with interventions that measured and addressed ecological, environmental, political, economic and social barriers to access.

Community investment should be undertaken in cooperation with actors that are working to deliver long-term sustainable change, and should both empower people and develop local capacity. It should be stressed that a company has no obligation to make such investments; nor can it legitimately use such investments to offset complicity in abuses of human rights that occur elsewhere or in connection with other activities in which it is involved.

### **Due Diligence: tracking performance and reporting**

To show how they are addressing adverse human rights impacts, business enterprises are expected to track their performance and communicate it publicly. The UN Guiding Principles make specific recommendations with regard to monitoring and reporting.<sup>53</sup>

The implications for water use are potentially profound. Unlike many human rights issues (such as freedom of expression, for example) where the issue at stake is non-physical or intangible, water is physically vital to life and physical health. This means that stakeholder expectations of companies who use water in large quantities, particularly in areas of water scarcity and limited access, will be explicit and significant. However, while the entitlement to clean water and sanitation is associated with a wide range of quantifiable measures (ranging from 20-100 litres a day *per capita*, for example), other dimensions of the right to water are more elusive. Examples include the sacred relationship that many indigenous peoples and cultures have with water. While efforts have been made to improve reporting on complex rights related issues, it is more difficult for companies to measure their impact on some dimensions, or track their performance or report it.

#### *The importance of measuring water consumption*

Both environmental sustainability and equity in water usage require accurate measurement of consumption, including for commercial use. Businesses should support efforts by governments and local authorities to develop tariffs based on consumption, and should prefer metering to flat-rate fees that take no account of consumption.

### **The provision of remedies**

When business enterprises find they are responsible for adverse impacts, they are expected to “provide for or cooperate in their remediation through legitimate processes.”<sup>54</sup> The *Protect, Respect, Remedy* framework offers several rights-based criteria for establishing remediation mechanisms in business (see box below).

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53 Guiding Principles 20 and 21 state specifically that performance tracking should “be based on appropriate qualitative and quantitative indicators” and “draw on feed-back from both internal and external sources, including affected stakeholders”.

54 Guiding Principle 22. A number of other Principles (for example, Principles 24-31) are directly relevant to provision of remedies.

### Effectiveness criteria for non-judicial grievance mechanisms:

Operational mechanisms should be:

**Legitimate:** “enabling trust from all stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes”.

**Accessible:** “being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access”.

**Predictable:** “providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation”.

**Equitable:** “seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms”.

**Rights-Compatible:** “ensuring that outcomes and remedies accord with internationally recognized human rights”.

**A source of continuous learning:** “drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms”.

**Based on engagement and dialogue:** “consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances”.<sup>55</sup>

A number of companies have been testing rights-based criteria since 2008 and will report on their experiences in 2011. Other reporting efforts focusing specifically on water are beginning to develop and it is hoped that future examples will address the human rights impacts of corporate water use, thereby allowing the wider business community to develop good practice in this area.<sup>56</sup> Signatories of the CEO Water Mandate may be able to play an important role here.

Internal grievance mechanisms need to work in coordination with, not as alternatives to other judicial and non-judicial remediation mechanisms. The updated OECD Guidelines on Multinational Enterprises provide an important reference on this matter. They indicate, for example, how the OECD’s national contact points will deal with future disputes related to water use and sanitation.<sup>57</sup>

<sup>55</sup> Guiding Principle 31.

<sup>56</sup> See for example Barton, Brooke, *Murky Waters: Corporate Reporting on Water Risk, A Benchmarking Study of 100 Companies*, Ceres, 2010, At: <http://www.ceres.org/resources/reports/corporate-reporting-on-water-risk-2010>.

<sup>57</sup> For more on the review process, see [http://www.oecd.org/document/33/0,3746,en\\_2649\\_34889\\_44086753\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/33/0,3746,en_2649_34889_44086753_1_1_1_1,00.html).

### Special Considerations in areas of weak or poor governance

As noted, parties to a conflict have specific obligations to ensure that civilians are able to access resources that are indispensable to their survival, including drinking water. Because it is essential to life, water is specifically protected under International Humanitarian Law.<sup>58</sup>

The UN *Protect, Respect, Remedy* Framework emphasises that all businesses should observe internationally recognised human rights even where national law is weak, non-existent or not enforced, and should respect principles of international humanitarian law in conflict areas. It also calls on companies to “treat the risk of causing or contributing to international crimes as though it were a legal compliance issue”.<sup>59</sup> This means that businesses are required to give particular attention to water use in contexts of corruption, extreme poverty, conflict or humanitarian emergency.<sup>60</sup> The right to water and sanitation remains an inalienable right even in situations where the national government is oppressive, national laws are not enforced, or local authorities are unwilling or unable to observe national law. In this sense, companies cannot simply wait for regulation; they have a role to play in pressing for standards to be respected. (See below on business leadership.)

In specific situations, companies may need to re-evaluate their normal patterns of water use. After a humanitarian disaster, for example a major earthquake, the surrounding population may not have safe, clean drinking water and it may be inappropriate for a company to maintain its water consumption. In conflicts, a company may become complicit in an international crime if it deprives a population of access to drinking water, even if it does so on the order of officials or an armed group. Companies that operate in countries where governance is poor or oppressive should plan for such risks, even if they rarely occur.

### Wider public policy considerations

Business impacts on water use are not confined to the local environment. Corporate lobbying, taxation, regional planning and a range of other engagements with national governments or local authorities can influence access to water and sanitation, or the quality of public services. The CEO Water Mandate’s *Guide to Responsible Business Engagement in Water Policy* explores these issues in some detail.

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58 Article 54, Protocol 1 to the 1977 Amendment Protocol to the Geneva Conventions; in Occupied Territories under Article 55, Geneva Convention IV and Article 69, Protocol 1; and in Other Territories under Article 70, Protocol 1.

59 UN Guiding Principle 21.

60 Institute for Human Rights and Business (2009), *Setting Boundaries: Clarifying the Scope and Content of the Corporate Responsibility to Respect Human Rights*, Submission to the UN Special Representative on Business and Human Rights. At: [http://www.ihrb.org/pdf/Setting\\_Boundaries-Clarifying\\_Scope\\_and\\_Content\\_of\\_Corporate\\_Responsibility\\_to\\_Respect\\_Human\\_Rights.pdf](http://www.ihrb.org/pdf/Setting_Boundaries-Clarifying_Scope_and_Content_of_Corporate_Responsibility_to_Respect_Human_Rights.pdf).

### **The role of business leadership**

Companies that aim to implement best practice in the area of human rights have a leadership role to play *vis à vis* other business water users. While a company's policy commitments, and its practical efforts to prioritise public access to water may give it a short-term competitive advantage, problems with water supply generate risks for all business sectors. Higher standards of practice need therefore to be shared, especially at the local level. If businesses demonstrate leadership by working to improve supply and equitable access, they send a powerful message to decision makers as well as other water users.

### **Collective action**

Wherever the provision of water is uncertain, it creates risks across society, for businesses, government and civil society alike. Sustainable solutions to major problems of water supply will require collective action, often on a large scale. Business leaders should therefore see it as part of their responsibility to work with other businesses and institutions to put in place policies on the scale required. Solutions need to take account of context, and people's needs and ability to access water. Where networks of stakeholders at local or national level do not already exist, companies may be in a position to assist their creation. Such networks should be inclusive and involve relevant stakeholders from government, business and civil society, including women's groups and other community representatives.

### **A stable regulatory environment**

Poor regulation or enforcement will increase the risk that companies will fail to respect the right to water. It is therefore in the interest of businesses as well as communities to ensure that regulatory frameworks are robust. A sound regulatory environment will not only enforce compliance; it will also establish transparent reporting criteria and clear standards for measuring performance. Sound regulation is beneficial for businesses that seek to respect human rights.



## 4. Implications for water and sanitation service providers

This section examines the human rights responsibilities of private companies that provide water and sanitation services. It builds on the general analysis of Section Two and the description of corporate responsibility with regard to water use in Section Three.

### **The state's duty to respect, protect and fulfil the right to safe clean drinking water and adequate sanitation**

In international human rights law, the State's duty to protect human rights is normally characterised in terms of its duty to *respect* (not interfere with or suppress rights), *protect* (prevent third parties from abusing rights), and *fulfil* (take steps to ensure that rights-holders are in a position to enjoy rights fully).

The work of the UN Independent Expert has clarified the role of private water and sanitation service providers, and their duty to respect the human rights of all those on whom they might have an impact. Whilst a business may choose to play an active role in realising the right to water and sanitation, its responsibility is to respect the right; it has no *duty* to fulfil it. Fulfilment remains a state obligation. States cannot legitimately derogate from their human rights responsibilities, for example because they have devolved the delivery of certain services to private actors.

Consultations with international legal experts indicate that in general terms the 'corporate responsibility to respect human rights' adequately covers the delivery by private providers of 'public goods' provided that:

The concept of human rights due diligence is understood expansively;

Complicity in abuses perpetrated by others is avoided; and

The particular risks associated with working in areas of weak or poor governance are adequately addressed (including potential liabilities under international criminal law and international humanitarian law).<sup>61</sup>

### **Human rights due diligence for service providers**

The UN *Protect, Respect, Remedy* framework proposes procedures for implementation, and sections Two and Three of this report have indicated how the Guiding Principles apply to issues relating to water use.

The framework's procedures are directly relevant to private water and sanitation providers, as they are to businesses in other sectors. At the same time, the UN Independent Expert pointed out that, "compared to other business activities, the provision of water and sanitation services is characterized by special features: the services relate directly to the fulfilment of human rights". "Therefore they need to observe particular requirements in

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<sup>61</sup> *Ibid.*

exercising due diligence."<sup>62</sup> In this context, the Independent Expert listed characteristics of water provision that can raise human rights issues.<sup>63</sup> In particular, when water services are privatised, it needs to be recognised that companies should:

- Guarantee transparent and democratic decision-making.
- Address power asymmetries in bidding and negotiation processes.
- Provide essential services to groups of people who are poor and marginalised.
- Ensure their services are affordable.
- Avoid disconnection when users are unable to pay.
- Ensure the quality of services.
- Put in place a sound regulatory capacity and ensure its enforcement.
- Monitor performance and follow-up monitoring.
- Establish effective complaint mechanisms.
- Address corruption.

These concerns should be addressed by States and businesses when they negotiate the terms of privatised delivery of water services, agree contracts, and implement them. Specifically, a service provider should expect to engage with state authorities on these issues to ensure its own conduct or practices do not contribute to human rights abuses.<sup>64</sup>

The global private water industry has signalled that it supports a strong emphasis on human rights. Responding to the UN General Assembly resolution of July 2010, which recognised the right to water and sanitation, the International Federation of Private Water Operators (AquaFed) stated:

For private water operators, this global recognition is an important milestone. Our members and our Federation have been working actively with the United Nations and many other stakeholders for a decade to ensure that the Right to Water and Sanitation is recognized, that it is practical and can be implemented. This UN resolution is welcomed because it is a stepping stone that should increase the commitment of national governments to ensuring that all their population enjoy the multiple benefits of having access to adequate water and sanitation services. Access to safe clean water and sanitation is ... essential for life and necessary for health, education, dignity, gender equality, employment, social and economic development and quality of life. The UN Member States have now to work on the implementation of this human right.<sup>65</sup>

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62 UN Human Rights Council (2010), Report of the Independent Expert on the issues of human rights obligations related to access to safe drinking water and sanitation, Human Rights Council, 15th Session, 29 June 2010 (A/HRC/15/31), p. 10.

63 *Ibid.*, p. 11.

64 *Ibid.*, p. 17.

65 AquaFed, Press Release, 29 July 2010.

In some sectors, debates between business, States and civil society focus on whether human rights are relevant; by contrast, private water providers have pushed proactively for recognition of the right to water. There is a strong business case to do so, because it helps to legitimise their access to a market that remains very politicised in some countries. As the SOAS paper prepared for this report points out:

*[T]he growing international attention on corporate human rights practices together with the impact of growing water scarcity around the world means that States are more likely than ever to regulate the water practices of users and providers alike. The need to be more responsible about water management is thus crucial not only for protecting and enhancing business image but also to secure the future of their operations within an environment of developing regulation.<sup>66</sup>*

Below, the challenges that companies face when they integrate human rights into different phases of a project are considered in more details.

### **Pre-operation phase**

In terms of due diligence, much can be done before companies and the government sign contracts. More research is needed to identify specific human rights safeguards that are relevant to the negotiation process and in contracts, but analogies can be drawn from work that has reviewed host-government agreements in the oil, gas and mining sectors.<sup>67</sup> The categories outlined here draw mainly on concerns raised by the UN Independent Expert.<sup>68</sup>

#### *The state decision to allow private participation*

The Independent Expert has stated that “the decision whether to delegate service provision must take place in the context of a sound overall strategy that lays out how the State aims to achieve universal access to sanitation and water”. This immediately raises the issue of state intention. The Independent Expert has underlined that governments should not be pushed toward privatisation by “donor conditionality”. The first responsibility of donors and donor countries is not to impede States that seek to promote and respect human rights (including the right to water) from implementing policies that have this objective in mind. At the same time, some States have been unwilling to meet their human rights obligations, and many communities are obliged to make informal – often very costly

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66 SOAS Human Rights Clinic Paper, *The Human Right to Water and Responsibilities of Business: An Analysis of Legal Issues*, 2011, p. 16.

67 Work has been undertaken to develop ‘markers’ for contracts in the extractive industries, in the context of the mandate of the UN Special Representative on Business and Human Rights. See also Andrea Shenberg (2008), *Stabilization Clauses and Human Rights*, a research project conducted for the International Finance Corporation and the Special Representative to the UN Secretary General on Business and Human Rights, 11 March 2008. At: [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p\\_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf).

68 UN Human Rights Council (2010), Report of the Independent Expert on the issues of human rights obligations related to access to safe drinking water and sanitation, Human Rights Council, 15th Session, 29 June 2010 (A/HRC/15/31).

– arrangements to assure their water supply. In some circumstances, therefore, donor conditionality may have sound human rights motives.

A number of human rights are directly relevant during the pre-operational phase. They notably include the rights to information and freedom of expression. Respect for the rule of law is also an important consideration, alongside questions associated with sovereignty. While the Independent Expert's recommendations are addressed to States, for service providers the lesson is that their contracts with government should not require commitments that undermine the state's ability to meet its human rights obligations.

#### *Tendering and bidding*

Once a decision to involve private actors has been taken, the process of tendering and bidding should be transparent and accountable. In the words of the UN Independent Expert, "[t]he terms of reference and the final contract should be made available for public scrutiny and commenting ... both tender and bids must be based on accurate information, taking into account all existing relevant facts". (For example, certain companies are alleged to have deliberately underbid, in order to win contracts that they subsequently renegotiated on better terms.)<sup>69</sup>

#### *Contract negotiation*

Despite the private water industry's declared commitment to the right to water, no evidence is publicly available that shows human rights have been referenced in a public-private water contract anywhere in the world. As the Independent Expert States, the "negotiation of contracts is extremely complex, including the need to clearly define responsibilities, allocate risks, set delivery and coverage targets and establish penalties for non-compliance". Yet contracts in other business sectors have integrated human rights considerations, in the garment and textile sector, the electronics industry, private and public security forces, and increasingly, across the board, in public procurement contracts. Arguably none of these raise issues as complex as public-private contracting in essential services, however, and this is what makes current work on agreements in the extractive sector particularly valuable. Businesses are also increasingly interested to integrate human rights risk into sophisticated business-business contracting processes, such as joint ventures, and mergers and acquisitions.

It would be wrong, therefore, to treat public-private contracts in the water and sanitation industry as unique. The industry can learn much from other sectors, specialist corporate lawyers, human rights experts and government representatives with expertise in this field. The contracting process should also be subject to human rights due diligence procedures, as an integral part of the UN *Protect, Respect, Remedy* framework. Specifically, service providers "have a responsibility to analyze the proposed instrument from a human rights perspective, in order to detect any human rights-related risks and aim to avoid them",

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69 J. Luis Guasch (2004), cited by the Independent Expert on the issues of human rights obligations related to access to safe drinking water and sanitation, *ibid.*

and should “proactively engage with the State to identify and address human rights concerns, and in this manner support the efforts of the State to realize human rights”.<sup>70</sup>

#### *Assessing human rights impacts*

Both state and company should conduct an impact assessment before signing contracts. Sometimes it will be appropriate to design a bespoke human rights impact assessment; at other times it will be sufficient to integrate human rights into other forms of assessment. Much depends on context. (Refer to Section Three for a fuller discussion of this point.) However, it is critical to ensure that human rights risks and potential impacts are understood, not just from the perspectives of the business or the state, but of the most vulnerable sections of the communities concerned.

It should also be noted that several issues may not be addressed adequately by more traditional business approaches. This is a point made by the Independent Expert, who has noted that minority or transient populations may be overlooked in the contracting process, or deliberately excluded from revenue models that concentrate investment in richer districts rather than districts that are less profitable to supply.

Security of tenure is an issue for more than one billion people who live in unauthorized urban and surrounding areas.<sup>71</sup> On this matter, the state is clearly responsible for protecting this population. Its duties “might include steps to formalize the legal status of settlements, guarantees to people that they will not be forcibly evicted, the provision of financial assurances, and, in some circumstances, resettlement to an alternative area as long as human rights standards are respected”.<sup>72</sup> A company undertaking due diligence on security of tenure should ensure that it avoids complicity in actions which cause a state to fail to meet its human rights obligations with regard to slum dwellers, indigenous peoples, irregular migrants, ethnic minorities or other vulnerable groups.

### **Operational Phase**

#### *Role of the regulator*

As noted, it is a state’s responsibility to respect, protect and fulfil the right to water and sanitation, and this duty remains whether or not private providers are involved. The state has a duty to regulate the provision of essential services, including water and sanitation, whether or not these are delivered by public or private entities. The role of a regulator is to set and monitor performance standards. The Independent Expert laid out factors that state regulators should evaluate when they try to monitor public enjoyment of the right to drinking water and sanitation.<sup>73</sup>

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<sup>70</sup> *Ibid.*, p. 13.

<sup>71</sup> *Ibid.*, p. 14.

<sup>72</sup> *Ibid.*, p. 14.

<sup>73</sup> See UN Committee on Economic, Social and Cultural Rights, General Comment 15, UN Doc. E/C 12 2002/11.

Organisations that manage the provision of water and sanitation have a professional duty to make sure that their services are delivered consistently and safely and in a non-discriminatory manner.<sup>74</sup> Their due diligence procedures should monitor these objectives. The Independent Expert recommends in addition that private service providers should “make suggestions on how to ensure that services are affordable”; they “can and should offer flexible payment schemes” adapted to the poor.<sup>75</sup>

#### *Ongoing due diligence by private operators*

The corporate responsibility to respect human rights is an open-ended and permanent responsibility. Even where a private provider has agreed with government, it should periodically review its operations to ensure they have no adverse human rights impact. This is a company responsibility, not one that should require prompting by the regulator, and it should be undertaken even when regulatory monitoring is absent. Checks should confirm that the company does not discriminate, that fair procedures apply in cases of non-payment, and that disconnection does not occur that would deny individuals access to essential supplies of water.

The Independent Expert cited a number of other social policy considerations that should be included in human rights due diligence procedures. They include the need to look at adverse effects of large-scale private involvement on existing public utilities or small-scale informal providers. Such impacts do not necessarily invalidate private investment but require planning and mitigation by both the state and the private operator.

### **Accountability and review of contracts**

It has been noted that several of the UN Guiding Principles address remedies. These have important implications for public-private agreements that cover the provision of essential services. In addition to the criteria set out for all grievance mechanisms, the Principles call on States to ensure that those affected by business-related human rights abuses within their jurisdiction have access to effective remedy.<sup>76</sup> “Remedy” includes the provision of effective “domestic judicial mechanisms” and non-judicial grievance procedures. The Guiding Principles affirm that business enterprises should “establish or participate in effective, operational-level grievance mechanisms”, and that industry-wide or multi-stakeholder initiatives should take similar steps at a macro-level. Regardless of whether States set up such mechanisms, service providers are expected to do so.<sup>77</sup>

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74 Report of the Independent Expert on the issues of human rights obligations related to access to safe drinking water and sanitation, (A/HRC/15/31), pp. 16-17.

75 *Ibid.*, p. 17.

76 Guiding Principle 25 specifies that those affected should have “access to effective remedy through judicial, administrative, legislative or other appropriate means”.

77 Report of the Independent Expert on the issues of human rights obligations related to access to safe drinking water and sanitation, Human Rights Council, 15th Session, 29 June 2010 (A/HRC/15/31), p. 19.

### *Role of the private provider in dealing with grievances*

The UN Guiding Principles set out human rights expectations with regard to customer complaints and access to complaint mechanisms, and the human rights-based principles that should underpin complaint procedures. Disputes between a company and governments, or between different private providers, should take account of the same principles as well as human rights safeguards embodied in contracts.

The Guiding Principles also remind water and sanitation providers that internal mechanisms should augment but should not compete with or undermine the need for official judicial and non-judicial mechanisms. In this regard, national human rights institutions, and extra-territorial processes (such as the updated OECD Guidelines on Multinational Enterprises) have a particular role, which companies should integrate within their general accountability framework. National and international judicial processes are part of the same framework.

### *Review of contracts and termination*

It is clear that businesses should not become complicit in abuses of international criminal or humanitarian law, or other forms of severe abuse by States or other actors. Businesses also need to ensure that their business arrangements do not contribute to other kinds of human rights abuse. The human rights environment in a country may deteriorate, and when it does the risks that companies will become complicit in abuse increase, notably when they have little or no leverage or influence. Where a business cannot control such risks, or cannot apply human rights due diligence procedures adequately, it may eventually have to terminate its business arrangements in the country concerned.



## 5. Conclusions

This report has summarised recent developments regarding the right to water and sanitation, and more generally business and human rights, and explored their implications for companies.

Following the approval of resolutions by the UN General Assembly and Human Rights Council in 2010, the right to water and sanitation is now an internationally recognised human right, though it is not yet legally binding on all States.

The United Nations *Protect, Respect, Remedy* framework, and its Guiding Principles, provide authoritative guidance on what the ‘responsibility to respect’ means for companies. The Guiding Principles substantively advance international efforts to assist companies to understand their human rights impacts and ensure human rights are respected throughout their operations, including those related to water use.

Integration of lessons from a rights-based approach to development into corporate policies and practices enables companies to foster more sustainable development and address human rights abuses, including violations of economic, social and cultural rights. The UN Independent Expert on safe drinking water and sanitation has suggested a number of additional steps that States should take, to translate international human rights law into domestic legislation, clarify the content of the right to water and sanitation, and explain its implications for the private sector.

Specifically with regard to water and sanitation, all companies should:

- Consider seriously the advantages of adopting a rights-based approach, and develop well-defined policies that integrate the right to water and sanitation.
- Develop strong due diligence procedures on the right to water and sanitation when they operate in conflict-affected areas or contexts in which the state is unable or unwilling to protect human rights. Take appropriate actions to implement the recommendations of the UN Independent Expert, notably if they are directly responsible for providing water and sanitation services.
- Develop operational guidance on human rights and water in the context of the CEO Water Mandate, since companies that participate in the Mandate will need to report publicly on their human rights performance wherever their activities have a significant impact on water use.
- Push proactively for higher standards on water and sanitation.

Specifically with regard to the provision of water and sanitation services, companies and state regulators should:

- Review existing water and sanitation contracts to ensure that they include sound human rights safeguards, and align their activities and those of the industry with their public commitments and with the UN *Protect, Respect, Remedy* framework on Business and Human Rights.

- Explore the merits of developing a new international multi-stakeholder initiative on water and sanitation that would establish human rights norms for the sector, including the need to deal with grievances. Such an initiative should explore norms beyond minimum compliance with national law, and would address dilemmas and challenges, that occur for example when States are weak, where the regulatory framework is not in line with human rights standards, or when the private sector is involved in strengthening the capacity of States to fulfil rights.

In conclusion, the report notes some specific implications for three business initiatives relevant to water use and delivery that have already voluntarily embraced human rights.

### **Implications for signatories of the UN Global Compact**

Although the corporate responsibility to respect human rights applies to all business enterprises everywhere, all Global Compact participating companies should take particular note of recent developments that have occurred with respect to the right to water and sanitation. Although States will not immediately embody this right in domestic law, since members of the UN Global Compact have voluntarily pledged to respect *all* internationally recognised human rights, those companies should now be aware of and be prepared to ensure respect for the right to water and sanitation whether or not States implement it. For businesses, this pledge has implications that are separate and additional to obligations they may need to meet as a result of state regulation.

In 2010, the Institute for Human Rights and Business recommended that the Global Compact<sup>78</sup> should:

- Tighten reporting standards for all member companies, particularly with regard to principles 1 and 2 (on human rights), which now should be understood as including the right to water and sanitation, and
- Align fully with the UN *Protect, Respect, Remedy* framework, in particular its provisions relating to human rights due diligence. Doing so would streamline and clarify the human rights expectations for participating companies and serve as a model for the many companies that have not pledged to uphold the UN Global Compact principles.

### **Implications for endorsers of the CEO Water Mandate**

Launched in July 2007, the CEO Water Mandate is a “unique public-private initiative designed to assist companies in the development, implementation and disclosure of water sustainability policies and practices”.<sup>79</sup> It is co-ordinated jointly by the UN Global Compact and the Pacific Institute.

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78 Institute for Human Rights and Business (2010), *The UN Global Compact and Human Rights: Developing a Vision for 2020*, October 2010, p. 4.

79 At: [http://www.unglobalcompact.org/Issues/Environment/CEO\\_Water\\_Mandate/](http://www.unglobalcompact.org/Issues/Environment/CEO_Water_Mandate/).

In November 2010, the CEO Water Mandate published *The Human Right to Water: Emerging Corporate Practice and Stakeholder Expectations*.<sup>80</sup> This white paper outlined recent developments with regard to water and business responsibility; discussed challenges facing business; touched on emerging practice with regard to the human right to water; and presented options before the CEO Water Mandate in the coming period.

Based primarily on 2010 survey data, the paper noted that companies were unclear about a range of issues: how to operationalise respect for the right to water; the extent, and minimum extent of a company's responsibility; the meaning of the "do no harm" principle; and whether that principle provides a company with sufficient guidance to meet its human rights responsibilities. It also reported that the understanding of corporate members of the CEO Water Mandate differed from that of external stakeholders. The paper discussed only briefly the implications of the UN Independent Expert's work; but it contains a useful exploration of three areas of uncertainty: framing corporate policy on the right to water; acting practically to respect the right to water; and putting in place corporate ambitions that exceed a company's minimum responsibilities (that would be aimed at the fulfilment of rights, for example).

Importantly, the paper emphasised that companies are not yet in agreement about whether fulfilling (distinct from respecting or protecting) rights is part of, or outside a company's responsibility. It should again be noted here that the UN business and human rights framework does not affirm that businesses have a duty to fulfil rights. However, the CEO Water Mandate paper touches only briefly on this point, and from the perspective of other stakeholders does not add much that is new. Nor does it analyse adequately the role of rights-based approaches or their value in policies on water and sanitation and the right to water. The paper ends by proposing a number of future actions that the CEO Water Mandate might take, without saying which ones would most usefully address the uncertainties it outlines.

The *Guide to Responsible Business Engagement with Water Policy*, a second recent publication by the CEO Water Mandate, focuses specifically on the role of business in advocating for sustainable water management.<sup>81</sup> Written for medium and large private water users (as opposed to private providers of water services), the guide provides a rationale for business involvement, illustrates how companies can contribute positively to public policy, and underscores the benefits to business of a strong regulatory framework. It puts forward some underlying principles for responsible water policy (for example, respect for both public and private roles, inclusion, accountability, and transparency) and sets out steps that companies can take to implement them (for example, evaluate context and assess stakeholders). It includes a thoughtful discussion of the risks that arise when water policy is weak or when companies choose to engage directly with communities.

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80 At: [www.unglobalcompact.org/.../ceo\\_water\\_mandate/Water\\_Mandate\\_Human\\_Rights\\_White\\_Paper.pdf](http://www.unglobalcompact.org/.../ceo_water_mandate/Water_Mandate_Human_Rights_White_Paper.pdf).

81 At: [www.unglobalcompact.org/.../ceo\\_water\\_mandate/Guide\\_Responsible\\_Business\\_Engagement\\_Water\\_Policy.pdf](http://www.unglobalcompact.org/.../ceo_water_mandate/Guide_Responsible_Business_Engagement_Water_Policy.pdf).

Examples of the negative impacts of corporations on water use and management are found mostly in the appendices. The main exception is policy capture, or undue corporate influence on policymaking, about which there is a useful discussion.<sup>82</sup> In the future, the CEO Water Mandate will need to grapple more with the human rights aspects of water and sanitation, since some of its members are both water users and providers. A deeper examination of the potential and actual negative impacts of corporations as water users will be needed. Initiatives such as the CEO Water Mandate will also benefit from further discussion both of the human right to water and its implementation, and of the UN *Protect, Respect, Remedy* framework.

### **Implications for members of AquaFed**

The International Federation of Private Water Operators has over 300 members.<sup>83</sup> It has actively lobbied in support of the right to water and the role of businesses in its realisation. AquaFed has consistently called for greater private sector investment in the provision of water services.

As has been noted in this context, international human rights law takes no position for or against private management of water, but is emphatic concerning accountability, to the state and to the people the state represents. Whether water services are managed publicly or privately, regulation needs to be effective and human rights due diligence should be at the core of contractual requirements between the state and providers. States and private companies both need to be proactive in ensuring that marginalised and poor communities have access to safe clean drinking water and adequate sanitation.

The Institute for Human Rights and Business recommends that AquaFed should issue public guidance to its members about how best to undertake human rights impact assessments, possibly by providing a template that gives appropriate attention to transparency, community participation and accountability. The areas of concern and safeguards suggested by the UN Independent Expert on Water, Sanitation and Human Rights should be central to this.

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82 An appendix to the Guide describes types of policy capture.

83 At: [www.aquafed.org](http://www.aquafed.org).

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Meeting the world's water and sanitation needs is an urgent challenge. In this context, the role of the private sector as a responsible water user and provider has become an issue of increasing prominence in recent years. Most businesses do not yet fully consider the social aspects of water, and the great majority do not explicitly assess the human rights impacts of their policies and operations in this area. This report seeks to provide greater clarity on the relationships between business, human rights and water and addresses some of the key questions that arise when they are considered together. Given the international political consensus that has developed around water as a human right as well as the recently adopted UN Guiding Principles on Business and Human Rights, the report anticipates that corporate leaders will increasingly be called on to be transparent and accountable for their water impacts in human rights terms.

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