

# The Human Right to Water and Sanitation: Going Beyond Corporate Social Responsibility

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## Keywords

International law, human rights law, human rights violations, private corporations, international corporate human rights responsibility

## Abstract

Traditionally, it has been understood that private corporations cannot be held responsible for human rights violations at the international level. Only States, main subjects of public international law, can be held legally responsible for human rights violations. Today, this classical argument is being increasingly challenged by the force of reality. States remain the entity that is principally responsible for human rights violations, but there is no epistemological reason for denying such responsibility in the case of private corporations at the international level. The increasing number of standards and mechanisms at the regional and international level addressed to enterprises, that enshrine environmental and human rights standards contribute to build this argument. There is a tangible trend that goes beyond corporate social responsibility towards the initial steps of the emergence of international corporate human rights responsibility.

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## I. Introduction<sup>2</sup>

In the last few decades, public international law has recognised non-State actors ('NSAs') in many fields as participants and to a certain extent as subjects.<sup>3</sup> Indeed, NSAs, particularly private corporations, have been recognised as relevant actors in international human rights law<sup>4</sup> but also in international economic law<sup>5</sup> and international environmental law. In this line, I differ from Cameron who asserted that '[e]xcept in the area of human rights law, public international law does not recognise non-state actors'.<sup>6</sup> In public international law, active legal capacity of private corporations is still easier to identify as the passive.<sup>7</sup> In our view, private corporations should potentially enjoy passive and active legal capacity under international law, ie they might be held responsible for violations of a rule and/or they might be able to bring an international claim.<sup>8</sup> The UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights<sup>9</sup> and the subsequent creation and appointment of the Special Representative of the United Nations' Secretary-General on Business and Human Rights reflect the current tendency and the interest of the international community towards corporate human rights responsibility.<sup>10</sup>

Private corporations, transnational companies and other businesses are one of the main stakeholders of the globalised world. However, these actors might also be a source of major concern regarding environmental and human rights violations and abuses, including water and sanitation rights.<sup>11</sup> Globalisation and economic liberalisation have led to a privatization of public services such as water supply and sanitation services. In the modern world, States have been privatising many of their traditional functions, as well as the distribution of essential services for livelihood such as water. This often comes at the expense of vulnerable groups, including people living in poverty, women, children and indigenous communities.<sup>12</sup> Large multinational corporations such as *Suez Environnement* or *Biwater* along with hundreds of medium-sized and small

1 C Darwin, *The Voyage of the Beagle* (PF Collier & Son Corp 1909) 526.

2 This article is part of a postdoctoral research about the Human Right to Water and Private Corporations. See also from the same author, 'The Human Right to Water and Sanitation: From Political Commitments to Customary Rule?' (2012) 3 Pace Int'l L Rev Online Companion 136.

3 Shaw made the proposal that international personality is participation plus some form of community acceptance. MN Shaw, *International Law* (6<sup>th</sup> edn, Cambridge University Press 2008) 197.

4 A Voiculescu, 'Human Rights and the New Corporate Accountability: Learning from Recent Developments in Corporate Criminal Liability' (2009) 87 J Bus Ethics 419. 'Particular branches of international law here are playing a crucial role. Human rights law, the law relating to armed conflicts and international economic law are especially important in generating and reflecting increased participation and personality in international law'. Shaw (n 3) 197; TO Elias, 'Modern Sources of International Law' in W Friedmann, L Henkin and O Lissitzyn (eds), *Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup* (Columbia University Press, 1972) 30.

5 'It has long been recognized that [international economic activity] is a field where international rules apply to nationals as well as to nations'. MW Janis, *An Introduction to International Law* (5th ed, Wolters Kluwer 2008) 295.

6 J Cameron, 'Future Directions in International Environmental Law: Precaution, Integration and Non-State Actors' (1996) 19 Dalhousie L J 122, 133.

7 M Delmas-Marty, 'Désordre mondial et droits de l'homme' in *Libertés, Justice, Tolérance: Mélanges en hommage au Doyen Gérard Cohen-Jonathan* (Bruylant, 2004) vol 1, 635-651, 649. In the case of bilateral investment treaties States often agreed to allow multinationals to have direct rights and possibilities to claims at the international level, for instance, through the International Centre for Settlement of Investment Dispute (ICSID).

8 However, active legal capacity is easier to identify in the current legal international sphere as the passive. See *ibid* 649.

9 See UNCHR (Sub-Commission), 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2, para 23.

10 UNCHR 'Responsibilities of transnational corporations and related business enterprises with regard to human rights' (22 April 2004) E/CN.4/DEC/2004/116; see UNCHR 'Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights' (15 February 2005) UN Doc E/CN.4/2005/91; see UNCHR Res 69 (2005) UN Doc E/CN.4/RES/2005/69, para 2. (adopted by a recorded vote of 49 votes to 3, with 1 abstention); see UNCHR 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises' (22 February 2006) UN Doc E/CN.4/2006/97; see UNHRC, 'Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises' (9 February 2007) UN Doc A/HRC/4/035; see UNHRC, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (2008) UN Doc A/HRC/8/57; see UNHRC, 'Towards operationalizing the "protect, respect and remedy" framework' (22 April 2009) UN Doc A/HRC/11/13; see UNHRC, 'Further steps toward the operationalization of the "protect, respect and remedy" framework' (9 April 2010) UN Doc A/HRC/14/27. In 2011, the Special Representative submitted the Guiding Principles on Business and Human Rights. See UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31.

11 A holistic and comprehensive concept of the human right to drinking water and sanitation is: 'all persons have the right to sufficient supplies of water to meet their essential needs and to have access to acceptable sanitation facilities that take account of the requirements of hygiene, human dignity, public health and environmental protection.' UNCHR 'Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation, Report of the Special Rapporteur El Hadji Guissé' (11 July 2005) UN Doc E/CN.4/Sub.2/2005/25.

12 See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht 26 January 1997) para 2; 'Globalization policies have accelerated the trends towards privatization of essential services for livelihood such as water, often at the expense of the poor and women.' UNCHR 'Statement of Mr. Miloon Kothari Special Rapporteur on adequate housing of the United Nations Commission on Human Rights' (30 August 2002) <<http://www.unhcr.ch/Hurricane/Hurricane.nsf/60a520ce334aa77802566100031b4bf9025f723f7eb70ec1256f5b003ae963?OpenDocument>> accessed 30 September 2010.

corporations have replaced the State in the provision of water. By doing so, water has been propelled into the logic of the market and often considered a pure economic good.

There are two main sectors –water and sanitation services and the extractive industries (oil, gas and mining)- which are increasingly related to the effective enjoyment of the human right to water and sanitation.<sup>13</sup> On the one hand, private corporations participate in water and sanitation services provision.<sup>14</sup> There is a growing interest in the global water and sanitation market that represents several billions of dollars.<sup>15</sup> The participation of private corporations in water and sanitation supply may imply a rise in the price of water or a discriminatory distribution of water provision that could mean a human rights abuse.<sup>16</sup> On the other hand, the activities of extractive industries have a great influence on water depletion and therefore water availability.<sup>17</sup> The Ecuadorian Tribunal's judgment against Texaco-Chevron for, *inter alia*, oil pollution of freshwater in the Amazon (2011) and the Hungary toxic sludge spill from the Ajkai alumina plant severely polluting Marcal river and putting in danger the Danube river (2010) illustrate this harsh reality.<sup>18</sup> As it can be observed worldwide, the extractive activities can be involved in human rights abuses and/or violations.<sup>19</sup> To sum up, the right to have access to adequate and safe water and sanitation that is conducive to the protection of public health and the environment can be jeopardised by both private water and sanitation suppliers and the extractive industry.<sup>20</sup> In this context, it is noteworthy that water is increasingly accepted as a human right by the international community, both at domestic and international levels.<sup>21</sup>

- 13 'The debate concerning the responsibilities of business in relation to human rights became prominent in the 1990s, as oil, gas, and mining companies expanded into increasingly difficult areas, and as the practice of offshore production in clothing and footwear drew attention to poor working conditions in global supply chains.' 'The UN "Protect, Respect and Remedy" Framework for Business and Human Rights: Background' (*Business & Human Rights Resource Centre*, September 2010) <<http://198.170.85.29/Ruggie-protect-respect-remedy-framework.pdf>> accessed 22 September 2012; S Larráin and P Poo (eds), *Conflictos por el Agua en Chile: Entre los Derechos Humanos y las Reglas del Mercado* (1<sup>st</sup> edn, Programa Chile Sustentable 2010); D Kemp and others, 'Mining, Water, and Human Rights: Making the Connection' (2010) 18 J Clean Prod 1553. 'Community relations approaches can help shape extractive companies' actions so that they are more socially, culturally, and environmentally responsive to the communities they impact.' R Davis and DM Franks, 'The costs of conflict with local communities in the extractive industry' (First International Seminar on Social Responsibility in Mining, Santiago, Chile, 19–21 October 2011) 9 <[http://shiftproject.org/sites/default/files/Davis%20&%20Franks\\_Costs%20of%20Conflict\\_SRM.pdf](http://shiftproject.org/sites/default/files/Davis%20&%20Franks_Costs%20of%20Conflict_SRM.pdf)> accessed 21 September 2012.
- 14 T Kiefer and C Brölmann, 'Beyond State Sovereignty: The Human Right to Water' (2005) 5 NSAIL 183.
- 15 SB White and others, 'Water Markets of the United States and the World: A Strategic Analysis for the Milwaukee Water Council, Milwaukee, Wisconsin' (1 November 2010) <<http://www.thewatercouncil.com/wp-content/uploads/2012/04/EDA-Report.pdf>> accessed 21 September 2012.
- 16 See UNHRC, 'Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation Catarina de Albuquerque' (2010) UN Doc A/HRC/15/31, para 56; UNHRC, 'Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation Catarina de Albuquerque: Addendum: Progress report on the compilation of good practices' (2010) UN Doc A/HRC/15/31/Add.1; Cfr. UNHRC, 'Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation Catarina de Albuquerque' (1 July 2009) UN Doc A/HRC/12/24.
- 17 '[...] the 65 cases of alleged corporate human rights abuse surveyed in the first report of the SRSG on business and human rights, 38 had related to the extractives sector.' UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Addendum: Summary of five multi-stakeholder consultations' (23 April 2008) UN Doc A/HRC/8/5/Add.1, para 161.
- 18 'Chevron fined for Amazon pollution by Ecuador court' (*BBC News*, 15 February 2011) <<http://www.bbc.co.uk/news/world-latin-america-12460333>> accessed 7 March 2011; Mark Tran, 'Hungary toxic sludge spill an "ecological catastrophe" says government' *The Guardian* (5 October 2010) <<http://www.guardian.co.uk/world/2010/oct/05/hungary-toxic-sludge-spill>> accessed 7 March 2011.
- 19 UNCHR 'Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 February 2006) UN Doc E/CN.4/2006/97, paras 25, 29.
- 20 UNCHR 'Draft Guidelines' (n 11) guideline 1.2; see UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Addendum: State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions' (15 May 2009) UN Doc A/HRC/11/13/Add.1, para 35; see UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Addendum: Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse' (23 May 2008) UN Doc A/HRC/8/5/Add.2, para 99; see UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Addendum: Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms' (28 February 2007) UN Doc A/HRC/4/35/Add.3, para 73.
- 21 At the international level, the international community has widely accepted the right to water and sanitation as a fundamental human right through the General Assembly Resolution 64/292, on 28 July 2010. See UNGA Res 64/292 (28 July 2010) UN Doc A/RES/64/292. The resolution was adopted by a recorded vote of 122 in favour, none against, with 41 abstentions, as follows: Abstain: Armenia, Australia, Austria, Bosnia and Herzegovina, Botswana, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Ethiopia, Greece, Guyana, Iceland, Ireland, Israel, Japan, Kazakhstan, Kenya, Latvia, Lesotho, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, Poland, Republic of Korea, Republic of Moldova, Romania, Slovakia, Sweden, Trinidad and Tobago, Turkey, Ukraine, United Kingdom, United Republic of Tanzania, United States, Zambia; Absent: Albania, Belize, Cameroon, Chad, Fiji, Gambia, Guinea, Guinea-Bissau, Kiribati, Malawi, Marshall Islands, Mauritania, Micronesia (Federated States of), Mozambique, Namibia, Nauru, Palau, Papua New Guinea, Philippines, Rwanda, Saint Kitts and Nevis, Sao Tome and Principe, Sierra Leone, Suriname, Swaziland, Tonga, Turkmenistan, Uganda, Uzbekistan. See also UNGA "Draft resolution: The human right to water and sanitation" (26 July 2010) Res A/64/L.63/Rev.1; see UNGA 'General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation' (28 July 2010) Press Release GA/10967 <<http://www.un.org/News/Press/docs/2010/ga10967.doc.htm>> accessed 1 May 2011. Following General Assembly Resolution 64/292, the UN Independent Expert on human rights obligations related to access to safe drinking water and sanitation Catarina de Albuquerque affirmed that '[t]he right to water and sanitation is a human right, equal to all other human rights, which implies that it is justiciable and enforceable. Hence from today onwards we have an even greater responsibility to concentrate all our efforts in the implementation and full realisation of this essential right.' L O'Hanlon 'UN united to make the right to water and sanitation legally binding' (*OHCHR*, 1 October 2010) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10403&LangID=E>> accessed 1 June 2011. Regarding the UN Resolution 64/292, 28 July 2010, Maude Barlow

The present article seeks to analyse from a theoretical perspective the legal possibility of international corporate responsibility for right to water and sanitation abuses and/or violations. Under public international law, is it legally possible to hold private enterprises responsible for water and sanitation rights abuses and/or violations? To what extent do international and regional human rights instruments create legal obligations that enterprises and companies must respect? The possible legal basis, including the so-called soft law, of the emergence of an corporate human rights responsibility will be discussed here. In this article, the right to water is used as a specific human right in order to try to develop a legal analysis on corporate responsibility at the international level. Corporate human rights responsibility might be considered a responsibility derived from a breach of a direct human rights obligation.

Throughout this article, the concepts of private corporations, enterprises, companies and businesses are considered exchangeable. I intend not to make a strict separation between multinational and national enterprises. In this article, any reference to multinational enterprises should *mutatis mutandis* be understood as made in respect to national enterprises. Further, I am aware of the differences in common law between the concept of responsibility and liability, though they are interrelated. Both terms are also meaningful in public international law, as the International Law Commission reserved the first concept for international wrongful acts and the second concept for injurious consequences arising out of acts not prohibited by international law.<sup>22</sup> However, we will use in this study only the term responsibility concerning human rights violations since this is the term used by the International Law Commission in its Project of Articles on State responsibility for international wrongful acts (2001).<sup>23</sup> Moreover, I do not focus on companies' and businesses' responsibility for human rights violations and/or abuses at the national level, which corresponds to the doctrine of horizontal application of human rights.<sup>24</sup> I rather focus on international responsibility for human rights violations and/or abuses of private companies according to public international law. There can be either direct or indirect international corporate human rights responsibility. Direct international corporate responsibility would mean responsibility which would stem directly from international norms or standards belonging to both hard and soft law. These norms and standards would address to corporations directly by trying to regulate at international level corporate conduct concerning human and environmental rights. Instead, indirect international corporate responsibility could be considered those infringements coming from corporations but the international standards make States directly responsible for the infringements.<sup>25</sup> In this situation, States must control corporations' conduct, demanding that they respect international human and environmental rights.<sup>26</sup> Then corporations would be indirectly

said '[t]his is a historic day. I think every now and then, the human species advances somewhat in our evolution, and today was one of those advances.' D Moss, 'At Last, a Human Right to Water' (*Yes! Magazine*, 30 July 2010) <<http://www.yesmagazine.org/planet/at-last-a-human-right-to-water>> accessed 1 May 2010. The General Assembly Resolution 64/292 was endorsed by the Human Rights Council which affirmed that 'the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.' See UNHRC, 'Human rights and access to safe drinking water and Sanitation' (6 October 2010) UN Doc A/HRC/RES/15/9; see UNHRC, 'The human right to safe drinking water water and Sanitation' (8 April 2011) UN Doc A/HRC/RES/16/2, para 1; see UN Committee on Economic, Social and Cultural Rights (UNCESCR), 'Statement on the Right to Sanitation' (19 November 2010) UN Doc E/C.12/2010/1; see UNCESCR, 'Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights' (20 May 2011) UN Doc E/C.12/2011/1. Moreover, at the domestic level, the right to water and sanitation is, directly or indirectly, increasingly recognised. See, for instance, the recent reforms introduced to the Constitution of Mexico (Reformed 2011) art 4; of Kenya (27 August 2010) art 43.1 (b), (d); of Uruguay (reformed 2004), art 47; and Dominican Republic (26 January 2010) arts 15, 61.1; see *Gaceta Parlamentaria*, año XIV, número 3249-III (27 April 2011) <<http://gaceta.diputados.gob.mx/Gaceta/61/2011/abr/20110427-III.html#DecDictamenes>> accessed 1 June 2011; see 'Elevan a rango constitucional el derecho humano al agua en México' (*Notimex*, 28 April 2011) <<http://www.freshwateraction.net/es/content/elevan-rango-constitucional-el-derecho-humano-al-agua-en-m%C3%A9xico>> accessed 1 June 2011; COHRE, AAAS, SDC and UN-HABITAT, 'Manual on the Right to Water and Sanitation' (2007).

22 See UNGA Res 52/156 (15 December 1997) UN Doc A/Res/52/156; see ILC, 'Prevention of Transboundary Harm from Hazardous Activities' (2001) <[http://untreaty.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_7\\_2001](http://untreaty.un.org/ilc/texts/instruments/english/draft_articles/9_7_2001)>; see UNGA Res 56/82 (12 December 2001) UN Doc A/Res/56/82; see UNGA Res 62/68 (6 December 2007) UN Doc A/Res/62/68.

23 See UNGA Res 56/83 (28 January 2002) UN Doc A/Res/56/83, corrected by document A/56/49 (Vol. I)/Corr.4 (Responsibility of States for Internationally Wrongful Acts).

24 A Nolan, 'Addressing Economic and Social Rights Violations by Non-state Actors through the Role of the State: A comparison of Regional Approaches to the 'Obligation to Protect'' (2009) 9 HRL Rev 225, 226.

25 J von Bernstorff, 'Die völkerrechtliche Verantwortung für menschenrechtswidriges Handeln transnationaler Unternehmen: Unternehmensbezogene menschenrechtliche Schutzpflichten in der völkerrechtlichen Spruchpraxis' (May 2010) <[http://www.humanrights-business.org/files/voelkerrechtliche\\_verantwortung\\_fuer\\_menschenrechtswidriges\\_handeln\\_transnationaler\\_unternehmen.pdf](http://www.humanrights-business.org/files/voelkerrechtliche_verantwortung_fuer_menschenrechtswidriges_handeln_transnationaler_unternehmen.pdf)> accessed 22 September 2012.

26 '41. In determining which actions or omissions amount to a violation of the right to water, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations in relation to the right to water. [...]; 42. Violations of the right to water can occur through acts of commission, the direct actions of States parties or other entities insufficiently regulated by States. [...]; 43. Violations through acts of omission include the failure to take appropriate steps towards the full realization of everyone's right to water, the failure to have a national policy on water, and the failure to enforce relevant laws.' UNCESCR, 'General Comment N°15 (2002); The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (20 January 2003) UN Doc E/C.12/2002/11, paras 41, 42, 43. 'Only governments could decide whether water services were to be operated by third parties, but states must regulate the private sector to ensure the right to water for the entire population.' E Riedel, 'The Human Right to Water' in K Dicke and others (eds), *Weltinnenrecht: Liber Amicorum Jost Delbrück* (Duncker & Humblot 2005) 585, 600. 'The Committee reiterates the obligation of States Parties to ensure that all economic, social and cultural rights laid down in the Covenant are fully respected and rights holders adequately protected in the context of corporate activities.' UNCESCR, 'Statement on the Obligations of States parties regarding the Corporate Sector and Economic, Social and Cultural Rights' (12 July 2011) UN Doc

responsible before the State for human and environmental rights violations; for instance, the right to access to safe water. As clarified in 2002 by the Committee on Economic, Social and Cultural Rights the obligation to protect the right to water and sanitation requires ‘State parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.’<sup>27</sup> In this hypothesis, it is the corporate activities that have undermined human rights and the State does not take any effective measures according to the due diligence principle to prevent corporations from causing injury to human rights. This international responsibility is indirect because it would reach the corporation by ‘ricochet’. This work only discusses direct international corporate human rights responsibility.

As international law has been developing, international corporate responsibility has increasingly come up as a crucial matter in human rights and environmental protection. Several international attempts to outline a direct regime of corporate human rights responsibility may be observed. Before analysing this emerging issue, I will briefly refer to the debate on what a private corporations might do concerning environmental and human rights: violate or abuse? (Part II) This debate should be understood within the broader context of the well-known and often criticised concept of corporate social responsibility (Part III). As far as human rights and environmental issues are concerned, the concept of corporate social responsibility seems to be deficient and useless to solve current tensions and abuses. Therefore, I will analyse the different initiatives regarding, in one way or another, direct international corporate human rights responsibility (Part IV).

## II. Human Rights Violations or Human Rights Abuses?

International law scholars use the expression ‘human rights abuses’ to refer to those human rights interferences coming from corporations and other private actors. The possible explanation can be that international law traditionally admits States as subjects of law and then international law can only create legally binding obligations for States entities. It is commonly acknowledged that international law regulates legal relationships between States. More importantly, human rights treaties create legal obligations only for States, not for private corporations. Therefore, these corporations cannot violate human rights norms because they do not have international human rights obligations. Consequently, the expression ‘human rights violations’ is usually reserved for States and the expression ‘human rights abuses’ for NSAs. However, the increasingly effective participation in the international arena of corporations has propelled the discussion about this matter. Hence, in its 2011 Statement on the Obligations of States parties regarding the Corporate Sector and Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights ‘observed that corporate activities can adversely affect the enjoyment of Covenant rights.’<sup>28</sup>

### A. Doctrinal Debate and Practical Challenges

From the perspective of public international law, including international human rights law, it is questionable whether private corporations can legally violate human rights. Why are some authors and civil society organisations using the concept of human rights abuses instead of human rights violations, as far as private companies are concerned? What are the legal differences between human rights violations and human rights abuses? Does the distinction only refer to semantic differences? The increasing recognition of the involvement of private corporations in human rights abuses and/or violations, including recent events involving violations of the right to water and sanitation, raises the question as to whether private corporations can be held responsible under international law for violations of the human right to water.<sup>29</sup> Liberti affirmed that according to the classic doctrine there is no place in international law to reflect on corporate responsibility.<sup>30</sup> In the light of recent

E/C.12/2011/1, para 1.

27 UNCESCR, ‘General Comment N°15’ (n 26) para 23.

28 UNCESCR, ‘Statement’ (n 26) para 1.

29 According to Ruggie, there can be ‘direct’ and ‘indirect’ companies involvement in human rights abuses. ‘[D]irect involvement was considered to occur when the company caused the abuse through its own acts or omissions. “Indirect” involvement was considered to occur where firms were alleged to contribute to or benefit from the abuse of third parties, such as suppliers, individuals, arms of a State and other businesses’. UNHRC, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Addendum: Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse’ (23 May 2008) UN Doc A/HRC/8/5/Add.2, paras 35, 36; see UNHRC, ‘Clarifying the Concepts of “Sphere of influence” and “Complicity”’; Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises John Ruggie’ (15 May 2008) UN Doc A/HRC/8/16, 21.

30 See L Liberti, ‘La responsabilité des entreprises en droit international: chimère ou réalité’ (2005) 7 International Law Forum du Droit International 235, 235.

evolutions, this idea is insufficient and new alternatives should be analysed.<sup>31</sup>

Traditionally, the theory of international human rights considers States as the unique duty-bearers in such a way that only States can violate human rights. At the national level, this restriction has been partially solved with the theory of horizontal effect (the German '*unmittelbare drittwirkung*' doctrine). Yet, at the international level, this crucial question remains. Can private corporations commit human rights abuses and/or violations under international law? Could there be an international responsibility derived from these abuses? What are the theoretical and practical differences between human rights abuses and human rights violations? Any answer to these questions goes hand-in-hand with the issue of international legal subjectivity of private corporations.

From a practical perspective, this issue is pertinent because in the field of water and sanitation services provisions, there has been an increasing participation of transnational private corporations in every region of the world. Moreover, there are a number of situations where private corporations' activities have led to human rights abuses, specifically in the context of water and sanitation services supply. There are also a number of cases of water pollution as a consequence of the extractive activities (oil, gas and mining) that affect also the full fulfilment of the right to water and sanitation. In this context, are there only international obligations and consequently responsibilities upon States or might there be international obligations and responsibilities for private corporations concerning water and sanitation? The question arises because of the increasing participation of private corporations, both at national and global levels, in water and sanitation services provisions.

Generally speaking, as any other legal order, public international law should provide a solution to new international legal problems, including those linked to globalisation. The main traditional legal argument in international human rights law is that only States can violate human rights, since only States are obliged by international and regional human rights instruments.<sup>32</sup> Indeed, article 2 of the International Covenant on Civil and Political Rights encompasses, for instance, the following general obligations: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals [...] the rights recognized in the present Covenant [...]'.<sup>33</sup> In the same line, article 2 of the International Covenant on Economic, Social and Cultural Rights sets down also States obligations: 'Each State Party to the present Covenant undertakes to take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.<sup>34</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, in Europe, and the American Convention on Human Rights embody the same provision for State obligations.<sup>35</sup> In this context, Sudre mentioned that human rights instruments create for States obligations which singularity resides in the fact that their observance is not dependant on the reciprocity principle, as is the case in general international law.<sup>36</sup>

However, it is also acknowledged that, in practice, private corporations and businesses can cause harm to human life, integrity, freedom, health and the environment.<sup>37</sup> Nevertheless, *de iure*, many authors argue that they are not proper violations, but rather they are at most human rights abuses. In my view, as further develops below, there are legal, ethical, logical and practical arguments aimed at suggesting that not only States can violate human rights.

There are legally binding international human rights instruments that refer to violations and/or abuses committed directly by individuals or private enterprises, such as the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>38</sup> the Convention on the Elimination of All Forms of Discrimination against Women<sup>39</sup> or the Convention

31 'If international law can protect the rights and interests of multinationals, it is reasonable to examine how it might also place duties on them.' International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (International Council on Human Rights Policy, 2002) 13.

32 See UNCHR 'Draft Guidelines' (n 11) guideline 7.3.

33 See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2.

34 In the same line, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 2.

35 See American Convention on Human Rights 'Pact of San José, Costa Rica' (adopted 22 November 1969, entered into force 18 July 1978) art 1.

36 F Sudre, *Droit international et européen des droits de l'homme* (5<sup>e</sup> éd'n, Presses Universitaires de France 2001) 75.

37 Comisión Ecuatoria de Derechos Humanos (CEDHU) and International Federation for Human Rights (FIDH), 'Large-Scale Mining in Ecuador and Human Rights Abuses: The Case of Corriente Recursos Inc.' (2010) <[http://www2.ohchr.org/english/bodies/cescr/docs/ngos/FIDH\\_Ecuador\\_CESCR49\\_en.pdf](http://www2.ohchr.org/english/bodies/cescr/docs/ngos/FIDH_Ecuador_CESCR49_en.pdf)> accessed 21 September 2012; FIDH, 'Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms' (2010) <<http://www.fidh.org/Updated-version-Corporate>> accessed 22 September 2012.

38 'Article 2: (d) Each State Party shall prohibit and bring to an end [...] racial discrimination by any persons, group or organization.' International Convention on the Elimination of All Forms of Racial Discrimination (adopted a 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

39 'Article 2: (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.' Convention on the

on the Rights of the Child.<sup>40</sup> There are also no binding international human rights instruments that confirm the possibility of human rights violations in the private sphere.<sup>41</sup> For instance, according to General Comment N° 15 on the right to water, 'steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.'<sup>42</sup> However, both types of human rights instruments do not impose direct human rights obligations upon NSAs. They only reflect the theory of indirect human rights obligations upon NSAs.

Concerning the ethical argument, in their daily life, individuals, communities and peoples are indeed exposed to human rights abuses coming from private entities and corporations. In these cases, the international legal system should provide a response to individuals' needs for protection, especially of those most vulnerable. Corporations cannot look for international legal immunity as they cause human suffering and impair individuals and communities' human rights. To seek protection in an incomplete and deficient international legal theory in order to be released from international responsibility in the case of human rights abuses is not an ethical behaviour.

In a logical perspective, there is no theoretical reason for private corporations who interfere with the enjoyment of human rights to stay outside of the international rule of law and thus to fail the principle of primacy of law.<sup>43</sup> The aforementioned arguments certainly apply to the human right to safe and clean drinking water and sanitation. If corporations can interfere with human rights such as the right to clean drinking water and then cause an injury to individuals and communities, from an individual-oriented international law perspective, corporations are to be supervised and controlled and held accountable in order to establish a credible global rule of law.<sup>44</sup> In this line, Carbone pointed out that it 'is increasingly necessary that the multinational enterprise be directly subjected to some principles of international law concerning human rights protection.'<sup>45</sup>

From a practical view, apart from being a euphemism, the expression 'human right abuse' is not necessarily accurate. In practical terms, a human right to clean drinking water violation or abuse brings about the same practical consequences on individuals and communities.

Additionally, in practice, private corporations are sometimes economically and politically even more powerful than sovereign States.<sup>46</sup> In that case, their economic and political power could sometimes be equated with sovereign power.<sup>47</sup> Consequently, private corporations can create the necessary conditions to improve the life of the bulk of the population, particularly of those most vulnerable.<sup>48</sup> Then, States need these private entities in order to achieve both domestic and global goals, especially

Elimination of All Forms of Discrimination against Women (CEDAW) (adopted in 1979) UN GAOR Supp. (No. 46) 193.

40 'Article 3 (1): In all actions concerning children, whether undertaken by public or private social welfare institutions [...] the best interests of the child shall be a primary consideration.' Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UN GAOR Supp (No 49) 167.

41 Article 1: 'the term "violence against women" means any act of gender-based violence [...] whether occurring in public or in private life.' Declaration on the Elimination of Violence against Women (adopted 20 December 1993) UNGA Res 48/104. 'We recognize that in many parts of the world, Africans and people of African descent face barriers as a result of social biases and discrimination prevailing in public and private institutions and express our commitment to work towards the eradication of all forms of racism, racial discrimination, xenophobia and related intolerance faced by Africans and people of African descent.' Durban Declaration, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (8 September 2001) UN A/CONF.189/12, para 35. 'Article 13: The responsibilities inherent in the activities of researchers, including meticulousness, caution, intellectual honesty and integrity in carrying out their research as well as in the presentation and utilization of their findings, should be the subject of particular attention in the framework of research on the human genome, because of its ethical and social implications. Public and private science policy-makers also have particular responsibilities in this respect.' Universal Declaration on the Human Genome and Human Rights (adopted 11 November 1997) UNGA Res 53/152 (9 December 1998).

42 UNCESCR, 'General Comment N°15' (n 26) para 33.

43 'That corporations are on the whole good for human rights should be no greater reason to exempt corporations from international human rights norms.' CM Vazquez, 'Direct vs. Indirect Obligations of Corporations under International Law' (2004-2005) 43 Colum J Transnatl L 927, 953.

44 DA Ijalaye, 'Indigenization Measures and Multinational Corporations in Africa' (1981) 171 Recueil des Cours de l'Académie de Droit International 50. 'The forms and types of power which the law seeks and needs to control become more varied and complex, and the standards of responsibility which it seeks and needs to enforce more exacting, as society develops.' WC Jenks, 'Multinational Entities in the Law of Nations' in W Friedmann, L Henkin and O Lissitzyn (eds), *Transnational Law in a Changing Society: Essays in Honor of Philip C Jessup* (Columbia University Press 1972) 71.

45 See SM Carbone, 'I soggetti e gli attori nella Comunità internazionale' in SM Carbone, R Luzzatto and A Santa Maria (eds), *Istituzioni di diritto internazionale* (3<sup>rd</sup> edn, Giappichelli 2006) 3, 37.

46 See D Cassel, 'Corporate Initiatives: A Second Human Rights Revolution?' (1995-1996) 19 Fordham Intl L J 1963; Vazquez (n 43) 953; H Mosler, 'The International Society as a Legal Community' (1974) 140 Recueil des Cours de l'Académie de Droit International 50.

47 Halliday pointed out that behind the scenes of political, social and economic globalisation, profit-mongering transnational corporations are dictating the world's fate with the direct consequences for human rights and the environment. F Halliday, 'The Romance of Non-State Actors' in J Daphné and W Wallace (eds), *Non-State Actors in World Politics* (Palgrave 2001) 21, 31. 'The corporation has effective control over much of the routine affairs of human governance.' AS Miller, 'The Global Corporation and American Constitutionalism: Some Political Consequences of Economic Power' (1971-1972) 6 J Intl L & Econ 235, 240. '[M] any multinational corporations have become at least as powerful as some of the states in which they function.' J Fleur, 'The Invisibility of the Transnational Corporation: An Analysis of International Law & Theory' (1993-1994) 19:4 Melb U L Rev 893, 903-904.

48 'It is today acknowledged that investment is capable of generating economic growth, reducing poverty, increasing demand for the rule of law and contributing to

economic, social and cultural human rights.<sup>49</sup> Moreover, multinational enterprises often sign agreements not only with other private entities, but also with States and international organisations. Often legal controversies are solved through international arbitration.<sup>50</sup> Secondly, private corporations 'wield a vast power and often do so in a fashion that violates international human rights standards'.<sup>51</sup> They are capable of doing great harm to individuals, population and activities of the host or determined State.<sup>52</sup>

In a nutshell, the controversy between human rights abuses and human rights violations should not be overstated, as well as the issue of determining how to qualify private companies' actions and omissions that have a negative impact on the enjoyment of human rights. I rather seek to examine the outcome of the action or omission of private companies in the light of international and regional human rights standards. The outcome of both abuses and violations is the same; namely, the infringements in the enjoyment of human rights. In practice there are many examples where private corporations have been involved in cases of interferences concerning the human right to water.

### B. *Private Corporations before International Mechanisms: Water at Stake*

Originally designed to settle disputes between private companies and States concerning international investments, arbitral tribunals have increasingly addressed public interest objectives such as human rights and environmental protection, particularly related to the right to access to drinking water and sanitation.<sup>53</sup> In recent years, the system of international settlement of investment disputes has been analysed from the other side of the coin, ie as a means of addressing the investors' behaviours regarding the host State's population and environment.<sup>54</sup> The latter would introduce an equity principle in the system of international investments since the tribunal would judge equally on the basis of full access to justice for both parties in the investment controversy.<sup>55</sup> By the same token, both investors' and population's interests would receive the equal protection of the law.<sup>56</sup>

There are different investment cases where water and sanitation provision services have been involved. The well-known Cochabamba's 'water war' (*Aguas del Tunari v Bolivia case*) is one of the clearest examples of a clash between investor interest and State public interest related to water provision.<sup>57</sup> *Biwater Gauff* in Tanzania is also another arbitration case concerning the

the realization of human rights.' U Kriebaum, 'Human Rights of the Population of the Host State in International Investment Arbitration' (2009) 10 JWIT 653, 654; see UNCHR Res 69 (2005) UN Doc E/CN.4/RES/2001/37; see UNHRC 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Protect, Respect and Remedy: a Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5, para 2.

49 See UNCHR 'Report of the High Commissioner for Human Rights: Human Rights, Trade and Investment' (2 July 2003) UN Doc E/CN.4/Sub.2/2003/9, para 6. Private business and corporations can make a great contribution to the welfare of peoples but at the same time reality has shown that they can make a lot of harm. See International Council on Human Rights Policy (n 31) 10.

50 A Cassese, *Diritto Internazionale* (Il Mulino 2006) 192.

51 RA Miller, 'Paradoxes of Personality: Transnational Corporations, Non-Governmental Organizations and Human Rights in International Law' in RA Miller and RM Bratspies (eds), *Progress in International Law* (Martinus Nijhoff 2008) 381, 388. '[T]oday corporations are among the world's most dominant and powerful institutions, in many cases surpassing the revenue-producing ability of smaller governments.' S Waddock, 'Building a New Institutional Infrastructure for Corporate Responsibility' (2008) *Academy of Management Perspectives* 87. 'Multinational corporations often operate beyond the control of domestic and international law'. J Mertus, 'Considering Non-state Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application' (2000) 32 NYU J Intl L & Pol 537, 549.

52 'In fact, many multinational corporations wield more effective power and wealth than many nation-states. In terms of potential impact, decisions and activities of many large multinational corporations are capable of doing more harm to persons and activities of some nation-states.' JJ Paust, 'Human Rights Responsibilities of Private Corporations' (2002) 35 Vand J Transnatl L 801, 802. Frequently, in fact, we hear cases where enterprises conduct in very poor countries their economic activities and operations, in order to take advantage not only of low labour cost, but also of scant social protection of workers, in violation of the minimum standard of treatment guaranteed by international labour conventions. Cassese (n 50) 192; see P Muchlinski, 'Human rights, social responsibility and the regulation of international business: The development of international standards by intergovernmental organisations' (2003) 3 NSAIL 123.

53 LE Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration* (Rights and Democracy 2009).

54 E Filmer-Wilson, 'The Human Rights-Based Approach to Development: The Right to Water' (2005) 23 NQHR 213, 216.

55 'Un système qui n'aborde un problème que du côté d'un seul partenaire ne peut être considéré comme un système international juste.' MA Bekhechi, 'Droit international et investissement international : quelques réflexions sur des développements récents' in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (Pédone 1991) 109, 118.

56 W Friedmann, 'General Course in Public International Law' (1969) 127 *Recueil des Cours de l'Académie de Droit International* 39, 122.

57 W Schreiber, 'Realizing the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations' (2008) 48 *Nat Resources J* 431, 435; J Razzaque, 'Trading Water: The Human Factor' (2004) 13 *RECIEL* 15, 24; M Fitzmaurice, 'The Human Right to Water' (2006-2007) 18 *Fordham Envtl L Rev* 537, 565. *Aguas del Tunari* was primarily controlled by the Bechtel Corp (USA) as seen in the ownership structure presented in *Aguas del Tunari SA v Rep of Bol* (Decision on Respondent's Objections to Jurisdiction) (2005) ICSID No ARB/02/3, 61).

expansion of water services.<sup>58</sup> And the International Centre for Settlement of Investment Disputes ('ICSID')<sup>59</sup> cases regarding provision of water and sanitation in Argentina raise the challenge to protect the human right to water for local populations.<sup>60</sup> All of them are international arbitration cases concerning water services related to international investment agreements.<sup>61</sup>

Examples of arbitral proceedings before the ICSID related to the issue of water and sanitation include, for instance, the case between Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA<sup>62</sup> as claimants and the Argentine Republic as respondent as well as the case between Aguas Provinciales de Santa Fe SA, Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA<sup>63</sup> as claimants and the Argentine Republic as respondent. In both cases, a group of NGOs and consumer associations lodged a petition to be authorised to act as *amicus curiae* and submit *amicus curiae* briefs, since the case involved matters of significant public interest, namely, water provision and sewage systems serving millions of people.<sup>64</sup>

In 2005, in the case *Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA*, the arbitral tribunal finally accepted the petition of NGOs concerning the submission of *amicus curiae* by concluding that 'the present case is an appropriate one in which suitable nonparties may usefully make *amicus curiae* submissions'.<sup>65</sup> The members of the Arbitral Tribunal held with remarkable clarity that

[t]he factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve.<sup>66</sup>

Along that line, it is important to bear in mind what Cançado Trindade, former President of the Inter-American Court of Human Rights, rightly asserted in the *Castro Castro Prison case*: 'we are before an humanized "ordre public" (or truly humanist) in which the public interest or common interest fully coincides with the prevalence of human rights – which entails the recognition that human rights consist in the basic fundament, they themselves, of the legal order at either the international or national level.'<sup>67</sup>

Then, in the case of *Suez, Sociedad General de Aguas de Barcelona, SA, and Vivendi Universal SA*, in 2007, the Arbitral Tribunal took a decision on a petition of the same group of NGOs in order to be authorised to submit an *amicus curiae*. In this case, facing the opposition of the private investors' claimant, the tribunal confirmed that

58 'Biwater has thus allowed for joint amici to be submitted to the tribunal to "address broad policy issues concerning sustainable development, environment, human rights and governmental policy".' Schreiber (n 57) 468. The *Biwater Gauff* case refers to a dispute over the provision of water and sewage services — arguably a basic public good to be provided in the last instance by the State — in Dar es Salaam, Tanzania. See WW Burke-White and A von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (2010) 35 Yale J Intl L 283, 294; JE Vinales, 'Access to Water in Foreign Investment Disputes' (2009) 21 Geo Intl Envtl L Rev 733; AK Bjorklund, 'The Emerging Civilization of Investment Arbitration' (2009) 113 Penn St L Rev 1269; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (Procedural Order N° 5) (2007) ICSID No ARB/05/22, 64.

59 ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States with over one hundred and forty member States.

60 S Tully, 'A Human Right to Access Water? A Critique of General Comment N°15' (2005) 23 NQHR 35, 47; Cf *Lanco v Argentina* (2001) ICSID Case No ARB/97/16, 40 ILM 457; *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic*, ICSID No ARB/03/17; *Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID No ARB/03/19; see also *Compañía de Aguas del Aconagua SA and Vivendi Universal v Argentine Republic* (2001) ICSID No ARB/97/13, 16 ICSID Rev –FILJ 641 and (2002) 17 ICSID Rev –FILJ 168.

61 Both cases *Aguas del Tinari v Bolivia* and *Biwater v Tanzania* 'illustrate the current difficulties of realizing the right to water within international investment law.' Schreiber (n 57) 436.

62 ICSID No ARB/03/19 (n 60).

63 ICSID No ARB/03/17 (n 60).

64 D Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 AJIL 611, 630; see *Aguas Argentinas SA, Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic* (Order in Response to Petition for transparency and Participation as *Amicus Curiae*) (19 May 2005) ICSID No ARB/03/19; see *Aguas Provinciales de Santa Fe SA, Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v Argentine Republic* (Order in Response to a Petition for Participation as *Amicus Curiae*) (17 March 2006) ICSID No ARB/03/17.

65 ICSID No ARB/03/17 'Order' (2006) (n 64) para 23.

66 ICSID Case No ARB/03/19 'Order' (2005) (n 64).

67 *Case of the Miguel Castro-Castro Prison v Peru* (Interpretation of the Judgment of Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 181 (Judgment 2 August 2008) Concurring Opinion of Judge AA Cançado Trindade, para 155.

[e]ven if its decision is limited to ruling on a monetary claim, to make such a ruling the Tribunal will have to assess the international responsibility of Argentina. In this respect, it will have to consider matters involving the provision of ‘basic public services to millions of people’. To do so, it may have to resolve ‘complex public and international law questions, including human rights considerations’.<sup>68</sup>

The latter shows that there are increasing connections and interactions between international investments, sustainable development, the effective realisation of the human right to water, and private sector operations.<sup>69</sup> In my view, it should be borne in mind that public international law is one of the most dynamic bodies of norms and that human rights have strongly influenced the current development of international law in the last two decades.<sup>70</sup>

The proceedings of investment settlement disputes could be seen also as a means of adjudicating on private investors’ involvement in the human right to water and sanitation and environmental abuses. Investors could and should be called into question before the dispute settlement body, as their activities and operations infringe, for instance, the right to drinking water and sanitation or polluted freshwater. In that case, the State obligation to protect its population and environment must prevail. Today, in the world of international law as the law of mankind, it is not possible to consider fields of human activity, such as investment, development, private sector, environment, political and social participation and human rights, as disconnected and non-interrelated fields.<sup>71</sup> The argument of public interest could constitute a first step that allows States to hold private investors responsible before a dispute settlement body.<sup>72</sup> This argument might allow the international dispute settlement mechanism to dismiss the investor claim in favour of higher public interests, that are recognised by international norms, principles and standards. By protecting the public interest, the arbitral tribunal can increase the access to justice at a substantive level.<sup>73</sup>

Investment agreements between private investors and States should not mean ‘*carte blanche*’ for investors; they must take into consideration the general interest of the collectivity and respect basic fundamental principles.<sup>74</sup> Indeed, States keep their legal duty to comply with their human rights obligations.<sup>75</sup> When States entrust investors with the duty to provide accessible and affordable drinking water and sanitation without discrimination, and the investors do not fulfil this obligation, States can pursue legitimate public policy objectives.<sup>76</sup> Rosemann highlighted ‘[t]he duty of non-state actors, such as companies or individual persons, to respect the human right to water and to support its implementation within their own scope of action.’<sup>77</sup> A legitimate public policy objective is, therefore, the fulfilment of the human right to water, by providing for access to drinking water and sanitation in an acceptable and affordable way.<sup>78</sup> As Jenks emphasised, ‘we must regard the public

68 See ICSID, *Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic* (Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an *Amicus Curiae* Submission) (12 February 2007) ICSID No ARB/03/19, para 18.

69 See ICSID Case No ARB/03/19 ‘Order’ (2005) (n 64) para 19; see Responsibility of States for Internationally Wrongful Acts (n 23); UNGA Res 59/35 (2 December 2004) UN Doc A/RES/59/35 commending the articles to the attention of Governments; UNGA Res 62/61 (6 December 2007) UN Doc A/RES/62/61; see also J Crawford, ‘The ILC’s Articles on Responsibility of State for Internationally Wrongful Acts: A Retrospect’ (2002) 96 AJIL 874.

70 ‘The human rights doctrine has positively influenced various fields of traditional international law. It has helped to introduce a new paradigm in the international community.’ A Cassese, *International Law* (2<sup>nd</sup> edn, Oxford University Press 2005) 396.

71 ‘Today, elements of international human rights law increasingly permeate other areas of international law.’ B Simma and others, ‘The Role of German Courts in the Enforcement of International Human Rights’ in B Conforti and F Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff Publishers 1997) 71, 71; F Orrego Vicuña and F Orrego Bauza, ‘The implementation of the International Law of Human Rights by the Judiciary: New Trends in the Light of the Chilean Experience’ in B Conforti and F Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff Publishers 1997) 135, 147.

72 Libert (n 30) 241; P Fouchard, ‘L’arbitrage et la mondialisation de l’économie’ in *Philosophie du droit et droit économique: Quel dialogue? Mélanges en l’honneur de Gérard Farjat* (Frison-Roche 1999) 380, 394; W Ben-Hamida, ‘L’arbitrage Etat-investisseur cherche son équilibre perdu: Dans quelle mesure l’état peut introduire des demandes reconventionnelles contre l’investisseur privé?’ (2005) 7 International Law Forum du Droit International 261, 262.

73 Francesco Francioni, ‘Access to Justice, Denial of Justice and International Investment Law’ (2009) 20 EJIL 729, 747.

74 Fouchard talks about an ‘ordre public transnational’. Fouchard (n 72) 394; I Fadlallah, ‘L’ordre public dans les sentences arbitrales’ (1994) 249 Recueil des Cours, Académie de Droit Internationale 417 et seq. ‘Within the realm of water privatization, this means that the state is willing to give up some of its sovereign rights through the provisions of an IIA while the investor is promising to act in a responsible and reasonable manner in accordance with the state’s development aims.’ Schreiber (n 57) 475.

75 ‘The increasing reliance on these non-state actors for the investment needed to advance state development goals risks compromising the ability of states to carry out their obligations to fulfil the right to water through the international protection that is afforded to the non-state actors under investment treaties.’ Schreiber (n 57) 446. ‘Only governments could decide whether water services were to be operated by third parties, but states must regulate the private sector to ensure the right to water for the entire population.’ Riedel, (n 26) 600.

76 Filmer-Wilson also highlighted the importance of having a right based approach related to water because it ‘emphasises the accountability of all actors whose actions impact the development process; both State and non-State.’ Filmer-Wilson (n 54) 218.

77 N Rosemann, ‘Financing the Human Right to Water as a Millennium Development Goal’ (2005) 1 LGD <[http://www.go.warwick.ac.uk/elj/lgd/2005\\_1/rosemann](http://www.go.warwick.ac.uk/elj/lgd/2005_1/rosemann)> accessed 30 July 2010.

78 ‘D’autres intérêts qu’économiques sont en jeu: ils sont culturels, moraux et sociaux, et ils doivent être préservés. C’est au juriste à dire comment. Et si l’Etat se trouve désarmé, et le juge étatique écarté, l’arbitrage, qui apparaît naturellement porté par cette mondialisation, ne doit pas en être qu’un instrument, voire un

interest as the overriding consideration.’<sup>79</sup>

The public aim of services of public interest such as the provision of safe and clean water and sanitation should allow States to reverse prior decisions on water services in order to ensure universal access of the population to basic human needs.<sup>80</sup> By accepting in trial the State legitimacy of public policy decisions, it constitutes a real opportunity for the realisation of human rights.<sup>81</sup> Individuals and peoples affected with defective or nonexistent water provision could have a voice through the State before the dispute settlement body. States do have a right and at the same time an international obligation to adopt legislation and practical measures in order to fulfil the human right to water and sanitation. In this context, Ruggie affirmed that ‘values are becoming a value proposition.’<sup>82</sup>

One of the biggest challenges of public international law remains to strike an adequate balance between international investment treaties and international human rights and environmental obligations, bearing always in mind that investors’ rights are conditional rights.<sup>83</sup> In this context, States, international tribunals and companies cannot see water just as a commercial commodity.<sup>84</sup> The General Agreement on Trade in Services (‘GATS’) requires the progressive liberalisation of service markets.<sup>85</sup> In the field of water and sanitation services, liberalisation should be carefully handled.<sup>86</sup> The human right to water does not preclude water provision privatisation as far as minimum water standards *vis-à-vis* the whole population are guaranteed, as clarified by the CESCR.<sup>87</sup> However, there is currently ‘serious concern over whether privatisation can address the social and environmental aspects of water.’<sup>88</sup>

Along with this ongoing doctrinal debate about corporate human rights violations and/or abuses, a number of governmental and multi-stakeholders initiatives have been raised in order to regulate corporate activities. Moreover, as it will be seen below, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises’ Guidelines adopted a clear position on this point.

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complice. Il peut devenir, au moins partiellement, le garant du respect du droit et des valeurs fondamentales que celui-ci est chargé de faire prévaloir.’ Fouchard (n 72) 395. ‘If the management of drinking and sanitation is entrusted to a private company whose main objective is profit, the State has an obligation to ensure that the poor receive a minimum supply of drinking water and sanitation. States must, in all cases, monitor, and if necessary take action to check the financing of works, the quality and quantity of water, the way shortages are managed, pricing, specifications, the degree of sanitation and participation by users.’ UNCHR (Sub-Commission), ‘Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation; Preliminary report submitted by Mr. El Hadji Guissé in pursuance of decision 2002/105 of the Commission on Human Rights and resolution 2001/2 of the Sub-Commission on the Promotion and Protection of Human Rights’ (25 June 2002) UN Doc E/CN.4/Sub.2/2002/10, para 33.

79 Jenks (n 44) 81.

80 ‘The High Commissioner for Human Rights proposed that reversing prior decisions on water service delivery or resisting market access requests is compatible with the obligation to ensure universal access to basic human needs.’ UNCHR (Sub-Commission), ‘Report on the liberalization of trade in services and human rights’ (25 June 2002) UN Doc E/CN.4/Sub.2/2002/9, paras 61 and 69.

81 ‘Unless right-holders can claim and exercise their rights effectively and the corresponding duty-bearers fulfil their obligations, human rights will not be realised.’ Filmer-Wilson (n 54) 223.

82 ‘Governments adopting policies that induce greater corporate responsibility, and companies adopting strategies reflecting the now inescapable fact that their own long-term prospects are tightly coupled with the well-being of society as a whole. Strengthening the international human rights regime against corporate-related abuse thereby contributes to, and gains from, the universally desired transition toward a more inclusive and sustainable world economy. Values are becoming a value proposition.’ UNHRC, ‘Towards operationalizing the “protect, respect and remedy” framework; Report of the Special Representative of the Secretary-General John Ruggie on the issue of human rights and transnational corporations and other business enterprises’ (22 April 2009) UN Doc A/HRC/11/13, para 119.

83 ‘In fulfilling the right to water, tribunals should examine the relevant treaties and the interpretive guidance provided by the CESCR to determine whether or not measures taken constitute the existing “public purpose” requirements that are proportional to their human rights obligations in the fulfilment of the right to water.’ Schreiber (n 57) 474. ‘In calling for a renewed commitment to respect economic, social and cultural rights, the Committee wishes to emphasize that international organizations, as well as the governments that have created and manage them, have a strong and continuous responsibility to take whatever measures they can to assist governments to act in ways which are compatible with their human rights obligations and to seek to devise policies and programmes which promote respect for those rights. It is particularly important to emphasize that the realms of trade, finance and investment are in no way exempt from these general principles and that the international organizations with specific responsibilities in those areas should play a positive and constructive role in relation to human rights.’ UNCESCR, ‘Globalization and Economic, Social and Cultural Rights; Statement by the Committee on Economic, Social and Cultural Rights’ (May 1998) UN Doc E/1999/22-E/C.12/1998/26, para 5.

84 Tully (n 60) 49; Filmer-Wilson (n 54) 215. ‘The articulation of investors’ rights through investment liberalization agreements should take note of the conditional nature of investors’ rights and balance those rights with the articulation of investors’ obligations towards individuals and communities.’ UN OHCHR, ‘Human Rights and Trade’ (5<sup>th</sup> WTO Ministerial Conference, Cancun, 10-14 September 2003).

85 Tully (n 60) 50; General Agreement on Tariffs and Trade 1994, Apr 15 1994, Marrakech Agreement Establishing the WTO, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1994) 1867 UNTS 187 (1999) Tariff Heading 22.01.90; *Sporhase v Nebraska ex rel Douglas*, 458 US 941 (1982).

86 Filmer-Wilson (n 54) 232.

87 ‘The right to water requires that certain steps be taken by states to achieve the full realization of the right, including regulation, and investors are aware that their actions in such an industry means that there are certain performance standards they must comply with.’ Schreiber (n 57) 467.

88 Filmer-Wilson (n 54) 229.

### III. Corporate Social Responsibility versus Human Rights

At the very base of corporate social responsibility is the main idea of doing good for society. Historically, a good source of inspiration was 'early notions of responsibility revolved largely around philanthropy, initially the philanthropy of individuals who had grown wealthy as industrialists.'<sup>89</sup> There are two basic situations that propel corporations to identify and then develop a business responsibility policy. First of all, corporations realise that they develop their industry activities for, within and in connection with society. Second, corporations realise that contemporarily the main assets they have are human capital, public trust, reputation and favourable public opinion.

#### A. *An Evolving Concept*

The concept of corporate social responsibility ('CSR') was developed at the end of the 60s and beginning of the 70s. Other concepts that express the same idea as CSR are corporate conscience, corporate citizenship, corporate social performance, corporate self-regulation to encourage positive social impact, corporate responsible business, corporate governance, business ethics, ethical concerns, social ethics and social responsibility of business. Wood considered that corporate social responsibility makes part of corporate social performance which is defined as 'a business organization's configuration of principles of social responsibility, processes of social responsiveness, and policies, programs, and observable outcomes as they relate to the firm's societal relationships.'<sup>90</sup>

There are several stages in the evolution of the CSR. First, around the 1950s corporations started to undertake philanthropic activities that directly benefit society. Second, in 1960-1970, corporations adopt a social responsibility orientation, linking business success with business ethics, particularly focused on product and consumer safety. Third, in the 1980s, corporations tried to become more responsive to stakeholders and social needs. Thus, corporations established numerous functions internally such as public affairs, community employee relations, etc. Fourth, in 1980-1990, corporate social responsibility focused on business ethics linked to bribery or anticorruption codes which tried to face industry scandals. Fifth, in the 1990s, social responsibility concentrates on how corporate business models, strategies and practices affect stakeholders and the natural environment. At this time it started a virtual search for self-regulations, mainly under the category of corporations' codes of conduct. Sixth, in 2000, corporations have totally acknowledged that crucial assets for business success are public trust and reputation and recognise the weight public opinion has in the success of their strategies and business models.<sup>91</sup> However, corporations still consider social responsibility within the make up of their business strategies and models. That is not the view that a human rights approach should provide corporations while they perform their industry activities.

In the 1980s, Freeman developed the concept of the stakeholder approach, which disregards the idea of social responsibility for business. He affirmed that the distinction between 'social responsibility' and 'business issues' is not useful and proposed to integrate both of these concerns into a notion of 'effective management'.<sup>92</sup> Notwithstanding, the concept of corporate social responsibility developed itself especially at the international level.

There are a couple of objections I have against the corporate social responsibility approach. All these initiatives are based on corporations' own understanding of issues concerning social and human rights sustainability and responsibility. Moreover, they are all still philanthropy, not fulfilment of legal obligations, even though they try to cover this under the label of 'code of conduct'. As a consequence, corporative codes of conduct are all voluntary; not mandatory.<sup>93</sup> The main problem with the term corporate social responsibility is that it tends to undermine the legal enforceability and overstates their voluntary aspect. Today, corporate social responsibility is not a legal concept, and it is more about charity and social awareness than legal obligations.

89 Waddock (n 51) 88.

90 DJ Wood, 'Corporate Social Performance Revisited' (1991) 16 *Academy of Management Review* 691, 693; see A Jara, 'La responsabilidad social empresarial: modelo en desarrollo' in X Erazo, MP Martin and H Oyarce (eds), *Políticas públicas para un Estado social de derechos: El paradigma de los derechos universales* (Lom 2007) vol I.

91 For a general overview, see Waddock (n 51) 87.

92 RE Freeman, *Strategic Management - A Stakeholder Approach* (Pitman 1984) 90; Cf RE Freeman and J McVea, 'A Stakeholder Approach to Strategic Management' (2001) Darden Business School Working Paper No 01-02 <<http://ssrn.com/abstract=263511>> accessed 31 January 2013.

93 'Voluntary initiatives are usually discussed in comparison with, and as an alternative to, traditional government-directed "command-and-control" regulation. Potoski and Prakash provide evidence of the effect of command-and-control approaches in significantly reducing industrial pollution. However, command and control has been criticised for being expensive to comply with, monitor and enforce and for cultivating an adversarial culture between business and government.' P Schiavi and F Solomon, 'Voluntary Initiatives in the Mining Industry Do They Work?' (December 2007) 28 <<http://www.greenleaf-publishing.com/content/pdfs/gmi53schi.pdf>> accessed 20 June 2011.

Human rights are not philanthropy; they are legally binding norms, therefore we can indeed properly talk about corporate human rights responsibility. Corporate human rights responsibility is not voluntary, is not philanthropy, is not just 'to do good' for society, is not corporation's own understanding of sustainability. It is to comply with existent human rights frameworks which have agreed on commonly and generally accepted human rights norms and standards. Such standards come from, *inter alia*, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the fundamental International Labour Organization ('ILO') Conventions, and the environmental treaties.

Generally speaking, corporations believe that by doing good these new rules (codes of conduct) help them to sustain their legitimacy and be accepted as valid social actors.<sup>94</sup> However, the most important social expectation from multinationals or businesses is that they respect and comply with human rights and doing so they will contribute to build a healthier and more equal society. In any case, corporate human rights responsibility is not about social expectations –as Ruggie's reports try to make us think-,<sup>95</sup> instead it is about legal standards which must be complied with by every person, group or organ within the community.

### B. *Codes of Conduct: Beyond Traditional Corporate Social Responsibility*

Codes of Conduct usually are a corporate response to social and political pressure, both at the domestic and international level, and therefore they correspond to a kind of self-regulation and thus are essentially voluntary. They attempt to formalise 'the policies and practices that business itself adopts voluntarily, triggered by its assessment of human rights-related risk and opportunities, often under pressure from civil society and local communities.'<sup>96</sup>

There are codes of conduct issued directly by corporations – multinational or national - ie individual private initiatives, as well as by groups of stakeholders or multi-stakeholders initiatives, ie collective private initiatives.<sup>97</sup> These codes of conduct are guidelines governing the major elements of the domestic and international conduct of private business organisations, often containing references to human rights and environmental standards. These self-regulatory regimes belong to the category of 'social responsibility'. The content tends to reflect human rights and environmental concerns.

Most of these initiatives respond to the increasing worldwide concerns related to harmful consequences of private companies' activities on population and environment, particularly in developing countries.<sup>98</sup> Henkin highlighted that 'Shell has put out a small primer on human rights for all of its managing employees. British Petroleum has taken similar action... This development means that big companies have become sensitive to human rights. As a result, we are seeing "voluntary" codes.'<sup>99</sup>

In this context, and as for individual private regulatory initiatives, some companies reacted by elaborating the so-called

94 Waddock (n 51) 87.

95 'In addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. Failure to meet this responsibility can subject companies to the courts of public opinion - comprising employees, communities, consumers, civil society, as well as investors - and occasionally to charges in actual courts. Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations - as part of what is sometimes called a company's social licence to operate.' UNHRC, 'Protect, Respect and Remedy: a Framework for Business and Human Rights; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises John Ruggie' (7 April 2008) UN Doc A/HRC/8/5, para 54; D Bilchitz, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 7 Sur-International Journal on Human Rights 199, 204; LM Zanitelli, 'Corporations and Human Rights: The Debate between Voluntarists and Obligationists and the Undermining Effect of Sanctions' (2011) 8 Sur-International Journal on Human Rights 35.

96 UNHRC, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' (19 February 2007) UN Doc A/HRC/4/35, para 63.

97 'Codes of conduct are not necessarily a characteristic of multinational enterprises only. Multinational enterprises differ from other comparable companies only by their transnational form of organization.' International Organisation of Employers (IOE) General Council, 'Codes of Conduct: Position Paper of the International Organisation of Employers' (11 June 1999) 9 <[http://www.ioeemp.org/fileadmin/user\\_upload/documents\\_pdf/papers/position\\_papers/english/pos\\_1999june\\_codesconduct.pdf](http://www.ioeemp.org/fileadmin/user_upload/documents_pdf/papers/position_papers/english/pos_1999june_codesconduct.pdf)> accessed 30 September 2010.

98 'The companies, especially the big ones, have begun to feel vulnerable. Companies other than Unocal, such as British Petroleum, Shell, Heineken, and others have become more sensitive and more vulnerable.' L Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets' (1999) 25 Brook J Intl L 17, 24; R Hamann and others, 'Business and Human Rights in South Africa: An Analysis of Antecedents of Human Rights Due Diligence' (2009) 87 J Bus Ethics 453.

99 Henkin (n 98) 24.

norms of corporate social responsibility.<sup>100</sup> Large worldwide companies such as Shell,<sup>101</sup> Suez,<sup>102</sup> G4S,<sup>103</sup> Body Shop,<sup>104</sup> the Bank of New York Mellon<sup>105</sup> and Heinz<sup>106</sup> established their own Board Committee on Corporate Social Responsibility and the corresponding applicable rules.<sup>107</sup> All of them uphold and support human rights norms and the protection of human dignity and the environment. The problem is that this label can sometimes be used as a shield for businesses in order to hide environmental and human rights abuses. These instruments allegedly appear to benefit brand image more than the community interests, as periodically recalled by civil society organisations.<sup>108</sup>

As for a multi-stakeholder initiative directly referring to environment and water scarcity, the Ceres Principles are notable. In 1989, after the Exxon Valdez oil spill near the Alaskan coast, a group of investors organised a coalition of investors, environmental organisations and other public interest organisations working with companies to address sustainability challenges and set up a new organisation called Ceres. In 1989, they also launched the Ceres Principles.<sup>109</sup> The Ceres Principles is a ten-point commitment for investors in the field of sustainability, climate change and water scarcity.<sup>110</sup> For instance, the first principle labelled 'Protection of the Biosphere' points out that 'We will reduce and make continual progress toward eliminating the release of any substance that may cause environmental damage to the air, water, or the earth or its inhabitants. We will safeguard all habitats affected by our operations and will protect open spaces and wilderness, while preserving biodiversity.' In 2010, Ceres launched its vision 2020 on sustainability, climate change and water scarcity with respect to corporate conduct, including, interestingly, principles of water management and human rights.<sup>111</sup>

- 100 'The response of a number of leading companies in Europe to external interest in the social and environmental performance of companies has been the formation of a Board Committee on CSR.' N FitzGerald and M Cormack, 'The Role of Business in Society: An Agenda for Action' (2006) <[http://www.hks.harvard.edu/m-rcbg/CSRI/publications/report\\_12\\_CGI\\_Role\\_of\\_Business\\_in\\_Society\\_Report\\_FINAL\\_10-03-06.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/report_12_CGI_Role_of_Business_in_Society_Report_FINAL_10-03-06.pdf)> accessed 31 January 2013.
- 101 See 'Royal Dutch Shell PLC Corporate and Social Responsibility Committee Terms of Reference' (*Shell*, 10 March 2010) <<http://www-static.shell.com/content/dam/shell/static/investor/downloads/company-information/committees/tor-csco-march2010.pdf>> 31 January 2013. 'Shell companies recognize five areas of Responsibility: [To society]: To conduct business as reasonable corporate members of society, to comply with applicable laws and regulations, to support fundamental human rights in line with the legitimate role of business, and to give proper regard to health, safety, security and the environment.' 'Shell Code of Conduct: How to live by the Shell General Business Principles' (*Shell*, 2006) <[www.shell.com/codeofconduct](http://www.shell.com/codeofconduct)> accessed 30 August 2010.
- 102 'Our Group is no stranger to the need to adopt ethical principles to protect against risks which could affect its operations, future and reputation. For many years now, the companies which make up SUEZ ENVIRONNEMENT have shared a culture of commitment to upholding Human Rights and respecting human dignity, fighting corruption and protecting the environment. What is more, this culture encourages our Group to comply with ethical principles that are often above and beyond the requirements of applicable laws and regulations.' See 'Suez Environnement Ethics Charter: Making the Planet Sustainable is the Best Job on Earth' (2010) <<http://www.suez-environnement.com/en/profile/ethics/ethics-policy/ethics-policy>> accessed 30 September 2010.
- 103 G4S Charter sets out that 'The CSR Committee shall have and may exercise in full all powers and authority of the Board of Directors of the Company on corporate social responsibility matters in relation to... Human Right... the Environment.' See 'CSR Committee' (*G4S*, 2010) <<http://www.g4s.com/en/Who%20we%20are/Corporate%20governance/CSR%20Committee>> accessed 30 September 2010.
- 104 'We aim to ensure that human and civil rights, as set out in the Universal Declaration of Human Rights, are respected throughout our business activities. We will establish a framework based on this declaration to include criteria for workers' rights embracing a safe, healthy working environment, fair wages, no discrimination on the basis of race, creed, gender or sexual orientation, or physical coercion of any kind.' See 'The Body Shop, Inc.: Trading Charter' (1994) <<http://www1.umn.edu/humanrts/links/bodycode.html>> accessed 31 January 2013.
- 105 'The Corporate Social Responsibility Committee (the "Committee") is appointed by the Board of Directors (the "Board") to promote a culture that emphasizes and sets high standards for corporate citizenship and reviews corporate performance against those standards. The Committee will consider matters relating to community development and involvement, philanthropy, sound environmental sustainability practices, government affairs and social responsibility relative to employees.' See 'Charter Corporate Social Responsibility Committee of the Board of Directors of the Bank of New York Mellon Corporation' (*BNY Mellon*, 13 April 2010) <<http://www.bnymellon.com/governance/committees/csr.html>> accessed 30 September 2010.
- 106 'The responsibilities and activities of the Committee include but are not limited to "monitoring issues and practices relating to [...] human rights matters."' See 'Heinz Corporate Social Responsibility Committee Charter' (20 January 2010) <<http://www.heinz.com/our-company/corporate-governance/charters/corporate-social-responsibility-committee-charter.aspx>> accessed 30 September 2010.
- 107 'CSR, including consideration of environmental sustainability, has evolved in recent years as a coherent way of thinking about a company' impact and interaction with society. It covers subject that affect all companies, such employment standards, equal opportunities, diversity and carbon emissions; as well as those that are specific to a particular industry, such as advertising to children, drug pricing, nanotechnology or sustainable use of water' FitzGerald and Cormack (n 100) 9.
- 108 F Tuodolo, 'Corporate Social Responsibility: Between Civil Society and the Oil Industry in the Developing World' (2009) 8 ACME: An International E-Journal for Critical Geographies 530.
- 109 These Principles establish an environmental ethic with criteria by which investors and others can assess the environmental performance of companies. Companies that endorse these Principles pledge to go voluntarily beyond the requirements of the law. The Ceres Principles are as follows: 1) Protection of the Biosphere; 2) Sustainable Use of Natural Resources; 3) Reduction and Disposal of Wastes; 4) Energy Conservation; 5) Risk Reduction; 6) Safe Products and Services; 7) Environmental Restoration; 8) Informing the Public; 9) Management Commitment; 10) Audits and Reports. See 'The Ceres Principles' (*Ceres*, 2010) <<http://www.ceres.org/about-us/our-history/ceres-principles>> accessed 24 June 2011.
- 110 S Leurig, 'The Ripple Effect: Water Risk in the Municipal Bond Market' (*Ceres*, 2010) <<http://www.ceres.org/resources/webinars/water-risk-in-municipal-bonds/view>> accessed 31 January 2013.
- 111 'P1.3: Water Management: Companies will assess water-related impacts and risks and will set targets to improve water use and wastewater discharge, with priority given to operations in water-stressed regions; P1.5: Human Rights: Companies will regularly assess key risks related to human rights throughout their entire operations, and will employ management systems that are aligned with internal policies and support the implementation of universal standards.' See '21<sup>st</sup> Century Corporation: The Ceres Roadmap to Sustainability' (*Ceres*, March 2010) 50-52 <<http://www.ceres.org/resources/reports/ceres-roadmap-to-sustainability-2010/view>> accessed 31 January 2013.

Yet, they still correspond to a self-regulatory norm and the breaches of the rules remain without legal sanction. In consequence, they can be framed as ‘règles de juste conduite’.<sup>112</sup> They reflect a voluntary and strong legal commitment to respect and comply with human rights and environmental norms. That raises the interesting question whether codes of conduct can be considered enough to comply with international human right standards.

Rules of corporate social responsibility have been also issued because of the companies’ concern about their reputation at the national and international levels. Civil society organisations play a critical role to ring the alarm bell about social, environmental and human consequences of companies operations.<sup>113</sup> Private commercial institutions that finance business projects and activities worldwide have also developed self-regulations based on human rights and environmental concerns. The Equator Principles (2003) constitute a major example of private social and environmental regulation.<sup>114</sup>

Some of the instruments that set out direct corporate obligations in the field of human rights, such as codes of conduct, are self-regulatory regimes and therefore self-imposed obligations.<sup>115</sup> They are not mandatory, but rather voluntary rules. Consequently, there are no enforceable legal obligations arising from those codes of conducts, but they strengthen social and political expectations and might constitute a sign of legal trends. Moreover, it might express a certain level of awareness of the relevance of human rights standards.<sup>116</sup> In this sense, they can be representative of a certain legal conscience that private corporations must legally act in a certain way, under penalty of breaching international human rights and environmental standards and rules.

Initially, voluntary codes and self-regulatory measures are positively viewed but ‘[t]here is a growing sense that voluntary codes alone are ineffective and that their proliferation is leading to contradictory or incoherent efforts.’<sup>117</sup> They strengthen current human rights instruments and international human rights obligations, since they incorporate international human rights standards. I argue that these codes of conduct confirm the relevance and legitimacy of international human rights standards for the private sector.<sup>118</sup> Therefore, when the time arrives, private corporations and businesses could not refuse a legal instrument which contains at least the same human rights obligations that they have for years committed to respect through their voluntary codes of conducts or self-regulations.

Codes of conduct belong to the field of environmental standards, sustainable development and human rights concerning corporations. However, codes of conduct better correspond to the notion of corporate social responsibility as they are self-regulatory initiatives.

### C. *International Voluntary Regulations: On the Way to Human Rights and Environmental Standards*

In 1974, the UN Commission on Transnational Corporations<sup>119</sup> was established, ‘whose purpose would be to draft a United

112 Liberti (n 30) 236.

113 S Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Reprinted Cambridge University Press 1998) 197-198; PJ Spiro, ‘Nonstate Actors in Global Politics’ (1998) 92 AJIL 808, 811. ‘They are worried about their vulnerability to brand tarnishing, to investor resistance, to shareholder resistance.’ Henkin (n 98) 24. ‘Justiciability would, hopefully, serve as a way to deter abuses of water rights as corporate interests would fear incurring liability for water pollution or illegal water shutoffs.’ ‘Note: What Price for the Priceless?: Implementing the Justiciability of the Right to water’ (2007) 120 Harv L Rev 1067, 1077.

114 ‘The “Equator Principles” are a set of social and environmental principles that have been agreed and adopted by an increasingly large group of like-minded commercial banks as applying to the “Project Finance”-type lending activities of these banks.’ DM Ong, ‘From “International” to “Transnational” Environmental Law? A Legal Assessment of the Contribution of the “Equator Principles” to International Environmental Law’ (2010) 79 Nordic JIL 35, 37.

115 ‘A code of conduct is an operational statement of policy, values, or principle that guides a company’s behaviour in relation to the development of its human resources, environmental management and interaction with customers, clients, governments and the communities in which the company operates.’ IOE General Council (n 97) 4.

116 ‘Companies were asked what if any international human rights instruments their policies and practices draw upon. Again they were given the opportunity to cite more than one and to add any not mentioned in the questionnaire. Approximately one-fourth of the respondents skipped this question, presumably indicating that they reference no international instrument. Among the other 75 per cent, ILO declarations and conventions top the list, referenced by seven out of ten. The Universal Declaration on Human Rights (UDHR) is the next highest. The only variations on this theme are in the extractive sector, where every single respondent cites the UDHR, and the fact that half of the Japanese respondents skipped this question compared to 25 per cent of all respondents.’ UNHRC, ‘Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises’ (28 February 2007) UN Doc A/HRC/4/35/Add.3, paras 85-86.

117 International Council on Human Rights Policy (n 31) 4.

118 ‘Some codes also go beyond minimum human rights standards.’ *ibid* 9.

119 See UN Commission on Transnational Corporation, ‘Information Paper on the Negotiations to Complete the Code of Conduct on Transnational Corporations’ (1983) 22 ILM 177; ‘Draft U.N. Code of Conduct on Transnational Corporations by the United Nations Commission on Transnational Corporations’ (1983) 22 ILM 192; ‘Report of the Secretariat on the Outstanding Issues in the Draft Code of Conduct on Transnational Corporations’ (1984) UN Doc E/C.10/84/S/5, 23 ILM 602; ‘Draft U.N. Code of Conduct on Transnational Corporations. Report: United Nations Commission on Transnational Corporations’ (1984) 23

Nations Code of Conduct on Transnational Corporations.’<sup>120</sup> In 1992, after consultations and meetings, it was concluded that ‘no consensus was possible on the draft Code.’<sup>121</sup> Major disagreements between industrialised and developing countries explain the failure of this first initiative and up until now it has not been taken up again.<sup>122</sup>

In 1999, the former Secretary-General Kofi Annan launched the Global Compact as a United Nations–corporate initiative.<sup>123</sup> The Global Compact Initiative encompasses ten core principles in the field of human rights, labour rights, environmental rights and corruption, which allegedly enjoy universal consensus.<sup>124</sup> Participant private enterprises should embrace, support and enact these core principles and standards. These principles are derived from the main existing international human rights and environmental instruments such as the Universal Declaration of Human Rights, the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption.

It must also bear in mind another multi-stakeholder initiative concerning human rights and environmental conduct of private investors. Indeed, in 2005 the former United Nations Secretary General Kofi Annan along with the United Nations Environmental Programme Finance Initiative and the UN Global Compact invited a number of the world’s largest investors to participate in the elaboration of the Principle for the Responsible Investment. The Principles were launched by the former Secretary-General in April 2006.

The Principles for Responsible Investment (‘PRI’) is a multi-stakeholder initiative convened by the United Nations Secretary-General concerning environmental, social and governance (‘ESG’) issues related to corporations and investment practices. The ‘comply or explain’ approach is one of the assets of these Principles and ‘requires signatories to report on how they implement the Principles, or provide an explanation where they do not comply with them.’<sup>125</sup>

In 2011, it was officially presented by the International Organization for Standardization (‘ISO’) ‘26000: 2010 Guidance on social responsibility’, which is voluntary guidelines addressed to public and private all type-size organisations. These affirm that the ultimate aim of social responsibility is to contribute to global sustainable development. The ISO 26000:2010 addresses seven core subjects on social responsibility: 1) organisational governance, 2) labour practices, 3) the environment, 4) fair operating practices, 5) consumer issues, 6) human rights and 7) community involvement and development.<sup>126</sup>

International Intergovernmental Financial Institutions (‘IFIs’) also developed their own guidelines for multinational enterprises. Most of the time, these guidelines are the result of a process of broad consultation inside and outside the leading institution. For instance, the World Bank elaborated the Guidelines on the Treatment of Foreign Direct Investment

ILM 626. The United Nations Commission on Transnational Corporations ceased work in 1993. See P Herrmann, ‘Human Environmental Crisis and the Transnational Corporation: The Question of Culpability’ (1995) 23 Hum Ecol 285, 287.

120 RA Hedley, ‘Transnational Corporations and Their Regulation: Issues and Strategies’ (1999) 40 Int J Comp Sociol 215, 219-221; UN Conference on Trade and Development (UNCTAD), ‘Transnational Corporations and Integrated International Production’ (United Nations Conference on Trade and Development 1993) 33; Ijalaye (n 44) 48.

121 UNCTAD (n 120) 33. ‘The attempts to regulate TNC behaviour have failed so far. In 1993, the UN gave up the effort to establish a code for TNCs when it became obvious that compromise was nearly impossible.’ J Scanlon, A Cassar and N Nemes, ‘Water as a Human Right?’ (2004) IUCN Environmental Policy and Law Paper N°51, 32; CF Hillemanns, ‘UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights’ (2003) 4 Ger Law J 1065, 1066.

122 International Federation for Human Rights, ‘Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms’ (July 2010) 5. The UN Global Compact has the following website: <http://www.unglobalcompact.org/>.

123 ‘[I]n January 1999, UN Secretary-General Kofi Annan proposed a “Global Compact” of shared values and principles at the World Economic Forum in Davos.’ D Weissbrodt, ‘UN Human Rights Norms for Business’ (2005) 7 International Law Forum du Droit International 290, 292; see Secretary-General Kofi Annan, ‘Address at the World Economic Forum in Davos, Switzerland’ (31 January 1998) UN Press Release SG/SM/6448; see Karsten Nowrot, ‘The New Governance Structure of the Global Compact: Transforming a “Learning Network” into a Federalized and Parliamentarized Transnational Regulatory Regime’ (2005) 47 Essays in Transnational Economic Law 12.

124 See ‘Ten Principles’ (*UN Global Compact*) <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>> accessed 3 June 2011; see K Buhmann, ‘Regulating Corporate Social and Human Rights Responsibilities at the UN Plane: Institutionalising New Forms of Law and Law-making Approaches?’ (2009) 78 Nordic JIL 1-52; S Chen and P Bouvain, ‘Is Corporate Responsibility Converging? A Comparison of Corporate Responsibility: Reporting in the USA, UK, Australia, and Germany’ (2009) 87 J Bus Ethics 299.

125 The Principles for Responsible Investment are as follows: 1) We will incorporate ESG issues into investment analysis and decision-making processes; 2) We will be active owners and incorporate ESG issues into our ownership policies and practices; 3) We will seek appropriate disclosure on ESG issues by the entities in which we invest; 4) We will promote acceptance and implementation of the Principles within the investment industry; 5) We will work together to enhance our effectiveness in implementing the Principles; 6) We will each report on our activities and progress towards implementing the Principles. See ‘Principles for Responsible Investment’ (*PRI*) <<http://www.unpri.org/principles/>> accessed 24 June 2011.

126 See ‘ISO 26000 – Social responsibility’ (*ISO*, 2010) <[http://www.iso.org/iso/iso\\_catalogue/management\\_and\\_leadership\\_standards/social\\_responsibility/sr\\_discovering\\_iso26000.htm](http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/social_responsibility/sr_discovering_iso26000.htm)> accessed 6 June 2011.

(1992)<sup>127</sup> and the Guidelines on Environmental, Health and Safety ('EHS Guidelines') concerning Good International Industry Practice ('GIIP') (2007).

The EHS Guidelines were developed as part of a two and a half year review process that ended in 2007. They contain performance levels and measures that are normally acceptable for the International Finance Corporation ('IFC').<sup>128</sup> These General EHS Guidelines are designed to be used together with the relevant Industry Sector EHS Guidelines, which provide guidance to users on EHS issues in specific industry sectors.<sup>129</sup>

Concerning water, EHS Guidelines include the principle of water quality<sup>130</sup> and availability without explicitly mentioning the right to water.<sup>131</sup> EHS Guidelines endorse international standards of the human right to water. Thus, '[d]rinking water sources, whether public or private, should at all times be protected so that they meet or exceed applicable national acceptability standards or in their absence the current edition of WHO Drinking Water Guidelines.'<sup>132</sup> The EHS Guidelines for Mining emphasises that '[m]anagement of water use and quality, in and around mine sites, can be a significant issue. Potential contamination of water sources may occur early in the mine cycle during the exploration stage and many factors, including indirect impacts (eg migration), can result in negative impacts to water quality. Reduction of surface and groundwater availability is also a concern at the local level and for communities in the vicinity of mining sites, particularly, in arid regions, or in regions of high agricultural potential.'<sup>133</sup> Guidelines put forward as '[r]ecommended practices for water management in mining activities [...] Consultation with key stakeholders (eg government, civil society and potentially affected communities) to understand any conflicting water use demands and the communities' dependency on water resources and/or conservation requirements that may exist in the area.'

#### IV. Towards Corporate Human Rights Responsibility

There is no epistemological reason for denying responsibility in the case of private corporations at the international level. The increasing number of standards and mechanisms at the regional and international level addressed to enterprises, that enshrine environmental and human rights standards contribute to build this argument. There is a tangible trend that goes beyond corporate social responsibility towards the initial steps of the emergence of international corporate human rights responsibility

##### A. Internationally-Agreed Initiatives from 70s to 90s

Basically we will now briefly refer to the 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the 1976 Organization for Economic Co-Operation and Development ('OECD') Declaration on International Investment and Multinational Enterprises and the OECD Guidelines for Multinational Enterprises (last update in May 2011), and the 2003 United Nations Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights.

Due to its geographical scope, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy may appear to be even more important than OECD Guidelines for Multinational Enterprises, though OECD Guidelines cover enterprises belonging to the most powerful economies in the world.<sup>134</sup> ILO Principles can be authoritatively

127 See World Bank, 'Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment' (1992) 31 ILM 1366; see SJ Rubin, 'World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment' (1992) 31 ILM 1363, 1379.

128 Ong (n 114) 37.

129 See International Finance Corp (IFC) and World Bank Group, 'Environmental, Health, and Safety General Guidelines' (*International Finance Corp*, 30 April 2007) 1 <<http://www1.ifc.org/wps/wcm/connect/554e8d80488658e4b76af76a6515bb18/Final%2B-%2BGeneral%2BEHS%2BGuidelines.pdf?MOD=AJPERES>> accessed 31 January 2013.

130 'Air emissions, wastewater effluents, oil and hazardous materials, and wastes should be managed according to the guidance provided in the respective sections of the General EHS Guidelines with the objective of protecting soil and water resources.' *ibid* 77.

131 'Project activities should not compromise the availability of water for personal hygiene needs and should take account of potential future increases in demand. The overall target should be the availability of 100 liters per person per day although lower levels may be used to meet basic health requirements. Water volume requirements for well-being-related demands such as water use in health care facilities may need to be higher.' *ibid* 78.

132 *ibid* 77.

133 IFC and World Bank Group, 'Environmental, Health, and Safety Guidelines for Mining' (*International Finance Corp*, 10 December 2007) 2 <<http://www1.ifc.org/wps/wcm/connect/1f4dc28048855af4879cd76a6515bb18/Final%2B-%2BMining.pdf?MOD=AJPERES&id=1323153264157>> accessed 31 January 2013.

134 See International Labour Conference (204<sup>th</sup> Session) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (Geneva November 1977) para 11; see Organisation for Economic Co-Operation and Development (OECD), 'Declaration on International Investment and Multinational Enterprises' (21 June 1976). The Declaration contains two Annexes, one representing the OECD Guidelines for Multinational Enterprises, the other dealing

interpreted by the Sub-committee on Multinational Enterprises.<sup>135</sup> Indeed, the ILO established a Sub-committee which is an organ of the Committee on Legal Issues and International Labour Standards of the ILO Governing body to oversee the Declaration and to discuss ILO policy concerning corporate social responsibility issues, and also the ILO Declaration of Principles includes procedures for the examination of disputes concerning its application.<sup>136</sup> The Sub-committee on Multinational Enterprises has a tripartite composition, consisting of governmental, employers and workers' representatives.<sup>137</sup>

On the other hand, the OECD Guidelines for Multinational Enterprises partly addresses the relationship between enterprises' operations, human rights and the environment.<sup>138</sup> The OECD Guidelines are government-backed recommendations to enterprises regarding responsible business conduct in their worldwide operations (human rights, employment, environment, disclosure, corruption and taxation).<sup>139</sup> Peter Costello, Chair of the 2000 OECD Ministerial Meeting pointed out that '[t]he basic premise of the *Guidelines* is that principles agreed internationally can help prevent conflict and to build an atmosphere of confidence between multinational enterprises and the societies in which they operate.'<sup>140</sup> One of the most outstanding features of these Guidelines is that they emphasise the due diligence of the enterprise with respect to the environment and health in its decision-making process.<sup>141</sup> The Guidelines reinforce the link between corporate responsibility and good governance, which helps to strengthen human rights and enhance environmental protection.<sup>142</sup> In this context, OECD has developed Principles on Corporate Governance that was updated in 2004.<sup>143</sup>

In their operations, enterprises should take into account foreseeable environmental health consequences; consult with competent authorities; take measures in order to minimise the risk of accident, and damage to health and the environment.<sup>144</sup> The rationale is that enterprises must respect environmental standards and basic human rights of those affected by their activities.<sup>145</sup> The OECD Guidelines are addressed to businesses and expected them to increase their labour, environmental and human rights accountability. OECD Guidelines has a monitoring mechanism (the OECD Committee on International Investment and Multinational Enterprises ('CIIME')) and a complaints mechanism that is implemented through the OECD National Contact Point ('NCP').<sup>146</sup> The role of the NCPs is to ensure the effectiveness of the Guidelines.<sup>147</sup> The NCPs are governmental offices in charge of promoting the corporations' adherence to the OECD Guidelines and opening a dialogue in cases of complaint. The number of complaints filed by non-governmental organisations, trade unions and other social partners and interested parties has been growing over the last few years.<sup>148</sup> Over the first years of NCP's running, the

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with general considerations and practical approaches concerning conflicting requirements imposed on multinational enterprises. See OECD 'Annex I: OECD Guidelines for Multinational Enterprises' (21 June 1976) Introduction, para 9.

135 International Council on Human Rights Policy (n 31) 102.  
 136 OECD 'Annual Report on the OECD Guidelines for Multinational Enterprises' (2009) 251.  
 137 See, for instance, International Labour Conference (307th Session) Report of the Subcommittee on Multinational Enterprises (Geneva, March 2010) GB.307/11.  
 138 'The Guidelines are recommendations addressed by governments to multinational enterprises operating in or from adhering countries (the OECD members plus Argentina, Brazil, Chile the Slovak Republic)'. See OECD 'The OECD Guidelines for Multinational Enterprises: Policy Brief' (2001) 2; See OECD 'The Declaration on International Investment and Multinational Enterprises' (21 June 1976). This Declaration was adopted by the Governments of OECD Member countries on 21 June 1976 and subsequently updated. The Declaration contains two Annexes, one representing the OECD Guidelines for Multinational Enterprises, the other dealing with general considerations and practical approaches concerning conflicting requirements imposed on multinational enterprises.  
 139 OECD Watch, 'The OECD Guidelines for Multinational Enterprises: A Tool for Responsible Business Conduct' (June 2012) <[http://oecdwatch.org/publications-en/Publication\\_3816](http://oecdwatch.org/publications-en/Publication_3816)> accessed 22 September 2012.  
 140 OECD 'OECD Guidelines for Multinational Enterprises: Statements made on the adoption of the Review 2000: Statement by the Chair of the Ministerial Meeting' (27 June 2000) 3.  
 141 Communiqué, 'OECD Council Meeting at Ministerial Level' (27 June 2000) para 26 <<http://www.g7.utoronto.ca/oecd/oecd2000.htm> > accessed 27 June 2011.  
 142 'Governance, at all levels, establishes the conditions whereby individuals singly and collectively seek to meet their aspirations in society. Good, effective public governance helps to strengthen democracy and human rights, promote economic prosperity and social cohesion, reduce poverty, enhance environmental protection and the sustainable use of natural resources, and deepen confidence in government and public administration.' *ibid* para 4.  
 143 'The corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities.' OECD 'OECD Principles of Corporate Governance' (OECD 2004) 17. The OECD Council Meeting at Ministerial Level adopted the OECD Principles of Corporate Governance. These Principles were revised and updated in 2004.  
 144 See OECD 'The Declaration on International Investment and Multinational Enterprises' (21 June 1976).  
 145 OECD 'Commentary on the OECD Guidelines for Multinational Enterprises' (OECD 2008); International Council on Human Rights Policy (n 31) 66; see Scanlon (n 121) 32.  
 146 International Council on Human Rights Policy (n 31) 100.  
 147 OECD 'The OECD Guidelines for Multinational Enterprises; Decision of the Council: Procedural Guidance: I. National Contact Points' (June 2000) Doc DAFFE/IME(2000) 20.  
 148 OECD 'Statements made on the adoption of the Review 2000' (n 140) 3. 'National Contact Points will: Respond to enquiries about the Guidelines from: (a) Other National Contact Points; (b) The business community, employee organisations, other non-governmental organisations and the public; and (c) Governments of non-adhering countries.' *ibid*.

mechanism showed some flaws.<sup>149</sup> The NCP model was considered as inadequate and deficient.<sup>150</sup> Those problems are being solved with monitoring and good practices.

The OECD Guidelines were last updated on 25 May 2011. The 34 OECD countries plus 8 other countries reinforced the Guidelines for Multinational Enterprises by adopting new and stronger rules, which aim to protect human rights and social development. The updating introduced substantial new provisions in areas such as due diligence, supply chain responsibility and human rights.<sup>151</sup> These rules should be observed by OECD countries' corporations in every country in which they operate and they must observe the due diligence principle in their processes.<sup>152</sup> The OECD Secretary-General Angel Gurría pointed out that '[t]hese guidelines will help the private sector grow their businesses responsibly by promoting human rights and boosting social development around the world.'<sup>153</sup> According to the 2011 revised Guidelines, enterprises should 'respect human rights' and 'take due account of the need to protect the environment, public health and safety'.<sup>154</sup>

Furthermore, a significant attempt to establish a global balanced framework between human rights and environmental protection and enterprises activities was achieved in 2003 by the United Nations.<sup>155</sup> It is noteworthy that this attempt was carried out by the former UN Sub-Commission on the Promotion and Protection of Human Rights. It should be recalled here that the former Sub-Commission was made up of a group of highly qualified independent experts. The *UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* address both transnational and national enterprises. Other business enterprise means any business entity, regardless of the international or domestic nature of activities or legal form used to establish the entity.<sup>156</sup> They are norms elaborated within an interstate organisation especially mandated, *inter alia*, to create international norms. States have participated in the law-making process of these norms that reflect the view of States.

It should also be recalled that States possess under international law the so-called full normative power. Hence, the United Nations Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights might become compulsory if they are incorporated into a formal treaty or most probably if they become the evidence of a general practice accepted as law. In this case, there is no such code of conduct from which a weak and vague social duty could arise. The UN Norms seem to reflect an emergent human rights responsibility upon private corporations, transnational companies and other businesses. Consequently, the UN Norms might contribute to clarify the distinction between corporate social responsibility and corporate human rights responsibility.

149 See OECD Watch, 'Five Years On: A Review of the OECD Guidelines and National Contact Points' (*SOMO*, 2005) 43. 'OECD Watch's September 2005 report [...] concluded that almost invariably the NCPs' final statements were skewed to protect companies rather than to draw a clear distinction between acceptable and unacceptable corporate conduct.' OECD Watch, 'The Model National Contact Point (MNCP): Proposals for improving and harmonizing the procedures of the National Contact Points for the OECD Guidelines for Multinational Enterprises' (*OECD Watch*, 2007) 5; see LC Backer, 'Rights and Accountability in Development (Raid) V Das Air and Global Witness V Afrimex: Small Steps toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations' (2009) 10 *Melb J Intl L* 258.

150 'As a global mechanism to improve the operations of multinational enterprises and contribute to a reduction in conflicts on social, environmental and human rights issues, experience with the Guidelines over the past five years demonstrates they are simply inadequate and deficient. Moreover, without the threat of effective sanctions, there is little incentive for companies to ensure that their operations are in compliance with the Guidelines.' OECD Watch (n 149) 45; see UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie; Business and human rights: mapping international standards of responsibility and accountability for corporate acts' (19 February 2007) UN Doc A/HRC/4/35, para 50; OECD Watch, 'Model National Contact Point' (*OECD Watch*, September 2007) 24 & fn 2 <[http://www.transparency.de/fileadmin/pdfs/intern/Corporate\\_Accountability/1\\_The\\_Model\\_European\\_National\\_Contact\\_Point.pdf](http://www.transparency.de/fileadmin/pdfs/intern/Corporate_Accountability/1_The_Model_European_National_Contact_Point.pdf)> accessed 27 June 2011.

151 OECD Watch, 'A Tool for Responsible Business Conduct' (n 139).

152 Enterprises should 'carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.' OECD 'Guidelines for Multinational Enterprises; Recommendations for Responsible Business Conduct in a Global Context' (*OECD* 2011) 29; see OECD 'Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas' (*OECD* 2011) 13. 'Due diligence is a dynamic process whereby individuals and entities discharge their responsibilities with reference to a given standard. One such standard is that of respecting human rights, entailing that the due diligence of individuals and entities is to mitigate the risk of their infringing on the human rights of others.' UNSC 'Final report of the Group of Experts on the Democratic Republic of the Congo' (29 November 2010) UN Doc S/2010/596, para 305; UNSC Res 1952 (29 November 2010) UN Doc S/RES1952, para 7.

153 See 'New OECD guidelines to protect human rights and social development' (*OECD* 25 May 2011) <[http://www.oecd.org/document/19/0,3746,en\\_21571361\\_44315115\\_48029523\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/19/0,3746,en_21571361_44315115_48029523_1_1_1_1,00.html)> accessed 27 June 2011.

154 'II. General Policies. A. Enterprises should: 2. Respect the internationally recognised human rights of those affected by their activities; IV. Human Rights. Enterprises should [...] 1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved; VI. Environment: Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.' OECD (n 152).

155 'The Norms represent a further significant step by the international community to involve companies in international standard setting.' Hillemanns (n 121) 1065.

156 UNCHR 'Norms on the responsibilities' (n 9) 20.

Weissbrodt emphasised that the *Norms on the Responsibility of Transnational Corporations and other business enterprises* have at least five special features. Firstly, the main human rights duty-bearer is the State; secondly, the norms apply to all kinds of private business corporations. Indeed, 'the Norms apply not only to TNCs, but also to national companies and local businesses, in that each will be responsible according to its respective sphere of activity and influence. This approach balances the need to address the power and responsibilities of TNCs, and to level the playing field of competition for all businesses, while not being too burdensome on very small companies.'<sup>157</sup> Thirdly, the Norms enclose a very broad and comprehensive approach to human rights. Fourthly, the Norms are not legally binding but entail a special value. Indeed, the Norms are similar to many other UN declarations, principles, guidelines, and standards that interpret existing law and summarise international practice.

In fact, the Norms have more legitimacy as mere corporate code of conducts since they are the result of a UN-authorized, public, participatory and consultative process. This is why one could qualify them as 'authoritative recommendations' to underline their normative power.<sup>158</sup> Eventually, of course, the Norms might be considered what international legal scholars call 'soft law' and might also provide the basis for drafting a treaty on corporate human rights responsibility.<sup>159</sup> The Norms might even be the reflection of existing customary law or engender new rules of customary character. Even 'the Norms and their explanatory commentaries can be regarded as an authoritative interpretation of the Universal Declaration of Human Rights (1948). Though the Universal Declaration addresses primarily nation-States as the main bearer of human rights obligations, it specifically mentions that 'every individual and every organ of society...shall strive...to promote respect for these rights and freedoms'. Accordingly, this postulate is valid for private businesses likewise.'<sup>160</sup> And fifthly, the Norms include a basic procedure of implementation and references to monitoring mechanisms.

The UN Norms law-making process was opened to discussion and many sectors could actively participate.<sup>161</sup> In this context, the private sector took part in this process. Apparently, the UN Norms faced heavy opposition from international employers' institutions.<sup>162</sup> For instance, the UN Norms had to resist strong lobbying from the International Chamber of Commerce and the International Organization of Employers.<sup>163</sup> It has been affirmed that '[t]he Norms shall be seen as a first attempt to establish an international framework for mandatory standards on Corporate Social Responsibility'.<sup>164</sup>

The 'Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' were adopted by the former Sub-Commission on the Promotion and Protection of Human Rights through a resolution in August 2003.<sup>165</sup> This regulation might well be seen as a form of 'strengthened soft law'.<sup>166</sup> Moreover, this sort of international regulation might have an impact on other classical sources of international law.<sup>167</sup>

157 Weissbrodt (n 123) 294.

158 Karl-Heinz Moder, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights* (Background Paper to the Friedrich Ebert Stiftung (FES) side event at the 60th session of the UN-Commission on Human Rights on 25 March 2005, Geneva) 2.

159 Weissbrodt (n 123) 295.

160 Moder (n 158) 2.

161 Weissbrodt (n 123) 295.

162 Tully (n 60) 50; Weissbrodt (n 123) 296; eg US Council for International Business, 'Talking Points on the draft Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights', 2003.

163 Since its creation in 1920 the International Organisation of Employers (IOE) has been recognised as the only organisation at the international level that represents the interests of business in the labour and social policy fields. Today, it consists of 147 national employer organisations from 140 countries from all over the world (June 2010).

164 Perspectives on the UN Draft Norms, Submitted by Sune Skadegaard Thorsen and Annemarie Meisling for the IBA/AIJA conference on Corporate Social Responsibility in Amsterdam (25-26 June 2004) 2.

165 Weissbrodt (n 123) 293; see UNCHR 'Norms on the responsibilities' (n 9); see UNCHR (Sub-Commission) 'Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) UN Doc E/CN.4/Sub.2/2003/38/Rev.2; UNCHR (Sub-Commission) Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (13 August 2003) Resolution 2003/16, UN Doc E/CN.4/Sub.2/2003/L.11, 52.

166 'The development of authoritative comprehensive "soft law" standards, such as the Norms, in conjunction with the increasing adaptation of more traditional methods of accountability (such as lawsuits) ensures the mainstreaming of human rights as a core issue of relevance to transnational business now and in future years.' J Nolan, 'Human Rights Responsibilities of Transnational Corporations: Developing Uniform Standards' (ANZSIL Conference, Canberra, 18-20 June 2004) 14 <<http://law.anu.edu.au/anzsil/conferences/2004/proceedings/nolan.pdf>> accessed 1 June 2011.

167 'The Norms are the most comprehensive statement of standards and rules relevant to companies in relation to human rights. They reflect the framework of human rights standards enshrined in a variety of treaties and other instruments that already have international agreement and should therefore be used as the main basis to enable companies to fulfil their responsibilities in relation to human rights.' Amnesty International, 'Submission under Decision 2004/116 on the "Responsibilities of Transnational corporations and related business enterprises with regard to Human Rights"' (29 September 2004) AI Ref: UN 411/2004 <<http://www.amnesty.org/en/library/asset/POL34/006/2004/en/6f1bbd13-d57d-11dd-bb24-1fb85fe8fa05/pol340062004en.pdf>> accessed 1 June 2011.

The decision 2004/116 of the former Commission on Human Rights confirmed the importance of the question of the responsibilities of transnational corporations and related business enterprises with regard to human rights and it expressed that the UN Norms contain useful elements and ideas for consideration by the Commission but at the same time pointed out that the aforementioned Norms, as a draft proposal, has no legal standing.<sup>168</sup> And, eventually, the Commission did not approve the Norms and did not take further actions on them. After the 2005 report of the United Nations High Commissioner on Human Rights on Responsibilities of transnational corporations and related business enterprises with regard to human rights, the Commission adopted resolution 2005/69 which requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises.

It may be argued that these Norms constituted a new regulatory form of holding enterprises responsible for the potentially devastating social and environmental effects of their activities and operations, based on existing international standards.<sup>169</sup> According to some authors, these Norms contribute to shaping a new international economic order and a new international legal order.<sup>170</sup> In this context, '[t]he Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights envisages commercial contributions to realizing the right to drinking water.'<sup>171</sup>

What has been the real impact of these Norms since their adoption in 2003? The UN Norms have become a powerful and convincing tool for non-governmental organisations in their human rights and environmental advocacy work.<sup>172</sup> Nevertheless, according to Shaw, the progress has been slow and 'several crucial issues remain to be resolved, including the legal effect, if any, of such guidelines'.<sup>173</sup>

United Nations Norms differ from voluntary initiatives and codes of conduct that have been analysed above, because they were a real attempt at international level to reach international legally binding standards. However, it was not a successful attempt due to the lack of political will and the powerful influence of multinational enterprises and other relevant business actors. Nevertheless, both voluntary codes of conduct and the United Nations Norms share a common goal: the international regulation of corporate activities under human rights lens. The 2003 UN Norms contain a direct imposition of obligations and a direct attribution of responsibility to private corporations such as transnational companies and other businesses. The current growing interest from corporations in voluntary codes of conduct or other voluntary international multi-stakeholder initiatives might be explained because some governments and corporations see as a threat any attempt to create enforceable international environmental and human rights standards concerning transnational enterprises and other businesses.<sup>174</sup>

These international organisations' initiatives are characterised by some main features. Firstly, they are supposed to apply to all sorts of business, either multinational or national enterprises. It has been argued that it is better if an international code of conduct addressed only to big enterprises, ie TNCs/MNCs, by the fact that 'the host country — also if it is a developing country — is always in a stronger position vis-à-vis small and medium-sized enterprises than vis-à-vis multinational groups

168 See UNCHR E/CN.4/DEC/2004/116 (n 10); see UNCHR 'Responsibilities of transnational corporations and related business enterprises with regard to human rights' (16 April 2004) UN Doc E/CN.4/2004/L.73/Rev.1.

169 'Given the evolution of international law and the changes taking place in international society it may, however, be more sensible to look to such sources as additional sources of law.' A Kaczorowska, *Public International Law* (3<sup>rd</sup> edn, Old Bailey Press 2005) 28. 'The most notorious MNC abuses occur in the developing world, including for example complicity in the brutality of host state's police and military, the use of forced and child labour, suppression of rights to freedom of association and speech, violations of rights to cultural and religious practice, infringement of rights to property (including intellectual property), and gross infringements of environmental rights.' D Kinley and S Joseph, 'Multinational Corporations and Human Rights: Questions about their Relationship' (2002) 27 *Alt L J* 7.

170 'It cannot be over-emphasized that the problems arising from controlling and regulating the operations of multi-national corporations occupy an important place in the general complex of the struggle for the establishment of the desired new international economic order. It is generally accepted in today's contemporary economic system that sovereign States have the right to regulate and control the operations of the multinationals'. Ijalaye (n 44) 49.

171 UNCHR (Sub-Commission), 'Situation of Human Rights in Burundi' (2003) UN Doc E/CN.4/RES/2003/16; UNCHR 'Norms on the responsibilities' (n 9) para 12.

172 Weissbrodt (n 123) 297. 'The present Norms document compiles internationally-recognized human rights issues in different domains (labour, health, environment, non-discrimination, safety, etc.). In each of the subject matters, the document goes into more details than other existing standards and initiatives such as the UN Global Compact.' A King, 'The United Nations Human Rights Norms for Business and the UN Global Compact' (2004) <<http://www.kingzollinger.ch/pdf/UN%20Norms.pdf>> accessed 1 June 2011.

173 Shaw (n 3) 250.

174 '[I]t appears that some governments and business federations have recently started to proclaim the virtues of the Guidelines, presumably because of the perceived threat of a binding UN instrument on the human rights responsibilities of transnational companies.' OECD Watch (n 149) 43. 'Most multinational companies automatically oppose calls for enforceable standards of corporate social responsibility. Under growing public scrutiny of their behaviour, many western companies have adopted voluntary codes of business conduct. But for most, the notion of enforceable standards remains anathema.' K Roth, 'Rules on Corporate Ethics could help, not hinder, Multinationals' *Financial Times* (London, 21 June 2005) <<http://www.ft.com/cms/s/0/3dd7ecba-e1fe-11d9-bf18-00000e2511c8.html#axzz1QVEDbgOH>> accessed 27 June 2011.

and for this reason does not need regulations concerning their conduct as much as for the big TNC'.<sup>175</sup> Yet, in fact, there is enough evidence so far that both big and medium enterprises can pollute water and can cause serious damages to the host State's environment. For this reason, the *OECD Guidelines for Multinational Enterprises*, the *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, the *UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* make no distinction; their standards and principles have to be followed by both multinational and domestic enterprises.

Secondly, such initiatives of international organisations establish direct corporate obligations. As Weissbrodt stressed, 'they speak directly to business'.<sup>176</sup> Thirdly, most of them set up mechanisms for interpreting their guidelines.<sup>177</sup> However, even though they are not binding instruments, they 'can be implemented and recognized if backed by adequate follow-up procedure'.<sup>178</sup> Fourthly, they use the expression 'human rights' and they at least partially refer to international human rights and environmental standards. Indeed, although they are not *per se* legally binding international instruments, they refer to existing legal obligations.<sup>179</sup> In fact, they might be interpreted as complementary to the legally binding international human rights instruments. The legally binding human rights instruments are a source of inspiration for international guidelines or declaration of principles.<sup>180</sup>

Fifthly, companies should comply -as States must- with the principle of due diligence in respect of human rights and environmental norms. As it will be analysed below, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises clarified this principle.<sup>181</sup> The Special Representative underlined that there is a 'baseline norm for all companies in all situations' with which businesses must comply, which 'is the corporate responsibility to respect human rights, or, put simply, to not infringe on the rights of others'.<sup>182</sup> This very minimal obligation arises from codes of conduct and guidelines, and from a comparative perspective, it 'has acquired near-universal recognition by all stakeholders'.<sup>183</sup>

#### B. *Towards a New Generation of Regulation: The UN Protect, Respect and Remedy Framework for Business and Human Rights*

In 2005, former Secretary-General Kofi Annan appointed John Ruggie as Special Representative of the UN Secretary General on Business and Human Rights. In 2008, Ruggie presented a threefold normative framework for business and human rights.<sup>184</sup> According to this UN expert, '[t]he framework rests on three pillars: 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 means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access by victims to effective remedy, judicial and non-judicial'.<sup>185</sup> In this

175 G Schetting, 'On the Definition of Transnational Corporations in a UN Code of Conduct' (March/April 1980) *Intereconomics* 76, 80.

176 Weissbrodt (n 123) 296. There is also no problem 'in the fact that the obligations are addressed to the enterprises themselves, because in human rights, pollution and various other areas governments may take it on themselves to see that those subject to their jurisdiction abide by standards concerned.' I Brownlie, 'Legal Effects of Codes of Conduct for MNEs: Commentary' in N Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Kluwer Law 1980) 39, 41.

177 Weissbrodt (n 123) 292.

178 Horn (n 176) 53.

179 '[I]t can be possible that one instrument, which it is not legally binding, in fact it contains and simply declares existing standards or refer to already existing legal obligations. Thus one can say that this instrument, although outside the law itself, deals with an area already subject to legal regulation and therefore has significance as a declaratory effect.' Brownlie (n 176) 41. 'CSR can be of particular use in situations where national law is weak. Here CSR, underpinned by internationally endorsed principles elaborated by the Declaration on Fundamental Principles and Rights at Work, Universal Declaration of Human Rights and the Rio Declaration on Environment and Development, can allow a company to respond correctly and act appropriately.' IOE, 'Corporate Social Responsibility' (*IOE*, 2003) 2 <[http://www.ioe-emp.org/fileadmin/user\\_upload/documents\\_pdf/papers/position\\_papers/english/pos\\_2003march\\_csr.pdf](http://www.ioe-emp.org/fileadmin/user_upload/documents_pdf/papers/position_papers/english/pos_2003march_csr.pdf)> accessed 30 September 2010.

180 'These Voluntary Guidelines have taken into account relevant international instruments, in particular those instruments in which the progressive realization of the right of everyone to an adequate standard of living, including adequate food, is enshrined.' Food and Agriculture Organization, 'Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security' (127th Session of the FAO Council, November 2004) 3.

181 See UNHRC 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 April 2009) UN Doc A/HRC/11/13, para 50.

182 *ibid* para 46.

183 Cf *ibid* paras 46-48.

184 See UNHRC, 'Protect, Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises John Ruggie' (7 April 2008) UN Doc A/HRC/8/5.

185 See 'Remarks at OECD Investment Committee; Professor John G. Ruggie Special Representative of the UN Secretary-General for Business and Human Rights' (4 October 2010) <<http://www.reports-and-materials.org/Ruggie-remarks-to-OECD-Investment-Committee-4-Oct-2010.pdf>> accessed 30 September 2010; ME van Yurick, J Schönsteiner and R Steward, *Derechos Humanos en el Dialogo Social entre Comunidades y Empresas* (Santiago 2011) 16.

context, as far as the first pillar is concerned, Ruggie affirmed that ‘one important step for States in fulfilling their duty to protect against corporate-related human rights abuses is to avoid unduly and unwittingly constraining their human rights policy freedom when they pursue other policy objectives.’<sup>186</sup> Moreover, Catarina de Albuquerque emphasised that ‘[s]tates must not limit their regulatory and policy space and must safeguard the ability to protect human rights.’<sup>187</sup> On the other hand, regarding the second principle, the corporate responsibility to respect reflects the basic expectation of the society and means ‘to do no harm’. And, ‘doing no harm’ is not merely a passive responsibility for firms but may entail positive steps.<sup>188</sup> It may be assumed that this threefold framework is inspired by the tripartite human rights obligations (to respect, protect, and fulfil) that have been constantly reiterated by United Nations treaty bodies and scholars.<sup>189</sup> However, one key difference is that the third pillar of the Ruggie Framework is the obligation to remedy and not the obligation to fulfil. Ruggie’s idea might be to replace the obligation to fulfil with the obligation to remedy. The latter appears to be softer than the former.

Unfortunately, it seems to be that the Special Representative has been using the same language as corporations and stakeholders initiatives. It seems that Ruggie has been ‘playing the game’ on the corporation’s field and incorporated into his framework the concept of social expectations. For instance, Ceres organisation released its 2010 Ceres Roadmap to Sustainability, where concerning human rights, it expresses that ‘[s]ociety increasingly expects a company’s obligation to respect human rights to extend beyond direct operations and throughout the complete value chain.’<sup>190</sup>

In 2011, the Special Representative, launched the Guiding Principles on Business and Human Rights which aims to operationalise and implement the threefold framework on transnational corporations and other business enterprises with respect to human rights, environment and labour rights.<sup>191</sup> With this Guiding Principles, the Special Representative has consolidated the process of undermining the United Nations Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The Guiding Principles hold the underlying idea of the social expectations regarding corporations in order to legally determine the corporate conducts.<sup>192</sup> That is one important reason why the Guiding Principles and the whole so-called United Nations Protect, Respect and Remedy Framework are currently still subjected to strong criticism by some scholars and many civil society organisations.<sup>193</sup>

Following the launching of the Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, the Human Rights Council endorsed in 2011 Ruggie’s proposal by Resolution 17/4.<sup>194</sup> In the same resolution of 16 June 2011, the Human Rights Council decided to establish a new special procedure: The Working Group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts.<sup>195</sup> The Human Rights Council also established as a subsidiary body a Forum on Business and Human

186 UNHRC, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises; John Ruggie; Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework’ (9 April 2010) UN Doc UN A/HRC/14/27, para 25.

187 UNHRC, ‘Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque’ (29 June 2010) UN Doc A/HRC/15/31, para 35.

188 See ‘Presentation of the work of the Special Representative of the UN Secretary General on Business and Human Rights to the 7th Inter-Committee meeting of the Human Rights Treaty Bodies. Background Note, prepared for UN Special Representative on business & human rights John Ruggie’ (Geneva, 24 June 2008) 2.

189 For instance, the General Comment N°15 states: ‘The right to water, like any human right, imposes three types of obligations on States parties: obligations to respect, obligations to protect and obligations to fulfil.’ UNCESCR, ‘General Comment N°15’ (n 26) para 20.

190 See Ceres ‘Roadmap to Sustainability’ (n 111) 52.

191 UNHRC ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (21 March 2011) UN Doc A/HRC/17/31; UNHRC ‘Piloting principles for effective company/stakeholder grievance mechanisms: A report of lessons learned; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (24 May 2011) UN Doc A/HRC/17/31/Add.1; UNHRC ‘Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (23 May 2011) UN Doc A/HRC/17/31/Add.2; UNHRC ‘Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (25 May 2011) UN Doc A/HRC/17/31/Add.3.

192 ‘It is a basic social expectation that businesses respect the dignity of people they interact with’. John Ruggie, ‘Global Business: To Protect, Respect and Remedy’ (*OECD Observer*, 2011) <[http://www.oecdobserver.org/news/fullstory.php/aid/3377/Global\\_business:\\_To\\_protect,\\_respect\\_and\\_remedy.html](http://www.oecdobserver.org/news/fullstory.php/aid/3377/Global_business:_To_protect,_respect_and_remedy.html)> accessed 10 July 2011.

193 Bilchitz (n 95) 199; see ‘Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights’ (January 2011) <[http://www.escr-net.org/user\\_doc/Joint\\_Civil\\_Society\\_Statement\\_on\\_the\\_draft\\_Guiding\\_Principles\\_on\\_Business\\_and\\_Human\\_Rights.pdf](http://www.escr-net.org/user_doc/Joint_Civil_Society_Statement_on_the_draft_Guiding_Principles_on_Business_and_Human_Rights.pdf)> accessed 10 July 2011.

194 UNHRC Res 17/4 (16 June 2011) UN Doc A/HRC/RES/17/4, para 1.

195 *ibid* para 6. Working Group Members: Mr Michael Addo; Ms Alexandra Guaqueta; Ms Margaret Jungk; Mr Puva Selvanathan (Chair); Mr Pavel Sulyandziga. The Working Group members formally took up their roles as of 1 November 2011.

Rights under the guidance of the Working Group.<sup>196</sup> A year later, the UN Office of the High Commissioner on Human Rights further elaborated a thoroughly Interpretative Guide of the Corporate Responsibility to Respect Human Rights.<sup>197</sup>

### C. *An Attempt to Conceptualise International Corporate Human Rights Responsibility*

International intergovernmental organisations have been adopting regulatory regimes addressing the business sector in order to promote relevant and recognised international human rights and environmental standards.<sup>198</sup> These international regulations cannot be identified with CSR. They are not issued by companies and their final aim might be to establish a set of binding human rights and environmental rules, targeting private companies and businesses, and to set up independent monitoring mechanisms.

Direct corporate human rights responsibility can be found under public international law in some non binding human rights instruments.<sup>199</sup> Indeed, there are legally binding international instruments which consider even legal persons responsible under international law.<sup>200</sup> Examples include, the Convention for the Prevention of Pollution of the Sea by Oil (1954),<sup>201</sup> the Paris Convention on Third Party Liability in the Field of Nuclear Energy (1960),<sup>202</sup> the Vienna Convention on Civil Liability for Nuclear Damage (1963),<sup>203</sup> the Protocol of 1992 to Amend The International Convention on Civil Liability for Oil Pollution Damage,<sup>204</sup> the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment,<sup>205</sup> and The Global Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.<sup>206</sup> These treaties impose direct international obligations and responsibility on persons both natural and legal.<sup>207</sup> The latter without mentioning those instruments that refer to direct individual criminal responsibility under international law.<sup>208</sup>

The United Nations Committee on Economic, Social and Cultural Rights ('CESCR') emphasised a direct corporate responsibility in the sphere of human rights, by affirming through an authoritative interpretation that 'while only States are parties to the Covenant and are thus ultimately accountable for compliance with it, [...] the private business sector have responsibilities in the realization of the right.'<sup>209</sup> That is particularly relevant as this statement has been issued in the sphere of economic, social and cultural rights.<sup>210</sup>

More specifically in the field of the right to water and sanitation, according to the CESCR, the core content of this right

196 *ibid* para 12.

197 UN OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretative Guide' (2012) HR/PUB/12/02.

198 Weissbrodt (n 123) 292; 'Tripartite Declaration' (n 134) para 6; OECD 'Guidelines for Multinational Enterprises' (1976) 15 ILM 967. The OECD updated these Guidelines in 2000. OECD 'Guidelines for Multinational Enterprises, Revision 2000' (2000) <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>> accessed 30 September 2010; Liberti (n 30) 238; Carbone (n 45) 35.

199 'Urges States and encourages all sectors of society to empower women and girls who are victims of racism, racial discrimination, xenophobia and related intolerance, so that they can fully exercise their rights in all spheres of public and private life, and to ensure the full, equal and effective participation of women in decision-making at all levels, in particular in the design, implementation and evaluation of policies and measures which affect their lives.' 'Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance' (Durban 31 August - 8 September 2001) UN Doc A/CONF.189/12, para 53.

200 'Several environmental treaties have taken a direct approach and made TNCs liable for their environmental delicts.' Scanlon (n 121) 23.

201 See International Convention for the Prevention of Pollution of the Sea by Oil, 1954 (London, 12 May 1954) imposing penalties for violations against offending ships.

202 See Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960, as amended by the Additional Protocol of 28<sup>th</sup> January 1964 and by the Protocol of 16<sup>th</sup> November 1982 imposing liability on operators of nuclear installations.

203 The Vienna Convention on Civil Liability for Nuclear Damage (adopted 21 May 1963) imposing liability on operators of nuclear installations. It was amended by The Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage (adopted 8-12 September 1997). Further, it was complemented by The Convention on Supplementary Compensation for Nuclear Damage (adopted 12 September 1997).

204 See Protocol of 1992 to Amend The International Convention on Civil Liability for Oil Pollution Damage 29 November 1969 (London, 27 November 1992); See International Council on Human Rights Policy (n 31) 57.

205 The 'polluter pays' principle is also imposed on legal persons in the Council of Europe's Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (adopted 21 June 1993, not entered into force) arts 2 (5), (6). This Convention has not yet been ratified by enough States to come into force.

206 Global Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted March 1989, entered into force May 1992). This states that such traffic is criminal (art 4(3)) and requires States to outlaw it in national laws (art 9(5)). 'Persons' are defined as any natural or legal person (art 2(14)).

207 'States create the international human rights law that can confer rights and obligations on individuals or companies.' International Council on Human Rights Policy (n 31) 57.

208 See Rome Statute of the International Criminal Court (adopted 17 July 1998) UN Doc A/CONF.183/9.

209 See UNCESCR, 'General Comment 12, "The right to adequate food (art. 11)"' (12 May 1999) UN Doc E/C.12/1999/5, para 20; see UNCESCR, 'General Comment 14, "The right to the highest attainable standard of health (art. 12)"' (11 August 2000) UN Doc E/C.12/2000/4, para 42.

210 See Quito Declaration on the Enforcement and Realization of Economic, Social and Cultural Rights in Latin America and the Caribbean (24 July 1998) art 17.

obliges particularly States, and other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical.<sup>211</sup> While it seems to be referring to international institutions, it might be argued that private corporations should cooperate with States to fulfil the right to water and sanitation.<sup>212</sup>

Furthermore, from a legal perspective, it may be argued that companies and businesses are obliged to comply with human rights norms and standards, as everyone else. That seems to be a straightforward consequence of an international rule of law. The International Bill of Human Rights, namely, the Universal Declaration of Human Rights (1948) and both International Covenants on Human Rights (1966) are at the very basis of the international rule of law. The preamble of the Universal Declaration proclaims the instrument itself as a ‘common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms’ and article 28 of the Universal Declaration sets forth that ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.’ Concerning precisely the Universal Declaration on Human Rights, Henkin affirmed that ‘[e]very individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.’<sup>213</sup> Additionally, the 1998 UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms recognises in its preamble ‘the responsibility of individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels.’<sup>214</sup> In this context, Paust emphasised that companies ‘have never been granted immunity under any known treaty or customary law with respect to violations of treaty-based or customary international law.’<sup>215</sup> Moreover, Ratner and Vazquez agreed that there is no theoretical or conceptual obstacle in international law to recognise legal duties on companies and businesses.<sup>216</sup>

Additionally, the very existence of the mandate of the Special Representative of the Secretary-General on Human Rights and Business might confirm the possibility of human rights violations by all sizes and types of private corporations. In this line, the former Commission on Human Rights, recalling its decision on the responsibilities of transnational corporations and related business enterprises with regard to human rights, requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises, *inter alia*, with the mandate ‘[t]o identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights.’<sup>217</sup>

However, John Ruggie did not extensively develop in his reports the debate on corporate international responsibility for human rights violations or abuses. The promotion of the UN Framework (respect, protect and remedy) may implicitly recognise the fact that private corporations enjoy international legal subjectivity and that their actions and omissions have an impact on the enjoyment of individuals’ human rights.<sup>218</sup> The most relevant concept of Ruggie’s framework is that corporations, either transnational or other businesses, have indeed international responsibilities concerning human rights violations, including the more precise aspect of international liability. Finally, Ruggie’s Guiding Principles on Business and Human Rights mainly address transnational corporations and other businesses that might be a useful tool to argue that international law creates direct international corporate responsibility concerning the infringement of human rights.<sup>219</sup> It may be argued that the Guidelines would facilitate more accurate discussions about corporate human rights violations rather than abuses.<sup>220</sup> On the other hand, legally speaking, public international law does not have a voluntary character: legal obligation

211 UNCESCR, ‘General Comment N°15’ (n 26) para 38.

212 Riedel (n 26) 603.

213 Henkin (n 98) 25.

214 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (adopted 9 December 1998) UNGA Res 53/144.

215 Paust (n 52) 803; see *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 88 (EDNY 2005).

216 ‘If states and international organizations can accept rights and duties of corporations in some areas, there is no theoretical bar to recognizing duties more broadly, including duties in the human rights area.’ SR Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 Yale L J 443, 488. ‘International law imposes no conceptual obstacle to an agreement among states to impose obligations directly on private parties.’ Vazquez (n 43) 930.

217 UNCHR Res 2005/69 (2005) UN Doc E/CN.4/RES/2005/69, para 1.

218 See UNHRC ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie; Protect, Respect and Remedy: a Framework for Business and Human Rights’ (7 April 2008) UN Doc A/HRC/8/5.

219 UNHRC ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31.

220 ‘The guidelines hold both governments and companies accountable for all human rights violations especially in conflict zones where the worst abuses have taken place as in the infamous diamond mines of the DRC (Democratic Republic of Congo)’. Pamela Taylor, ‘Transnationals Accept Global Human Rights Guidelines’ (2011) The Global Journal <<http://www.theglobaljournal.net/article/view/122/>> accessed 25 June 2011.

means binding obligation. And if international law grants rights and remedies to private corporations, there is no legal reason to refuse imposing obligations upon them. Maybe there are political reasons that might explain this refusal.

## V. Final Remarks

There is an increasing and worldwide concern on water scarcity. As a natural resource, water is commonly exploited by the private sector. At the heart of this issue is the relationship between the legitimate human and environmental public interest and the business interest. The human right to water should put a fair equilibrium between them.

States remain the main entities responsible in international human rights law but it seems to be that they are not the only ones. It might be observed a growing trend to recognise private corporations' responsibilities under international human rights law. A humanitarian legal order with the human being at the heart of it should be headed for a human rights approach complemented with the victim's approach. Corporate social responsibility has increasingly been addressed at the international level, especially within the United Nations. It can be argued that there has been an evolution of the concept of corporate social responsibility over the last two decades. Despite this evolution, there is still an ongoing debate on human rights abuses and/or violations concerning private corporations. This debate undoubtedly shows the urgent need for progress on legal thinking in order to develop a new conceptual framework on who can commit a human rights abuse and/or violation.

Parallel to the increasing promotion of corporate social responsibility by private companies, international organisations, especially the UN, have led various initiatives that directly focus on the effect of corporate activities on human rights and environment. These international initiatives are explicitly based on international environmental and human rights standards. And from a legal perspective, this evolution clearly marks a turning point. That is why some authors and an increasing number of civil society organisations have been arguing the need to address direct international corporate human rights responsibility. Direct international responsibility refers to companies' responsibility for human rights abuses and/or violations. It is commonly observed that private companies are active in infringing human rights.

Although still underdeveloped and facing businesses' opposition and to a large extent States' resistance, it may be argued that international human rights law tends to shape a certain type of direct corporate human rights responsibility. International law is dynamic and evolving like all legal order. The business commitment, through its self-regulatory regimes concerning human rights and environmental standards, is obviously a step forward, but this situation appears to be still insufficient, in the light of human rights and environmental standards.

The United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights seems to disclose new trends. Yet, theoretically, there is no conceptual justification to oppose against direct corporate human rights responsibility, but perhaps political and ideological reasons may justify this opposition. States and the international community as a whole could create corporate international obligations since they have already recognised corporate rights under international investment law. In our view, that is just a matter of willingness at both the domestic and international political decision-making levels.

To advocate for direct international corporate human rights responsibility does not mean undermining the States human right responsibility under international human rights law. In the authors view both types of international responsibility are not contradictory but complementary

Why should business be allowed to hide behind a corporate façade to avoid human rights legal responsibility? Yet, some internationally legally binding instruments but also jurisdictional and quasi-jurisdictional decisions have already admitted companies' obligations to respect human rights. In other words, there is no conceptual obstacle to hold enterprises internationally responsible for violations and/or abuses of the human right to water, but regulation, state practice and *opinio juris* are still urgently needed. Therefore, at the start of the twenty-first century, we can legitimately argue that international human rights law aims at better regulating the effects of corporate activities on human rights, by leaving behind the 'soft concept' of corporate social responsibility. The notion of direct international corporate human rights responsibility might be a useful tool in this endeavour. ■