

**IN THE MATTER OF the United Nations Human Rights
Council Resolution 7/22 on the Issue of Human Rights Obligations
Related to Access to Safe Drinking Water and Sanitation**

Submissions of Ingenieria sin Fronteras Catalunya and
Council of Canadians Blue Planet Project



The following submissions are presented in response to the request for stakeholder views concerning private sector participation in the provision of water and sanitation services. Pursuant to Human Rights Council Resolution 7/22, the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Ms. Catarina de Albuquerque, has been mandated:

to advance the work by undertaking a study, in cooperation with and reflecting the views of Governments and relevant United Nations bodies, and in further cooperation with the private sector, local authorities, national human rights institutions, civil society organizations and academic institutions, on the further clarification of the content of human rights obligations, including non-discrimination obligations, in relation to access to safe drinking water and sanitation.

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PREFACE

We wish to thank the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Ms. Catarina de Albuquerque, for providing the opportunity to submit our views on the issue of private sector participation.

The submissions provide a broad overview of key issues concerning the role of the private sector in water and sanitation services and the right to water. We emphasize the importance of holding the private sector accountable for human rights violations. However, it is with great reluctance that we examine the role of the private sector in water and sanitation services.

As will be explored, privatization in all its forms and the commercialization of water and sanitation services has had devastating affects on peoples' access to water, the environment and human health. The current human rights framework promotes the privatization of water by treating water as an economic good. We firmly believe that treating water as an economic good is incompatible with the view that water is a human right, public good and part of the commons.

Although recommendations are made in these submissions to ensure that the private sector respects human rights obligations, these recommendations and a strong regulatory framework should only be implemented until alternatives to privatization models are established. Although a strong regulatory framework is imperative for private sector participation, it is even more critical for states to develop or maintain public management of water and sanitation services that guarantees adequate access to quality water and sanitation services.

INTRODUCTION

In the last fifty years, regions around world have experienced economic globalization of an unparalleled scale. The expansion of multinational corporations (hereinafter MNCs) from industrialized countries into countries of the South is one of the complex processes of globalization. Proponents of economic globalization promote foreign investment and private sector participation (hereinafter PSP)¹ as solutions for countries to improve infrastructure, access resources and develop their comparative advantage. In return, MNCs gain opportunities to expand their corporations, access territories rich with natural resources and operate with lower costs of production.

The growth in the numbers and sizes of MNCs is staggering. In 2008, out of 200 world economies, 131 or 66% were multinational corporations.² The astounding wealth of MNCs and their connections within governments enable them to influence local and national laws as well as trade and other international policies. In almost all water privatization cases, communities complained of closed-door meetings between the private sector and the local government. Corporate influence on national governments has shaped laws on water policies, health care and other issues affecting the public. Corporate partnerships with the United Nations (hereinafter the UN) have resulted in criticisms by many members of civil society.³ The World Water Council, which organizes the triennial World Water Forum - with the 5th Forum held in 2009 in Istanbul, Turkey - influences water policies at local, national and international levels through the forum as well as in UN consultations. Loïc Fauchon, who is the president of the World Water Council, is also the president of Groupe des Eaux de

¹ Private sector participation can include multinational corporations, domestic companies, local vendors, user associations and community-based organizations. However, this submission mainly focuses on multinational corporations and domestic companies. We also note that the division between public and private water and sanitation management is becoming increasingly blurred. In some cases, although water management remains under public agencies, the agencies are adopting commercialization models that promote cost recovery among other business principles. The commercialization of water by public authorities has similar effects to privatization of water. See David Hall and Emanuele Lobina, "Water in Europe," Public Services International Research Unit, (2008).

² This figure is based on 186 countries' GDP (Source: World Bank, October 2009) and the total revenue of the 500 largest multinational corporations (Source: Fortune Magazine May 5, 2008).

³ Maude Barlow, Blue Covenant, Toronto: McClelland & Stewart Ltd., (2007) 43-45; Richard Girard, "The Corporate Stranglehold over the United Nations: How Big Business Already Wields Significant power over the UN Water Agenda," Polaris Institute, (2009); David Lewitt, "Who runs the UN? A half-century of Corporate Influence," The Alliance for Democracy, (2000) <<http://www.globalpolicy.org/component/content/article/225/32239.html>>.

Marseille. The business industry comprises 36% of Council's membership.⁴ Civil society has criticized the Council and the forums for promoting privatization policies and for being dominated by the private sector.⁵

These submissions explore critical issues on the right to water, state responsibility and MNC accountability for human rights abuses. Some important questions include many raised by the Independent Expert. In this submission, we consider some of those and raise a few others:

- What should the regulatory framework put into place by host States⁶ provide for?
- Which obligations do home and host States of MNCs bear in the context of private sector participation in the provision of water and sanitation services?
- What roles and responsibilities should regional and international organizations have in the regulatory framework?
- What are the responsibilities of the private sector bear when participating in the provision of water and sanitation services?
- Which obligations and responsibilities do (or should) international financial institutions (hereinafter IFIs), regional banks and donor organizations bear when developing countries' Poverty Reduction Strategy Papers and providing funding for water and sanitation services?
- Apart from regulation, what additional measures, structures and institutions are necessary?
- What guidelines should states and MNCs follow when trade agreements or policies conflict with human rights obligations in the context of private sector participation in the provision of water and sanitation services? Who should develop and enforce these guidelines?

Part I summarize key issues concerning private sector participation and water privatization. It also examines a sample of case studies that raise important considerations for states when developing regulatory frameworks for ensuring that the private sector respects human rights in the context of water and sanitation. The

⁴ World Water Council, "Politics Gets Into Water World Water Council 2006-2009." (2010). Note: In the "World Water Council Biennial Report 2004-2005," the business industry comprised 41% of the Council's membership.

⁵ Sonia Giovannina Vani, "Taking back the World Water Forum Activists Buck the World Water Council's Privatization Trend," *Canadian Perspectives*, (2006); "People's Water Forum Declaration – Istanbul," (2009); Martin Pigeon, David Hall, Emanuele Lobina, Philippe Terhorst and Emma Lui, "Controlling the Agenda at the WWF – the Multinationals' Network," *PSI-CEO-PSIR*, (2009).

⁶ To be clear, host states are countries in which foreign MNCs operate. Home states are countries from which MNCs originate or in which they are incorporated.

case studies also highlight significant challenges for communities harmed by MNCs who are seeking redress.

Part II begins by exploring state obligations in upholding human rights. The reports of Louise Arbour, former High Commissioner for Human Rights, on state compliance with international human rights instruments and human rights obligations concerning water and sanitation are summarized to highlight the importance of the role of the state. It provides an overview of the international progress on ensuring that MNCs respect human rights including voluntary mechanisms, the Alien Tort Claims Act and advances with the right to water. Part II ends with the significant contribution that Professor John Ruggie, as Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, has made in promoting human rights in business.

Part III explores the barriers that communities face in seeking redress for human rights abuses. The barriers include: lack of resources and delayed legal proceedings in host states, inability for communities to make complaints in MNCs home countries, variations and inconsistencies in different countries' resources and laws, MNCs lack of international legal personality and the corporate veil.

We view water as a human right and believe that privatizing water creates inherent challenges to upholding the right to water. We believe that water is a human right, a public good and part of the commons (a shared entity). Multinationals in extraction, mining and other sectors hamper communities' access to water by polluting water sources and extracting exorbitant amounts of water from natural sources. MNCs wield a significant amount of power and can escape legal consequences when they do not respect human rights. Maude Barlow advises, "Corporate control of water in other areas must be confronted as well. That is not to say there is no role for the private sector in finding solutions to the global water crisis. But all private sector activity must come under strict public oversight and government accountability, and all would have to operate with a program whose goals are conservation and water justice."⁷

Although there have been significant advances in human rights and MNC accountability in the last thirty years, further progress and cooperation by states and other members of the international community are needed to enable states to protect human rights. We strongly encourage the Independent Expert to consider ten recommendations or areas for further research. These are imperative to a comprehensive framework that would ensure that states protect and the private sector respect human rights obligations in relation to access to safe drinking water and sanitation.

⁷ Barlow 163.

The ten recommendations and further areas of research, which will be explored in Part IV, include:

1. UN body to lead work on a clear and broad definition of the right to water and include it in the *International Covenant of Social, Cultural and Economic Rights* or to develop a *UN Declaration on the Right to Water*.
2. UN body to lead work on a broader definition of human rights so as to include community / collective rights.
3. Further research and work on how human rights clauses (including clear redress mechanisms) can be included in contracts, Bilateral Investment Treaties and other trade agreements.
4. Export credit and investment insurance agencies should examine how loans can be made conditional upon respect for human rights obligations by MNCs.
5. Home states should assess how national and other legislation can allow foreign nationals to make claims against their MNCs.
6. The international community including the UN should assign international legal personality to MNCs.
7. Regional human rights courts need to revise complaints procedures so that complaints can be made against MNCs concerning the right to water.
8. The UN and other relevant international actors need to develop a clear framework of responsibilities and guidelines for when trade policies, treaties and contracts conflict with human rights obligations. These guidelines should place greater importance on human rights obligations.
9. The UN and other members of the international community should examine the human rights responsibilities of international financial institutions, regional development banks and donor organizations.
10. The UN Human Rights Council or Commission should explore the possibility of taking complaints against MNCs including at an International Court of the Environment.

PART I: THE CASE OF WATER

Although economic development is an important goal for countries, the nature of international trade and the impunity with which MNCs operate transnationally have harmful effects on communities, the environment and human health. The destructive impact that many MNCs have on access to water and the environment is a significant concern for many communities, states and civil society members. The following case studies show how MNCs have operated in ways that hinder communities' access to water, impede environmental sustainability or harm human health. They also highlight important issues in business and human rights, current weaknesses in regulatory frameworks between states and MNCs, barriers to ensuring MNCs respect human rights and challenges to obtaining redress for affected communities.

An Overview of Private Sector Participation and Privatization

Private sector participation has increased significantly in the last two decades. According to the World Bank's Private Participation in Infrastructure Database, in 1991, there were only two water and sewerage projects. The numbers steadily increased with 15 projects in 1995, 39 in 2000, a peak of 81 in 2007 and 65 in 2008. From 1990 to 2008, there were 60 countries with private participation and a total of 662 projects. The region with the largest investment share was East Asia and the Pacific (49%). The type of PSP with the largest investment share was concessions which made up 65% of all projects. 60 projects, or 34% of the total investment, were cancelled or under distress.

The two largest water corporations Suez Environment and Veolia were 97th and 153rd on the 2008 Fortune 500 list, respectively. Suez ranks 159th out of the 300 largest world economies, making it larger than 123 countries' economies.⁸ Veolia ranks 227th out of the 300 largest economies, making it larger than 111 countries' economies.

The transfer of municipal water and sanitation services over to Suez, Veolia, other MNCs or their subsidiaries is at the heart of a complex and heated debate. Proponents of privatization and PSP promote PSP because of increased funding for infrastructure, expansion of water networks, incentives to conserve water, technology transfer, improved efficiency and improved access to the poor.⁹

⁸ This figure is based on 186 countries' GDP (Source: World Bank, October 2009) and the total revenue of the 500 largest multinational corporations (Source: Fortune Magazine May 5, 2008).

⁹ Organization for Economic Co-operation and Development, "Private Sector Participation in Water and Sanitation Infrastructure (Draft) Background Paper for the Regional Roundtable on Strengthening

Part of the debate on PSP includes a debate on whether water should be a human right, what the definition of the right to water should be and the implications of a right to water. Although proponents of water privatization including the private sector, the World Bank and the Organisation for Economic Co-operation and Development (hereinafter the OECD) previously denied the right to water, many have altered their positions by conceding that privatization or PSP can assist in upholding the right to water. The World Water Council and Green Cross International developed a draft convention on the right to water. However, Maude Barlow warns that the convention “places the commercial and human right to water on equal footing, sets the stage for private financing for water services, allows for private management of water utilities and says that water systems should follow market rules.”¹⁰

She notes the stark contrast between “forces and institutions that see water as a commodity, to be put on the open market and sold to the highest bidder, and those who see water as a public trust, a common heritage of people and nature and a fundamental human right.”¹¹ For the global water justice movement, which is comprised of communities, citizen groups, women’s groups, trade unions, farmers, NGOs and aboriginal communities, commodification of water is incompatible with respecting water as a human right.

For some, there is little difference between privatization and PSP. The World Development Movement has noted that “the World Bank uses the term *privatization* only when referring to the complete divestiture of public assets, preferring the less politically loaded terms of *private sector participation* or *public-private partnerships* to describe its more current projects, most of which are leases or management contracts...But these contracts should all be considered privatization because they all involve profits for the private companies and cut-offs to people who cannot pay for their ‘product.’”¹²

Privatization or PSP in water and sanitation services have had devastating effects around the world including price hikes, decrease in water quality, loss of jobs and decreases in salaries.¹³ Further, the private sector “cherry-picks” lucrative markets where profits are guaranteed. A 2006 report by non-governmental organizations (hereinafter NGOs) Public Service International Research Unit and World Development Movement revealed that “the actual contribution of private sector

Investment Climate Assessment and Reform in NEPAD Countries,” Lusaka, Zambia, 27-28 November 2007.

¹⁰ Barlow 171.

¹¹ Barlow 102.

¹² Barlow 39.

¹³ Public Citizen, “Water Privatization Fiascos: Broken Promises and Social Turmoil,” (2003); Food and Water Watch, “Water Privatization Threatens Workers, Consumers and Local Economies,” (2009).

investment in extending water services in developing countries is extremely low. In all of sub-Saharan Africa, South Asia, and East Asia (excluding China), [the authors estimated] that 600, 000 new connections to households have been made as a result of investment by private sector operations in the last 15 years, extending access to around 3 million people.”¹⁴

Naren Prasad, Research Co-ordinator of the United Nations Research Institute on Social Development found that from 1990 to 2003 “Argentina received the largest volume of private investment...followed by the Philippines, Malaysia and Chile. These are not the countries with the lowest level of access, nor are they the poorest of the poor.”¹⁵ Prasad noted, “It is increasingly recognized that foreign capital is only interested in large markets with very limited risk.”¹⁶

The 2003 Report of the High Commissioner for Human Rights on Human Rights, Trade and Investment noted that “there is concern that private sector participation might threaten the goal of basic service provision for all, particularly the poor, and transform water from being an essential life source to primarily an economic good.”¹⁷ Even a World Bank report noted, “It is estimated that some 80 percent of those who have no access to improved sources of drinking water are the rural poor. It is quite unlikely that the private sector would see sufficient financial incentives to work in those rural areas.”¹⁸

Maude Barlow highlights that competitive corporations cannot supply water to the poor and affirms that:

This is and will remain the role of the governments. The ultimate goal of private companies is to make a profit, not fulfill socially responsible objectives such as universal access to water. In countries where most of the population earns less than two dollars a day, notes Sara Grusky of Food and Water Watch, private companies cannot meet shareholder obligations to provide a market rate of return. Nor can they expand their services to a population that cannot pay. The only way that the private sector can stay competitive in such a situation is to have access

¹⁴ Public Services International Research Unit and World Development Movement, “Pipe Dreams: The failure of the private sector to invest in water services in developing countries,” (2006).

¹⁵ Naren Prasad, “Privatisation Results: Private Sector Participation in Water Services After 15 Years,” Development Policy Review 24 (6) (2006): 676.

¹⁶ Prasad 676.

¹⁷ “Report of the High Commissioner for Human Rights - Human Rights, Trade and Investment,” Commission on Human Rights, C/CN.4/Sub.2/3003/9 (2003).

¹⁸ Salman M.A. Salman and Siobhan McInerney-Lankford, “The Human Right to Water: Legal and Policy Dimensions,” Washington, D.C.: International Bank for Reconstruction and Development / The World Bank, (2004): 73-74.

to public subsidies, the very thing they were supposedly brought in to relieve.¹⁹

Despite the OECD's promotion of private sector involvement, they have admitted that "the water and sanitation sector cumulates most of the features that habitually make the cooperation between the public and the private sector difficult."²⁰ These challenges include "high fixed costs coupled with long-term irreversible investments and inelastic demand make it a monopolistic sector where competition is difficult to introduce."²¹ Quality of access has significant impacts on health, gender equality and environment. Further, the local nature requires local management and an integrated water resource approach with consideration for the full water cycle. They also noted that "pricing for the private sector is a complex issue... due to its multiple objectives: cost recovery, economic efficiency, equity and affordability."²² These challenges are revealed in the following case studies. They also show how private sector participation has negatively impacted communities, health and the environment.

Water and Sanitation Services

Water Privatization in Buenos Aires

In 1999, Buenos Aires privatized its water systems by handing over municipal water systems to Azurix Inc. Less than a year after the transfer, the presence of algae in the water raised significant concerns on water quality. The state requested a payment freeze because of poor water quality and later fined the company for outages in certain areas.

Argentina later cancelled the contract with Azurix. Azurix lodged a complaint against Argentina through the International Centre for Settlement of Investment Disputes (hereinafter ICSID) as stipulated by the Bilateral Investment Treaty (hereinafter BIT) between Argentina and the US. ICSID found that Argentina breached the BIT by "failing to accord fair and equitable treatment to Azurix's investment,...[failing] to accord full protection and security to Azurix's investment and taking arbitrary measures that impaired Azurix's use and enjoyment of its investment."²³

Argentina was ordered to pay \$165 million in compensation. The state filed a request for an annulment of the decision. However, in September 2009, ICSID dismissed

¹⁹ Barlow 58.

²⁰ Organization for Economic Co-operation and Development 4.

²¹ Organization for Economic Co-operation and Development 4.

²² Organization for Economic Co-operation and Development 4.

²³ *Azurix Corp. v. The Argentine Republic*, International Centre for Settlement of Investment Disputes, ICSID Case No. ARB/01/12 Annulment Proceeding (2009).

Argentina's request, reaffirmed its decision and ordered Argentina to pay "all expenses incurred by the Centre in connection with the proceeding, including the fees and expenses of the members of the Committee."²⁴ The BIT negotiated between the state and Azurix did not include a human rights component and failed to outline the rights of the state in the context of declining water quality and violations of the right to water. The decision on Argentina's request for annulment cites the *European Convention on Human Rights* but only in reference to the human rights of the company's shareholders, rather than the right of the state to protect human rights and the human rights of citizens or communities.

Through ICSID, MNCs have the ability to file complaints against states for breach of contracts while states have little power to protect the human rights of communities. Maude Barlow describes ICSID as "an arbitration court used by water companies to sue governments who try to break their contracts." She further highlights the 2007 Food and Water Watch Report, *Challenging Corporate Investor Rule*, which found that "nearly 70% of ICSID cases are settled in favor of the investor, with compensation awarded against the country where the investment failed. In at least 7 cases, the investors' revenues exceeded the gross domestic product of the country they were challenging."²⁵ This case highlights several critical barriers to a state's ability to protect human rights and to ensure that MNCs respect human rights. It also reveals significant gaps in existing trade agreements and human rights obligations.

The Water Directive Framework in Catalunya

This case study is an important example of how the lines between public and private entities in water and sanitation services are becoming increasingly blurred. Catalunya's water management is overseen by public entities. However, the business framework under which water is managed creates similar barriers to full privatization of water and sanitation services.

Spain has had a long history of public water management with its first water law enacted in 1879. Further, the 1985 Water Law "[transferred] all continental waters, public or private to the public domain."²⁶ However, the recent restructuring of water management in Spain creates significant barriers to developing a strong regulatory framework protecting the human right to water. In 1999, amendments to the Water Law introduced "a water market, changing former water rights system of the Water Law."²⁷ Although public entities still oversee Catalunya's water management, the

²⁴ *Azurix Corp. v. The Argentine Republic*.

²⁵ Barlow 41.

²⁶ Maunel A. Soler Manuel, "Water Privatization in Spain," *International Journal of Public Administration* 26(3) (2003): 213-246.

²⁷ Maunel A. Soler Manuel, "Water Privatization in Spain," *International Journal of Public Administration* 26(3) (2003): 213-246.

European Water Framework Directive (hereinafter WFD) enables the private sector to enter segments of water management. Water authorities use the private sector to collect taxes and invest in infrastructure and technology. The WFD also adds economic concepts, such as cost recovery, to water (basin) management.²⁸

The aim of the WFD is “guarantee the good status of water systems, in terms of both quantity and quality.”²⁹ It is based on four principles of sustainability including environmental sustainability, rationality in the use of resources, economic sustainability and social sustainability. Water prices are being increased under the aim of cost recovery or the third principle of economic sustainability. The Public Services International Research Unit notes that “prices rise to compensate for reductions in state subsidies, and cost recovery policies are more advanced for households than for industry or agriculture.”³⁰

Catalunya, along with other parts of Spain, are plagued by droughts. The Catalan Water Agency (Agència Catalana de L’Aigua, hereinafter ACA) noted that six drought alerts were issued from 1987-2007 requiring “the adoption of exceptional measures in order to guarantee supply.”³¹ In 2007, the ACA estimated that a total of €1.3 billion in infrastructure investment was needed to improve water quality and ensure availability.³² In total, the Catalan Water Agency estimates that a total €6.4 billion is needed to implement European directives related to water including the Water Framework Directive, the Groundwater Directive, the Nitrates Directive and the Wastewater Treatment Directive.³³

The Catalan Water Agency notes that “Article 9 of the Water Framework Directive states that Member States shall take account of the principle of recovery of the costs of water services.” Water prices do not account for all costs related to water services. The Catalan Water Agency recovers only 67% of its costs.³⁴ In addition to assisting

²⁸ Maunel A. Soler Manuel, “Water Privatization in Spain,” *International Journal of Public Administration* 26(3) (2003): 213-246.

²⁹ Agència Catalana de L’Aigua (Catalan Water Agency), “Water in Catalonia Diagnosis and Proposed Actions,” (2008).

³⁰ David Hall and Emanuele Lobina, “Water in Europe,” *Public Services International Research Unit* (2008)

³¹ Agència Catalana de L’Aigua (Catalan Water Agency), “Water in Catalonia Diagnosis and Proposed Actions,” (2008).

³² Catalan Water Agency (Agència Catalana de L’Aigua), “Notable Infrastructure,” <<http://www.gencat.cat/hidro/eng/infrastructures.html>> 5 April 2010.

³³ Catalan Water Agency (Agència Catalana de L’Aigua), “Water in Catalonia Diagnosis and Proposed Actions,” (2008).

³⁴ Catalan Water Agency (Agència Catalana de L’Aigua), “Water in Catalonia Diagnosis and Proposed Actions,” (2008).

with infrastructure and implementation costs, cost recovery under the WFD also “[provides] adequate incentives for users to use water resources efficiently.”³⁵

In Catalunya, block systems are used to increase water pricing, with higher rates in urban areas.³⁶ However, the price levels within the blocks vary widely throughout Catalunya and are “only used on households while other uses keep a single tariff.”³⁷ Public Services International Research Unit warns that households will be most affected by price increases:

Article 9 also requires cost recovery to be assessed separately for the three main categories of users - households, industries, and agriculture - and so cross-subsidy is implicitly discouraged. Households may in fact be suffering worst. (sic) The EC report on implementation of the directive in 2007 found that there is more attention given to cost recovery from households, and also that the level of cost recovery for households is 70-100%: higher than for business (40-100%) or agriculture (1-100%). The effect could therefore be to increase household prices faster than others (despite the fact that households consume less than 20% of total water abstracted in the EU 15, on average).³⁸

Despite public water management in Catalunya, the business framework by which water is provided prevents the government from establishing a strong regulatory framework that ensures access to water. Full cost recovery under the WFD also denies people the right to water.

Extractive Industries

³⁵ David Hall and Emanuele Lobina, “Water in Europe,” Public Services International Research Unit (2008).

³⁶ Maunel A. Soler Manuel, “Water Privatization in Spain,” *International Journal of Public Administration* 26(3) (2003): 213-246.

³⁷ Maunel A. Soler Manuel, “Water Privatization in Spain,” *International Journal of Public Administration* 26(3) (2003): 213-246.

³⁸ David Hall and Emanuele Lobina, “Water in Europe,” Public Services International Research Unit (2008).

In 2009, seven out of the top ten richest MNCs were oil companies including Royal Dutch Shell, Exxon Mobil, BP, Chevron, Total, ConocoPhillips and Sinopec.³⁹ Oil companies have been implicated in destroying the natural environment in which they operate including polluting water systems to toxic levels.

Various indigenous communities in Ecuador have lodged complaints against US oil companies for oil extraction ventures in the 1960s and 1970s that resulted in hazardous environmental damage. In *Aguinda v. ChevronTexaco*, the failure of Texaco⁴⁰ to properly re-inject toxic by-products back into the earth resulted in “627 open-air, toxic waste pits and hundreds of swamps and streams filled with fudge-like oil muck.”⁴¹ There has been a surge in cancer rates in the region. Young women regularly develop uterine cancer and young children are dying of cancer. Studies have shown that the communities’ water sources “are contaminated at hundreds or even thousands of times levels considered safe by the US Environmental Protection Agency or the European Union.”⁴²

Communities affected by Texaco’s operations faced significant challenges in bringing complaints forward. However, they succeeded in bringing a multi-million dollar lawsuit in Ecuadorian courts. Chevron argued that a series of agreements negotiated in 1994-98, in which its subsidiary TexPet agreed to fund remediation in affected areas, absolves Chevron’s responsibility. In September 2009, Chevron served Ecuador with a notice of arbitration under the UN Commission on International Trade Law (hereinafter UNCITRAL) claiming several breaches in the BIT between the US and Ecuador.

This case reveals how MNCs outside of the water and sanitation sector can negatively impact communities and their access to clean water. It also raises key issues concerning MNCs human rights violations. MNCs often transfer responsibility onto local subsidiaries. As in the case of Azurix and Argentina, Chevron has the right to file a complaint against a state while victims are involved in a 40-year struggle to hold a MNC accountable for grave human rights violations.

Chemical Industries

³⁹ “Fortune 500,” *Fortune Magazine*, May 4, 2009.

⁴⁰ In 2001, Chevron and Texaco amalgamated and became ChevronTexaco. See Steven R. Donziger, “Rainforest Chernobyl: Litigating Indigenous Rights and the Environment in Latin America” (2004) 11 *Human Rights Brief* 1, <<http://www.wcl.american.edu/hrbrief>>. In May 2005, ChevronTexaco changed its name to Chevron. See <<http://www.chevron.com/news/press/2005/2005-05-09.asp>>.

⁴¹ Donziger.

⁴² Donziger.

In 1984, a gas leak at the Union Carbide pesticide plant in Bhopal, India killed more than 7000 people in a few days. Amnesty International and Earth Rights International cite that an ensuing 15,000 – 25,000 died in following years and 100, 000 developed chronic illnesses from the leak.

Communities faced significant hurdles including the inability to hold Union Carbide responsible. In 1986, a U.S. District Court judge decided that the case should be heard in India. Even the Indian government made submissions before the US Courts arguing “that its own judicial system was not the appropriate forum for the claim precisely because the Indian judiciary was incapable of dealing with the issues raised by the tragedy.”⁴³ Despite appeals, the U.S. Court ruled that Union Carbide India Limited (hereinafter UCIL) is “a separate entity, owned, managed and operated exclusively by Indian citizens in India.”⁴⁴ In 1989, a settlement was reached and UCIL agreed to pay \$470 million. Several petitions were submitted requesting that the court overturn the settlement. However, in 1991, the Supreme Court dismissed outstanding petitions, upheld the settlement and closed legal proceedings. Earth Rights International reports that “most survivors have received less than \$500 of Union Carbide’s \$470 million compensation payout, which has been mired by Indian bureaucracy and other delays.”⁴⁵

After the disaster, Union Carbide immediately fled leaving large amounts of toxic chemicals behind. The underground aquifers have been polluted by toxic chemicals, which seeped deep into the surrounding soil. Communities have no other water sources and are forced to drink from contaminated wells and taps. Dominique Lapierre, French author of *Five to Midnight in Bhopal* tried a glass of water and said, “I wanted to reckon the aggressiveness of this pollution by drinking half a glass of the water of one of these wells. My mouth, throat, my tongue instantly got on fire, while my arms and legs suffered an immediate skin rash.”⁴⁶

Subsequent cases have been brought before U.S. courts concerning environmental pollution including *Bano v. Union Carbide, Co.* The case concerns exposure to contaminated water not from the 1984 gas leak but rather from the large amounts of toxic chemicals Union Carbide left behind. The Court dismissed this case stating that the injury occurred too long ago and “the organizations that filed suit were not proper

⁴³ Oxford Pro Bono Publico, “Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse,” (2008): 4.

⁴⁴ Union Carbide Corporation, “Chronology,” Bhopal Information Centre, <<http://www.bhopal.com/chrono.htm>>

⁴⁵ “Bhopal Survivors Win 2004 Goldman Prize,” Earthrights International, (2004) <<http://www.earthrights.org/legal/bhopal-survivors-win-2004-goldman-prize>>.

⁴⁶ “The Poisoning of Bhopal,” The Bhopal Medical Appeal, <<http://www.bhopal.org/index.php?id104>>.

representatives of the victims.”⁴⁷ However, in 2008, the U.S. Court of Appeals for the Second Circuit reinstated the plaintiffs’ claims for the progressive water pollution.

Nevertheless, the first court’s reasoning raises the issue of timeliness in MNCs respect for human rights. As in the case of Ecuador, this case raises the question of what responsibilities MNCs should have for long-term effects of their operations such as water or other environmental pollution.

Further, since DOW Chemical acquired Union Carbide in 2001, there have been demands for remediation against DOW. DOW denies any liability for the past disaster. This also raises the issue of what (human rights) responsibilities MNCs have when taking over existing MNCs.

The case studies summarized in Part I highlight significant barriers to upholding human rights, which will be further examined in Part III. There are significant gaps between trade agreements and human rights obligations that can prevent states from protecting human rights. MNCs can lodge complaints against states that cancel contracts even if a state does so in order to protect human rights. Public water management under a business framework can deny people the right to water. Affected communities, particularly in the global South, face difficulties lodging complaints against MNCs in their country and the home state of MNCs. Part II summarizes advances made in addressing human rights violations, particularly concerning the right to water.

⁴⁷ “Bano v. Union Carbide Case History,” Earthrights International, (2006)
<<http://www.earthrights.org/legal/bano-v-union-carbide-case-history>>.

PART II: OVERVIEW OF ADVANCES TO DATE

Part II examines advances on state responsibilities for human rights, voluntary mechanisms and the right to water including General Comment No. 15, conventions that recognize the right to water and the entrenchment of the right in national constitutions. This part concludes by summarizing the significant contribution Professor John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, has made in promoting human rights in business.

State Responsibility and the Right to Water

In the last two decades, the international community has witnessed the shift from government to governance in the water and sanitation sector. International organizations, the business sector, IFIs and civil society have played a role in developing water policies at local, national, regional and international levels. Although MNCs, IFIs, regional banks and donor organizations should have some human rights responsibilities in the water and sanitation sector, states should ultimately be responsible for protection of human rights. In 2006, the then-High Commissioner for Human Rights, Louise Arbour, released the Report on Indicators for Monitoring Compliance with International Human Rights Instruments. The report outlined “a conceptual and methodological framework for identifying quantitative indicators for monitoring compliances by State parties with international human rights treaties.”⁴⁸ A set of structural, process and outcome indicators are summarized which assist in assessing the progress of states, as primary duty bearers of human rights, in upholding their human rights obligations.

In 2007, Louise Arbour wrote the Report of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water under International Human Rights Instruments. The report presents an overview of the existing obligations of the right to water and sanitation, the scope and content of access to safe drinking water and sanitation and state obligations to this right. She highlights the importance of the state establishing a regulatory framework when allowing the private sector to provide drinking water and sanitation to communities. In fact, she warns that “privatization of water and sanitation services should not take place in the

⁴⁸ “Report on Indicators for Monitoring Compliance with International Human Rights Instruments,” United Nations International Human Rights Instruments, HRI/MC/2006/7 (2006): 2.

absence of a clear and efficient regulatory framework that can maintain sustainable access to safe, sufficient, physically accessible and affordable water and sanitation.”⁴⁹

As part of this regulatory framework, states need to develop and enforce laws that prevent pollution, prevent large-scale extraction from natural water sources and ensure equitable and adequate access to water and sanitation services. States must also develop the capacity to regulate and control water and sanitation service providers. Transnational trade policies and power and resource imbalances in the current global political economy can hinder states’ abilities to be primary duty bearers of human rights. However, some advances have been made with the aim of addressing these hindrances. The remainder of Part II explores some of these advances.

Voluntary Mechanisms for Corporate Social Responsibility

The OECD created the *Guidelines for Multinational Enterprises* in 1976. The Guidelines are voluntary and non-binding. They encourage MNCs to respect principles including environmental protection and non-discrimination. With reviews in 1979, 1982, 1984, 1991, 2000 and an ongoing review due in 2010, the OECD claims that the Guidelines reflect the “rapidly changing the global economy.” The 2000 revisions emphasized the importance of economic, social and environmental considerations in sustainable development. The 2000 edition included all international recognized core labour standards and encouraged MNCs to raise environmental standards and introduce a human rights component. National Points of Contact are responsible for effective implementation of the Guidelines.

The OECD has published several documents to assist states, the private sector and other international actors involved in PSP in water and sanitation services. The *OECD Principles for Private Sector Participation in Infrastructure* and *Private Sector Participation in Water Infrastructure – Checklist for Public Action* both encourage actors to abide by these recommendations in conjunction with *Guidelines for Multinational Enterprises*.

In 1977, the International Labour Organization adopted the *Tripartite Declaration of Principles Concerning Multinational Enterprises* in an attempt to address the harms caused by MNCs in the 1960s and 1970s. The Declaration set out guidelines for

⁴⁹ United Nations Human Rights Council, “Report of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water under International Human Rights Instruments,” A/HRC/6/3 (2007): 23.

MNCs, governments and employers' and workers' organizations in respecting standards in employment, conditions of work and life, and industrial relations.

The *UN Global Compact*, developed in 2000, encourages MNCs to uphold ten human rights, labour, environmental and anti-corruption principles. The Global Compact is based on international law instruments including the *Universal Declaration of Human Rights*, the *International Labour Organization on Fundamental Principles and Rights at Work*, the *Rio Declaration on Environment and Development* and the *United Nations Convention Against Corruption*. In 2007, the *UN Global Compact*, the government of Sweden and many members of the water industry developed the *CEO Water Mandate* as an initiative to address the global water crisis. However, many members of civil society have criticized this initiative for lacking any meaningful progress and have even labelled it as corporate 'greenwashing.'⁵⁰

In 2003, the UN adopted the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. The Norms received support from 194 members of civil society who issued a statement declaring it as "a major step forward in the process of establishing a common global framework for understanding the responsibilities of business enterprises with regard to human rights."⁵¹ The Norms set out MNCs obligations to respect human rights including the right to adequate drinking water and the obligation to operate in accordance with laws, policies and regulations in the context of environmental protection.

Despite the development of these voluntary mechanisms and the support that the Norms received, the non-binding nature of these soft law instruments allow MNCs to escape from legal responsibility. MNCs continue to commit egregious human rights violations. While the 1999 *Code of conduct for European enterprises operating in developing countries* applauds voluntary measures, it warns "voluntary codes of conduct must not be used as instruments for putting multinational enterprises beyond the scope of governmental and judicial scrutiny."⁵² It also stressed the importance of developing "the right legal basis for establishing a European multilateral framework governing companies' operations worldwide."

⁵⁰ "The CEO Water Mandate Fact Sheet," *Polaris Institute*, (2010)
<<http://www.polarisinstitute.org/files/The%20CEO%20Water%20Mandate.pdf>>.

⁵¹ Statement of Support for the *UN Human Rights Norms for Business*, (2004).

⁵² *Code of conduct for European enterprises operating in developing countries*, A4-0508/98 (1999).

The Right to Water at the International Level

In 2002, the UN issued *General Comment No. 15 on the Right to Water*. The UN's Comment draws on the *International Covenant on Economic, Social and Cultural Rights* as the legal basis for the right to water. Article 2 stipulates that "the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses." Articles 13-16 outline principles including non-discrimination and equality. Three obligations are outlined for states in Part III of the General Comment: "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 *fulfill*."

Article 10 states that: "The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies."

While the Comment is a step in the right direction, the Comment has several key weaknesses. The Comment notes that the right to water "clearly falls within the category of guarantees essential for securing an adequate standard of living" and is inextricably related to the right to the highest attainable standard of health and the rights to adequate housing and adequate food. However, the right to water has not been included in the *International Covenant on Economic, Social and Cultural Rights*.

The right to water is explicitly noted in several UN conventions including the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention on the Rights of the Child*, the *Geneva Convention relative to the Treatment of Prisoners of War*, and the *Geneva Convention relative to the Treatment of Civilian Persons in Time of War*. Although the right to water is cited in these Conventions and in reports of international conferences,⁵³ we urge the UN to make the right to water an explicit human right by including it in the *International Covenant on Economic, Social and Cultural Rights* or by developing a UN Declaration on the Right to Water.⁵⁴

⁵³ Report of the United Nations Conference on Environment and Development (1992), Dublin Statement on Water and Sustainable Development (1992), Report of the United Nations International Conference on Population and Development (1994), Recommendation of the Committee of Ministers to Member States on the European Charter on Water Resources (2001) and the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination (2003).

⁵⁴ On World Water Day, March 23, 2010, Bolivian President Evo Morales urged the UN to declare access to safe water a universal human right. See "Bolivia Proposes Declaring Potable Water a Universal Right," *Democracy Now*, (23 March 2010), <http://www.democracynow.org/2010/3/23/headlines/bolivia_proposes_declaring_potable_water_a_universal_right>.

Article 11 of the Comment affirms that “water should be treated as a social and cultural good, and not primarily as an economic good.” The UN’s reference to water as an economic good, however subtle, reinforces the notion that water is also a commodity. As seen in cases around the world, treating water as a commodity is incompatible with respecting water as a right, public trust and part of the commons. As well, the Comment suggests several options in water provision including private provision of water. It does so without outlining clear guidelines for a regulatory framework or for when trade obligations conflict with the right to water.

The Comment stipulates that states have an obligation to respect, protect and fulfill the right. States are given the primary responsibility for upholding this right and are required to “prevent third parties [including corporations] from interfering in any way with the enjoyment of the right to water.” While states should have primary responsibility for protecting human rights, this is problematic in the current global political economy for a couple of reasons. As seen in the case of *Azurix v. the Argentine Republic*, host states have next to no rights to cancel contracts with MNCs. MNCs have rights to lodge complaints against states even if a state cancels a contract in order to protect the right to water. As well, countries of the South have been required by IFIs or regional banks to allow the private sector to manage water and sanitation services, which hinder access to water and lead to human rights violations.

Article 28 encourages states to develop strategies and programmes that include:

- (a) reducing depletion of water resources through unsustainable extraction, diversion and damming; (b) reducing and eliminating contamination of watersheds and water-related eco-systems by substances such as radiation, harmful chemicals and human excreta;
- (b) monitoring water reserves; (d) ensuring that proposed developments do not interfere with access to adequate water;
- (e) assessing the impacts of actions that may impinge upon water availability and natural-ecosystems watersheds, such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity.

While states should have these crucial aims in mind, this article also fails to reflect the current nature of international trade. Countries of the South that enter into contracts with MNCs have few rights to uphold human rights and environmental standards because of BITs and other trade agreements place the investment rights of MNCs over human rights obligations. We urge the UN to include the right to water as a distinct right in *International Covenant on Economic, Social and Cultural Rights* or develop a Declaration on the Right to Water that reflects the reality of the global political economy, refrain from defining the right to water as an economic right and

to develop guidelines for when trade policies or agreements conflict with human rights obligations.

In 2005, Special Rapporteur, El Hadji Guissé, released the report *Realization of the Right to Drinking Water and Sanitation*. The report outlined what the right to water should look like. He called for “a regulatory system for private and public water and sanitation service providers that require them to provide physical, affordable and equal access to safe, acceptable and sufficient water and sanitation and includes mechanisms to ensure genuine public participation, independent monitoring and compliance with regulations.” He also states that people “should have access to administrative or judicial procedures for the making of complaints about acts or omissions committed by persons or public or private organizations in contravention of the right to water and sanitation.”

The Right to Water in National Constitutions

The right to water has also been entrenched in some States’ constitutions. In October 2004, Uruguay became the first country in the world to vote on the right to water. Nearly two-thirds of Uruguayans voted to entrench the right to piped water and sanitation in their constitution. Their constitution also stipulates that “public services of water supply for human consumption will be served exclusively and directly by state legal persons” thereby making privatization and PSP illegal in Uruguay.⁵⁵

After the apartheid, Nelson Mandela amended South Africa’s constitution to include the right to water. However, the constitution does not stipulate how the right should be upheld. With pressure from the World Bank, local governments have transferred their water systems to the private sector. Privatization in a small community called Ngwelezane resulted in cut-offs when the poor could not afford the price of water. People were forced to drink from the dirty lake of Emshulutuzi, which led to the worst cholera outbreak in recent decades.

In the Phiri case, residents of a poor neighbourhood in Johannesburg, South Africa filed a case against the corporations for installing prepaid water meters and for the inconsistency with which water was cut off. Water was not cut off for businesses and governments who did not pay. The lower court ruled that the basic minimum should be raised to 50 litres per person per day and declared meters unconstitutional. The Supreme Court of Appeal’s ruling lowered the basic personal amount to 42 litres per person per day. Although the Court maintained that pre-paid meters were unlawful, it gave the city a two-year grace period to rid the city of them. On a further appeal, the

⁵⁵ Maude Barlow, “Victory in Uruguay,” *Blue Planet Project* (2004), <<http://www.blueplanetproject.net/Movement/Uruguay.html>>.

Court unanimously reinstated the 25 litres per person per day amount and declared pre-paid metres lawful. So, although South Africa has entrenched the right to water in its constitution, PSP is lawful despite the disastrous results of past privatization cases.

In 2005, Belgium adopted a resolution that included access to safe water as a human right in its constitution. In 2008, the Netherlands announced that it would recognize the right to water in its constitution and work towards improving access to water for the poor. In 2009, after a battle with the Columbian government, Columbians celebrated victory of a referendum vote that entrenched the right to water in its constitution.

The number of countries entrenching the right to water in their constitutions is slowly but steadily increasing. We encourage states to follow suit in order to protect water as a human right, public trust and as part of the commons.

Alien Tort Claims Act

In the last thirty years, many foreigners have begun using the *Alien Tort Claims Act* (hereinafter ATCA) to hold MNCs liable for human rights violations. ATCA was first created in 1789 to address the issue of piracy and to provide non-US citizens with the ability to sue entities that had violated “the laws of nations or a treaty of the United States.”⁵⁶ However, ATCA was rarely used. It was not until 1980 with the *Filartiga v. Pena-Irala* case that ATCA was revived. In *Filartiga v. Pena-Irala*, a Paraguayan family made a claim against an ex-Paraguayan police officer who was living in Brooklyn, New York. The family claimed that their son, Joelito Filartiga, was tortured to death by the police officer. Originally, a district court rejected the claim that a violation of the laws of nations had not occurred. When appealed, the Second Circuit reversed the decision stating that US courts have jurisdiction even though “foreign plaintiffs [were] suing a foreign defendant for a foreign act.”⁵⁷

Shortly after this case, other court decisions reaffirmed that “ATCA not only provides jurisdiction, but also authorizes plaintiffs to base their substantive claims on international law norms.”⁵⁸

However, judges have been sceptical in using ATCA because they are inexperienced with ATCA claims and call into question their ability to hear transnational claims. Claims are only generally accepted when they involve complaints of serious human

⁵⁶ Richard Herz, “Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment,” 40 *Virginia Journal of International Law*, (2000): 552.

⁵⁷ Herz 148.

⁵⁸ Herz 552.

rights abuses.⁵⁹ Courts have dismissed cases under the doctrine of *forum non-conveniens* when they believe there is a “more convenient forum” as was the case in *Aguinda v. Texaco, Inc.*

In June 2004, in its ruling of *Sosa v. Alvarez-Machain*, the US Supreme Court limited the use of ATCA to a “modest number of cases involving clear international law violations” without providing a specific definition.⁶⁰ Since this decision, various US senators have attempted to refine ATCA using the *Alien Tort Statutes Reform Act* (bill S. 1874). The bill was retracted because of fervent protests by human rights advocates who claimed that the bill further restricts the number and types of cases heard under ATCA. However, organizations such as the National Foreign Trade Council and other corporate lobby groups are attempting to further limit the use of ATCA.⁶¹

Water Tribunals

The Latin American Water Tribunal (Tribunal Latinoamericano del Agua, hereinafter the TLA) was founded in 1998 and has its headquarters in Costa Rica. It has held hearings in San Jose, Costa Rica (2000 and 2004), Mexico City (2006), Guadalajara (2007) and Guatemala (2008). It was created to address the failure of states to uphold norms and rules for the protection of water. The TLA bases its work on principles of environmental justices and on four main guidelines: justice for alternative to the prevailing crisis of legality, ecological security, education and awareness for the adequate water systems protection, and water security and fair government for water.⁶²

The Istanbul Water Tribunal (hereinafter IWT) was held on March 10-11 and March 14, 2009, prior to the 5th World Water Forum. The IWT aimed to assist in resolving water-related conflicts such as pollution of waters, construction of dams, privatization of water and sanitation services and lack of access to potable water. The IWT highlighted the inability of current legal frameworks in addressing these critical problems.

⁵⁹ **Error! Main Document Only.**“EarthRights Legal Manual, Volume 1: Litigation,” EarthRights International, (2003) <<http://www.earthrights.org>>.

⁶⁰ *Sosa v. Alvarez-Machain* 542 U.S. 692 at 723 (S. Ct. 2004).

⁶¹ “Defend ACTA,” Earthrights International, < <http://www.earthrights.org/campaigns/defend-atca>>.

⁶² Latin American Water Tribunal, < http://www.tragua.com/index_english.html>.

UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises

In 2005, the UN Commission on Human Rights 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” with the following mandate:

- (a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- (b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
- (c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as “complicity” and “sphere of influence”;
- (d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
- (e) To compile a compendium of best practices of States and transnational corporations and other business enterprises;⁶³

Austrian Professor John Ruggie was appointed to this position with his mandate being renewed in 2008 for an additional three years and expanded in order to operationalize his framework.⁶⁴ Professor Ruggie has conducted extensive work in this area including 14 multi-stakeholder consultations around the world and over two dozen research projects. The framework he outlines in his report *Protect, Respect and Remedy: a Framework for Business and Human Rights* is based on three principles including “the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.”

He notes that companies should apply due diligence in order to know that they are respecting human rights. In the Framework report, he defines due diligence as “a process whereby companies not only ensure compliance with national laws but also

⁶³ “Human Rights Resolution 2005/69, Human Rights and transnational corporations and other business enterprises,” United Nations Commission on Human Rights, (2005).

⁶⁴ “Mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, Resolution 8/7,” United Nations Human Rights Council, (2008).

manage the risk of human rights harm with a view of avoiding it.”⁶⁵ The four core elements of human rights due diligence were outlined in the framework report: having a human rights policy, assessing human rights impacts of company activities, integrating those values and findings into corporate cultures and management systems, and tracking as well as reporting performance.

Ruggie’s Addendum report, *Corporations and Human Rights: a Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, recognizes the right to water and impacts on communities. He notes several pertinent findings on access to water:

- Access to clean water was raised in 20 per cent of cases, where firms allegedly impeded access to clean water or polluted a clean water supply.
- Nearly 50 per cent of direct cases of alleged abuse affected communities. The majority of allegations in this category involved companies’ environmental impacts that were alleged to have negatively affected the health and livelihood of local populations. Corporate impacts on water supplies were raised in almost 40 per cent of direct cases of abuse impacting communities.
- Workers were also reported to have settled in shacks with no access to sewage, electricity or piped water, prompting allegations that the companies impacted the right to adequate housing and raising issues of access to water.
- Moreover, company dormitories were reported to house 8-12 workers in one small room and to have no electrical appliances or ready access to water.

Ruggie’s framework and subsequent work on business and human rights represents a significant advance to holding MNCs responsible for human rights. However, more work is needed on local, national, regional and international levels. Further research is needed on whether the water and sanitation sector requires specific human rights instruments. Professor James Harrison of the University of Warwick said, “It has been demonstrated through existing initiatives that a great degree of specificity is required to deal with the particular human rights problems afflicting each corporate sector or activity.”⁶⁶

⁶⁵ John Ruggie, “Protect, Respect and Remedy: a Framework for Business and Human Rights,” United Nations Human Rights Council, A/HRC/8/5 (2008): 9.

⁶⁶ Harrison, James. “Human Rights and Transnational Corporations: Can More Meaningful International Obligations be Established” To be published in Faundez and Tan (ed.) ‘Human Rights and Trans-national Corporations: Establishing Meaningful Obligations’ in International Law, Economic Globalisation and Developing Countries (Edward Elgar, forthcoming, 2010).

PART III: CHALLENGES TO HOLDING MNCs ACCOUNTABLE

There are many challenges that victims of human rights abuses face when attempting to hold MNCs accountable and obtain redress for harms done. Part III draws the aforementioned challenges together and provides a brief summary of the issues.⁶⁷

As noted in Ruggie's report, *Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework*, and as shown in the case studies, victims face significant barriers when attempting to file complaints in their own countries. A lack of resources in legal systems, corruption and delays make redress difficult. A decision in a community's own country may not address policies of parent MNCs.

Equally, victims can face even greater hurdles in home countries of MNCs. Courts of home countries are often limited to citizens and do not apply to foreign nationals. The laws of home countries do not apply in host countries. Home countries are often reluctant to interfere in another country's affairs. Respect for state sovereignty and the principle of non-intervention can act as a shield for parent MNCs against complaints of violations of human rights.

In an extensive study on the ability of states to address MNC human rights abuses, the Oxford Pro Bono Publico noted that the competitive dynamics of international trade may make host states reluctant to hear cases against MNCs. MNCs may flee the host state if a government requires adherence to (strict) human rights or environmental standards. MNCs are at an advantage, particularly in the global South, because poorer countries are willing to lower or even ignore human rights and environmental laws in order to attract foreign investment. MNCs from industrialized countries do not have to operate with the same respect of human rights in countries of the South as they would in their home countries. Ruggie's Addendum on *Corporations and Human Rights: a Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse* reported that 68% of alleged abuses occurred mostly in countries of the South with 18% in Latin America, 28% in Asia and the Pacific and 22% in Africa. The nature of free trade facilitates MNCs' abilities to evade human rights responsibilities. For this reason, as Ruggie states, there must be concerted efforts by governments in order to prevent a MNC from fleeing one

⁶⁷ For a detailed and country-specific examination of challenges, see Oxford Pro Bono Publico. "Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse," (2008) <<http://www.reports-and-materials.org/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-08.pdf>>.

country and simply relocating to another country with lower human rights or environmental standards.⁶⁸ Further, we encourage members of the international community to examine how the dynamics of international trade, which promotes investment and profit before human rights and environmental standards, contributes to human rights abuses.

In the 2003 Report of the High Commissioner of Human Rights on Human Rights, Trade and Investment, Sergio Vieira de Mello noted, “National, regional and international accountability mechanisms for violations of human rights need strengthening given that the race to attract investment might lead to a “race-to-the-bottom” of environmental and human rights standards. To this end, it is relevant to note the decision of the Commission on Human Rights to consider options for an individual complaints mechanism in relation to violations of economic, social and cultural rights.”

The variation and inconsistency in different countries’ laws and level of resources may act as another barrier to MNCs respect for human rights. Changes in laws to adhere to international standards may be costly for poor countries to implement. For example if countries were to entrench the right to water in their constitutions, some countries may have difficulty providing a free basic personal amount. This may require that a city transfer its water services over to an MNC that may charge people for what would be their free basic personal amount, even if they could not afford it.

The variations in the level of resources among countries act as a barrier to hold MNCs accountable for human rights. A country with inadequate funding for legal processes may have difficulty hearing complaints against MNCs and may mar the process with lengthy delays. Countries with inadequate funding for courts may attract MNCs because they can evade legal responsibility.

Despite MNCs power, wealth and rights, MNCs lack the international legal personality for complaints to be made against them. States are the primary actors in international or transnational law. In regional human rights courts, victims of corporate human rights violations can only lodge complaints against states. While states are considered primary duty bearers, some states may be unwilling to launch complaints against MNCs. Therefore, it is also imperative that victims be able to make complaints against MNCs in regional courts and other redress mechanisms.

⁶⁸ John Ruggie, “Addendum: Corporations and human rights: a survey of the scope and pattern s of alleged corporate-related human rights abuse,” Human Rights Council, (2008).

In his Framework report, Ruggie notes that the fact that “a parent company and its subsidiaries continue to be construed as distinct legal entities” creates a considerable barrier to ensuring MNCs respect human rights.⁶⁹ As the Oxford Pro Bono Publico report notes, having separate legal personality, also known as the corporate veil, allows parent MNCs to escape legal liability. The inability to launch legal proceedings against parent MNCs prevents victims and states from changing corporate policies developed and encouraged by parent companies. It also limits the financial compensation granted to victims since subsidiaries have limited financial resources.

Evidently, communities face significant challenges to obtaining redress for human rights violations cause by MNCs. While the strengthening of states willingness and abilities to uphold human rights is imperative, Part IV explores recommendations and areas for further research, which would assist in states abilities to regulate and control PSP in water and sanitation services.

⁶⁹ Ruggie Framework Report (2008) 5.

PART IV: Recommendations and Areas for Further Research

1. Water as an explicit human right

Although support for the right to water is gaining momentum, a clear definition of the right to water would clarify the parameters of the right. Inclusion of a right to water in the *International Covenant on Economic, Social and Cultural Rights* as a distinct right or a UN Declaration on the Right to Water would increase its importance in the international community. Promotion that MNCs respect human rights would therefore explicitly include the right to water. Although some conventions include it and many reports note it, making the right to water a distinct and recognized right would enable victims to make complaints at regional human rights courts and would strengthen people's abilities to cite it as an explicitly recognized human right.

Although the World Water Council has attempted to define the right to water,⁷⁰ their definition treats water as a commodity, which differs drastically from the global water justice movement's conception of the right to water. The global water justice movement understands water to be part of the global commons, which belongs to everyone. As seen in cases around the world, treating water as a commodity is mutually exclusive to water being a human right and often denies people the right to water.⁷¹ We believe that a definition of right to water and sanitation should include how dams, the bottled water industries and water pollution by various corporate sectors affect the right to water and sanitation. We urge the UN to carefully examine how treating water as a commodity impacts the right to water. As Maude Barlow asserts, "It must be commonly understood that water is not a commercial good, although of course it has economic dimensions, but rather a human right and a public trust."⁷² She quotes Michigan lawyer Jim Olson, "who has been deeply involved in the fight against Nestlé, the point must be "repeated and repeated" that privatization of water is simply incompatible with the nature of water as a commons and therefore, with fundamental human rights."⁷³ We urge the UN to lead work on defining the water as a human right, public trust and as part of the commons.

⁷⁰ Céline Dubreil, "The Right to Water: From Concept to Implementation," World Water Council (2006).

⁷¹ Public Citizen, "Water Privatization Fiascos: Broken Promises and Social Turmoil," (2003); Food and Water Watch, "Water Privatization Threatens Workers, Consumers and Local Economies," (2009).

⁷² Barlow (2006) 164.

⁷³ Barlow (2006) 165.

2. Collective rights versus individual rights

The current understanding of the right to water and human rights in general falls within an individualist, neo-liberal framework. Human rights belong to individuals and complaints are made on an individual basis. However, as seen in *Bano v. Union Carbide* and many other cases, violation of the right to water and sanitation, and water pollution affects whole communities including future generations.

Ruggie recognizes the right to water as one that belongs to and affects communities.⁷⁴ In his Addendum Report Corporations and Human Rights” A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse, he found that “45% of all cases alleged impacts on the rights of communities, making up to 50% of direct cases and 40 per cent of indirect cases in the sample. He also found that “corporate impacts on water supplies were raised in almost 40 per cent of direct cases of abuse impacting communities.”

The Canadian Human Rights Commission has begun debate on collective rights and individual rights in the context of Aboriginal issues.⁷⁵ In the related provision of Bill c. 30 (2008), it outlines that the *Canadian Human Rights Act* is to be “interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly balancing of individual rights and interest against collective rights and interests, to the extent that they are consistent with the principle of gender equality.” We urge the Independent Expert, the UN Human Rights Council, the Office of the High Commissioner of Human Rights and other members of the international community to expand their definition of human rights, particularly the right to water and sanitation, to be conceived of not only as individual rights but also as collective rights.

3. Including human rights in contracts, Bilateral Investment Treaties and other trade agreements

Contracts, Bilateral Investment Treaties (hereinafter BITs) and other trade agreements between MNCs and states should include a human rights and environmental standards component.

Currently in BITs, if a state cancels a contract regardless of the reason, a MNC has the right to bring a complaint against a state under ICSID or UNCITRAL. Although MNCs should have some investment guarantees, further work needs to be done on

⁷⁴ Ruggie Addendum (2008).

⁷⁵ “Expanding Knowledge,” *Canadian Human Rights Commission*, (2005), <http://www.chrc-ccdp.ca/proactive_initiatives/section_67/page4-en.asp>.

whether these investment guarantees should trump human rights and environmental standards. We believe that in order to fulfil their duties of protecting human rights, states should have the right to cancel contracts when human rights and environmental standards violated.

In the *Code of Conduct for European enterprises operating in developing countries* adopted by European Parliament in 1999, the Code encourages states to include “human rights clauses in trade agreements with third countries outside Europe.” It also “strongly recommends that...the European Union not only contribute to establishing the legitimate rights of multinational enterprises, but also their duties - with due regard to the present minimum applicable international standards - in the field of environment, labour and human rights...[and be] incorporated in such an agreement.”

In Ruggie’s report *Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework*, he points to the Norwegian Draft Model Agreement which addresses concerns about BITs. The draft model “strives to ‘ensure that the State’s right to make legitimate regulations of the actions of investors is not restricted by an investment agreement.’”⁷⁶ He notes that “the right to regulate must be balanced against the investors’ wish for predictability, legal safeguards, minimum requirements regarding the actions of the State and compensation in the event of expropriation.”⁷⁷ Ruggie recognized that “a majority of the host Government agreements with non-OECD countries did have provisions to insulate investors from compliance with new environmental and social laws or facilitated compensation for compliance; the most sweeping stabilization provisions were found in Sub-Saharan Africa, where 7 of the 11 host Government agreements specified exemptions from or compensation for the effect of all new laws for the duration of the project, irrespective of their relevance to protecting human rights or any other public interest.”⁷⁸

4. Export Credit Agencies or Investment Insurance Agencies and Human Rights

Export credit or investment insurance agencies (hereinafter ECAs) provide MNCs with loans, insurance and risk protection. In Ruggie’s Framework report, he suggests that “on policy grounds alone, a strong case can be made that ECAs, representing not only commercial interests but also the broader public interest, should require clients to perform adequate due diligence on their potential human rights impacts. This would

⁷⁶ John Ruggie, “Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework,” *United Nations Human Rights Council*, A/HRC/11/13 (2009): 11.

⁷⁷ Ruggie (2009) 11.

⁷⁸ Ruggie (2009) 11.

enable ECAs to flag up where serious human rights concerns would require greater oversight - and possibly indicate where State support should not proceed or continue.”⁷⁹ Lending or guarantee contracts should be made conditional upon respect for human rights and environmental standards.

ECA-Watch, Halifax Initiative Coalition and ESCR-Net prepared a report entitled, *The Legal Obligations with Respect to Human Rights and Export Credit Agencies*. The report stated, “The need to focus attention on ECAs and human rights is underscored by the significant contribution that ECAs make to international trade and investment flows.”⁸⁰ In a meeting between John Ruggie and Global Witness on home states and human rights violations, participants concluded that “Export Credit Agencies require adequate human rights due diligence before providing loans to companies operating in conflict zones” and that they should “ensure that investments comply with human rights standards.”⁸¹ We encourage ECAs to examine how human rights and environmental standards can be incorporated into their contracts with MNCs.

5. Making complaints in home states of MNCs

As shown in the case studies and in Part III, victims face significant challenges when making complaints against MNCs in their own countries (the host state). They include insufficient resources in court systems, lengthy delays, the inability to change corporate policies of the parent company and limited financial resources of the subsidiary for financial compensation.

Although victims may also face barriers in making complaints in home countries of MNCs including legal costs, language barriers and lack of understanding of foreign court systems, legal proceedings in home countries can change policies of parent companies and increase financial compensation for victims.

Based on Ruggie’s Framework report, the Ministry of Economic Affairs of the Netherlands conducted the Study into the Legal Liability of Dutch Parent Companies for Subsidiaries’ Involvement in Violations of Fundamental, Internationally Recognised Rights. The study examined the ability of court systems in the Netherlands to hear complaints from foreign nationals. It found that there were “no national or international examples of legislation providing for explicit liability

⁷⁹ Ruggie Framework (2008) 12.

⁸⁰ Sara L. Seck, “*The Legal Obligations with Respect to Human Rights and Export Credit Agencies*,” *ECA-Watch, Halifax Initiative Coalition and ESCR-Net*, (2006).

⁸¹ “Business & Human Rights in Conflict Zones: The Role of Home States Summary report of Consultation by SRSB and Global Witness,” Berlin (2007) < <http://www.reports-and-materials.org/Ruggie-Global-Witness-Berlin-report-5-Nov-2007.pdf>>: 2-3.

applicable to companies for the harmful effects on fundamental internationally recognized rights of the actions of their foreign subsidiaries or suppliers.”⁸² When determining which law to apply, the study recommended a “tried and test procedure” including determining whether the court has jurisdiction over the claim, determining what law is applicable (national law or the law of the foreign country) and “assess[ing] the claim and facts underlying the claim.”⁸³ The study also examined the matter of liability for failing supervision. It argued that although a person cannot theoretically be held responsible for the actions of others, “in case law – in the Netherlands and elsewhere in Europe – it has been assumed that a parent company may have a duty to care vis-à-vis the injured parties.”⁸⁴

Stemming from Ruggie’s Framework, the European Commission is also working on a study to examine how European states can hear claims from nationals of countries in which their subsidiaries operate.

There is a misconception that states do not have the power to regulate MNC activities overseas. However in Ruggie’s Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework, he states, “Current guidance from international human rights bodies suggests that States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis, and that an overall test of reasonableness is met.”⁸⁵ He also notes that “there are also strong policy reasons for home States to encourage their companies to respect rights abroad...and it can provide much-needed support to host States that lack the capacity to implement fully an effective regulatory environment on their own.”⁸⁶

In a meeting between Ruggie and Global Witness, participants concluded that “home states should play a bigger role in addressing business and human rights concerns in conflict areas.”⁸⁷ In the Oxford Pro Bono Publico’s study of MNCs human rights abuses and jurisdictions abilities to hear claims, it concluded that “states do, in fact,

⁸² A.G. Castermans and J.A. van der Weide, “Summary of Study into the Legal Liability of Dutch Parent Companies for Subsidiaries’ Involvement in Violations of Fundamental, International recognised Rights,” Ministry of Economic Affairs of Netherlands, (2010).

⁸³ Castermans and van der Weide 2.

⁸⁴ Castermans and van der Weide 2.

⁸⁵ Ruggie (2009) 7.

⁸⁶ Ruggie (2009) 7-8.

⁸⁷ “Business & Human Rights in Conflict Zones: The Role of Home States Summary report of Consultation by SRSG and Global Witness,” Berlin (2007) < <http://www.reports-and-materials.org/Ruggie-Global-Witness-Berlin-report-5-Nov-2007.pdf>>: 2-3.

have jurisdictional competency to regulate activities of their own corporations operating abroad; but they have generally refrained from doing so.”⁸⁸

We also urge states to examine their human rights commissions as forums for hearing complaints against parent MNCs. In his report on the Realization of the Right to Drinking Water and Sanitation, Guissé encourages states to “[establish or authorize] independent institutions such as human rights commissions or regulatory agencies to carry out monitoring activities in a manner that ensures full transparency and accountability.”⁸⁹

6. Assign International Legal Personality to MNCs

MNCs wield an immense amount of power. They have the right to make complaints against states for breach of contract, despite the reason for the breach, yet they can evade responsibility for human rights and environmental standards in foreign countries. Traditional international law only recognizes states as international actors.

However, we believe that this traditional view fails to reflect the complexity and transnational nature of international relations and the current global economy. International lawyers and members of academia have extensively explored this issue.⁹⁰ With international legal personality, complaints at regional human rights courts can be made against MNCs who violate international human rights standards as explored below. We urge the UN and other international actors to assign MNCs international legal personality so that regional and other human rights institutions and courts can ensure that they respect human rights where states fail to or do not have the capacity to do so.

⁸⁸ Oxford Pro Bono Publico 5.

⁸⁹ El Hadji Guissé, “Realization of the right to drinking water and sanitation,” Commission on Human Rights, E/CN.4/Sub.2/2005/25 (2005) 9.

⁹⁰ David Kinley and Junko Tadaki, “From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law”(2004) 44 Virginia Journal of International Law, 936; Sarah Joseph, “Multinational Enterprises and Human Rights,” (1999) XLVI Netherlands International Law Review, 174; Karsten Nowrot, “New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities” (Paper presented to ESIL Research Forum on International Law: Contemporary Issues Graduate Institute of International Studies, May 2005).

7. Regional Human Rights Courts to Take Complaints against MNCs

Regional human rights courts only hear complaints against states. None of the regional courts currently take complaints against MNCs. Although states should be the primary duty bearers for human rights, we urge the regional human rights courts to hear complaints against MNCs from individuals, communities and non-governmental organizations and to expand their rights to include the right to water and sanitation.

The European Court of Human Rights (hereinafter ECHR) hears cases concerning civil and political rights from the European Convention.⁹¹ Decisions are binding and have resulted in changes to government legislation. However, victims can only lodge complaints against member states. The right to health and the right to water are not justiciable at the ECHR.

The Inter-American Commission on Human Rights receives petitions from victims, investigates claims of human rights abuses and can forward cases to the Inter-America Court of Human Rights. The Commission and the Court hear cases pertaining to the *American Declaration of the Rights and Duties of Man* and the *American Convention on Human Rights*. Decisions of the Court are binding. Although Article XI of the Declaration recognizes a right to health, the Declaration does not explicitly recognize the right to water. Individual and NGOs can make complaints but only against member states. However, the Commission does have the power to “study those petitions alleging that human rights violations were committed by state agents.”⁹²

The African Court on Human and Peoples’ Rights (hereinafter the African Court) began its operations in 2006. It hears cases concerning “the interpretation and application of the African Charter on Human and Peoples’ Rights (Charter), the Protocol to the Charter on the Establishment of the African Court on Human and Peoples’ Rights (Court’s Protocol) and any other relevant human rights instruments ratified by States that are party to a case.”⁹³ Decisions of the Court are binding. Although Article 16 of the Charter recognizes a right to health, it does not explicitly recognize a right to water. The Court does not have a statute of limitations, which is important in cases of water pollution. Cases can be brought forward by the African

⁹¹ “Basic Information on Procedures,” European Court of Human Rights
<<http://www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/Procedure+before+the+Court/>>.

⁹² “What is the IACHR?” Inter-American Commission on Human Rights,
<<http://www.iachr.org/what.htm>>.

⁹³ “General Information,” African Court on Human and Peoples’ Rights, <<http://www.african-court.org/en/court/mandate/general-information/>>.

Commission on Human and Peoples' Rights, state parties, states whose citizen is the victim, African Intergovernmental Organisation, individuals and NGOs. However, complaints can only be lodged against states.

The Asian Human Rights Commission (AHRC) differs from the aforementioned institutions because it is an independent, non-governmental body. It was created in 1986 by "a prominent group of jurists and human rights activists in Asia" to address the "wide gap between rights enshrined in [national constitutions] and the abject reality that denies people their rights."⁹⁴ The Commission has a number of objectives including monitoring, investigation, advocacy and education pertaining to human rights. The Commission "[assists] organizations and persons in Asia to utilize [UN] agencies for better promotion and protection of human rights in Asia." It promotes the Asian Human Rights Charter. Article 7.1 recognizes the right to clean water.

We urge regional human rights courts and commissions to hear complaints against MNCs and to include the right to water and sanitation in their human rights acts.

8. Development of a clear framework or guidelines for when contracts or trade agreements conflict with human rights obligations

We urge the UN to make a statement that balances human rights and trade obligations in the context of water supply and sanitation. In the 2003 Report of the High Commissioner for Human Rights on Human Rights, Trade and Investment, Sergio Vieira de Mello outlined "that the duty to regulate concentrates on four particular areas in the context of investment liberalization:

- (a) The need to regulate some forms of investment. Investment agreements should retain greater flexibility for States to regulate and control some forms of investment – particularly short-term and volatile investment - that can have negative effects on economic performance and reduce the available resources needed to promote human rights;
- (b) The flexibility to use some performance requirements and other measures. Bans on performance requirements and the application of national treatment provisions should not: reduce States' capacity to use local content requirements in the interests of promoting cultural rights, or reduce States' capacity to introduce special measures such as positive action schemes to promote the human rights of particular individuals or groups;
- (c) The flexibility to withdraw commitments to liberalize investment in light of experience. Getting the right balance between investors' rights and States' rights that promotes the human rights of all takes time and the right balance

⁹⁴ "About AHRC," Asian Human Rights Commission. <<http://www.ahrchk.net/modules68af.html>>.

may vary over time. Liberalization is not a one-track process. States should maintain the flexibility to withdraw commitments to liberalization where experience demonstrates that liberalization has had a negative effect on the enjoyment of human rights;

(d) The flexibility to introduce new regulations to promote and protect human rights. There is mounting concern that tribunals adjudicating investor-to-State disputes are increasingly interpreting expropriation provisions broadly in ways that could threaten States' ability and willingness to introduce new regulations to protect the environment and human rights.⁹⁵

He also recommended:

- Increasing dialogue on human rights and trade. Greater consultation is needed between delegates to the WTO and delegates representing the same country as members or observers at the Commission on Human Rights on the links between human rights and trade and on particular ways to ensure coherence in policy and lawmaking;
- As a possible field of future study, the High Commissioner ad interim suggests that consideration could be given to the development of methodologies for human rights impact assessments of trade and investment rules and policies and the appropriate assistance needed to undertake them.⁹⁶

As mentioned, trade and investment obligations currently take precedence over human rights and environmental standards. This has resulted in a plethora of grave human rights abuses. In particular, we request that the UN:

- outline a state's right to cancel a contract when a MNC pollutes water, charges unaffordable prices for water and sanitation services, disconnects peoples water and sanitation services or extracts amounts of water harmful to surrounding communities, the environment and future generations.

9. Exploring financial institutions responsibility for human rights

IFIs, regional development banks and donor organizations regularly promote PSP. IFIs often make PSP conditional on loans. We believe that if IFIs, regional development banks or donor organizations promote policies (i.e. PSP) that hinder the right to water and sanitation, they should be held responsible for human rights obligations.

⁹⁵ "Report of the High Commissioner for Human Rights - Human Rights, Trade and Investment," 3-4.

⁹⁶ "Report of the High Commissioner for Human Rights - Human Rights, Trade and Investment," 5.

The 1999 *Code of Conduct for European Enterprises Operating in Developing Countries* requires that “all private companies carrying out operations in third countries on behalf of the Union, and financed out of the Commission's budget or the European Development Fund, act in accordance with the Treaty on European Union in respect of fundamental rights, failing which such companies would not be entitled to continue to receive European Union funding, in particular from its instruments for assistance with investment in third countries.”

In Guissé's Report on the Realization of the Right to Drinking Water and Sanitation, he warns that “bilateral and multilateral assistance for the water and sanitation sector ...should not interfere with the realization of human rights and should focus on bringing tangible benefits to those with no basic access to water and sanitation.”⁹⁷ If IFIs, regional banks and donor organizations interfere with the realization of human rights, particularly the right to water, the UN and other members of the international community should examine how these institutions should be held accountable and the appropriate redress for victims.

10. UN Body to accept complaints against MNCs concerning water and sanitation services

We urge the UN to consider designating one of its human rights bodies to accept complaints against MNCs. The aforementioned recommendations would assist in addressing complaints of human rights abuses at national or regional levels. However, in extreme cases where home state courts or regional human rights courts fail, the UN may be an appropriate forum to hear cases of human rights violations by MNCs. In its examination, the UN should explore: what the governing piece of legislation should include, who should fund it and whether it should include mediation, investigation, conciliation, arbitration and monitoring.

The 1999 *Code of conduct for European enterprises operating in developing countries* recommends that the “EU efforts notably go into reviving the UN Commission on TNCs for it to be entrusted with concrete tasks in the context of the monitoring and implementation of Codes, along with the OECD Committee for International Investment and Multinational Enterprises and the ILOs Department for Multinational Enterprises.” We encourage the UN to examine the possibility of designating a UN body not only to monitor and implement codes but also to hear violations of codes.

⁹⁷ Guissé 10.

We encourage the UN to examine the possibility of victims lodging complaints against states and MNCs with the Human Rights Council Complaint Procedure (hereinafter HRCCP). The HRCCP currently addresses “consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms occurring in any part of the world and under any circumstances.”⁹⁸ They will not accept complaints that are “being dealt with by a special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights; or ... The domestic remedies have not been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged.”⁹⁹ We believe the violation of the right to water constitutes “consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms” that, if left unaddressed by states or regional courts, should be investigated by a UN body.

In February 1988, Justice Amedeo Postiglione of the Italian Supreme Court of Cassation founded a committee to explore the possibility of an International Court of the Environment (hereinafter ICE).¹⁰⁰ The International Court of the Environment Foundation has several objectives including the creation of an ICE and “the inclusion of international environmental crimes within the competence of the International Court of the Environment or of the already constituted International Criminal Court.”¹⁰¹

At the 1989 Conference in Lincei, Rome, environmental experts from 30 countries proposed a comprehensive plan for an ICE at the UN level. The ICE would be a forum for states, individuals and NGOs to submit complaints against other states or MNCs concerning environmental damage, which would include water pollution. The complaints would be based on an international convention on environmental rights.¹⁰² The importance of providing individuals with an avenue for legal redress was a key focus in discussing the ICE.

The Draft Statute of the International Environmental Agency and the International Court of the Environment was presented at the 1992 UNCED Conference in Rio de

⁹⁸ UN Human Rights Council Complaint Procedure., <<http://www2.ohchr.org/english/bodies/chr/complaints.htm>>.

⁹⁹ UN Human Rights Council Complaint Procedure, <<http://www2.ohchr.org/english/bodies/chr/complaints.htm>>.

¹⁰⁰ See International Court of the Environment Foundation website for more details, <<http://www.icef-court.org/default.asp>>.

¹⁰¹ “About ICEF,” International Court of the Environment Foundation, <http://www.icef-court.org/base.asp?co_id=15>.

¹⁰² Susan M. Hinde, “The International Environmental Court: Its Broad Jurisdiction as a Possible Fatal Flaw,” 32 Hofstra Law Review, (2003): 730.

Janeiro.¹⁰³ The Draft Statute calls for the creation of an International Environmental Agency and ICE within the United Nations. Article 1 outlines “a fundamental right to the environment and an absolute duty to preserve life on earth for the benefit of present and future generations.” Subsequent articles outline rights to information, participation and legal action as well as a “duty to utilise natural resources with equity and care.” States are the primary duty bearers and “are legally responsible to the entire International Community for acts that cause substantial damage to the environment in their own territory, in that of other States or in areas beyond the limits of national jurisdiction and shall adopt all measures to prevent such damage.” States, individuals, corporations, NGOs and local, regional and international authorities would all be granted standing in the ICE. The Draft Treaty stipulated a role for the UN Security Council to enforce the ICE’s rulings.¹⁹

We encourage the UN to examine the possibility of hearing complaints against MNCs. We also encourage the UN to explore the advantages of creating an International Court of the Environment that would address violations of the right to water including disconnections, water pollution, inadequate access to drinking water and sanitation, unaffordable prices and extracting amounts of water from natural resources that harms communities, the environment and future generations.

¹⁰³ *Draft Statute of the International Environmental Agency and the International Court of the Environment presented at the UNCED Conference in Rio de Janeiro, June 1992* at <http://www.icef-court.org/base.asp?co_id=51>.

¹⁹ *Draft Statute of the International Environmental Agency and the International Court of the Environment presented at the UNCED Conference in Rio de Janeiro.*

Conclusion

We have provided a broad overview of several critical issues pertaining to private sector participation and human rights obligations related to access to safe drinking water and sanitation. These submissions included the key issues in the water privatization debate, case studies related to water, advances concerning state and MNC obligations to human rights, advances concerning the right to water, challenges to MNC accountability and recommendations and areas for further research.

These submissions focused largely on holding the private sector accountable for human rights violations related to water and sanitation. However, we wish to reaffirm our position that privatization and commercialization of water and sanitation services is incompatible with the view that water is a human right, public good and part of the commons. Although the recommendations are imperative to ensuring the protection of human rights and regulation of the private sector, these recommendations and a strong regulatory framework should only be implemented until alternatives to privatization models can be established. The private sector participation in the context of a strong regulatory framework should not replace developing public management of water and sanitation that guarantees adequate access to quality water and sanitation services.