



The CEO Water Mandate

DISCUSSION PAPER

Water and Human Rights: Exploring the Roles and Responsibilities of Business

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Summary

The authors of this paper take the position that access to water is a human right, and explores what it would mean to apply to water the human rights framework developed by the UN Secretary-General's Special Representative for Business and Human Rights, John Ruggie.¹ In particular, the paper posits what would it mean to adhere to Ruggie's "corporate responsibility to respect" principle in the context of access to water and what preventive and proactive due diligence measures businesses have to take to ensure that they meet the responsibility to respect. The discussion paper concludes with a broader assessment of what taking a rights-based approach to water would mean in practical terms for businesses.

Background on the human right to water²

According to a study by the United Nations High Commissioner for Human Rights, a human right to water entitles everyone to access to a sufficient, safe, physically accessible and affordable amount of safe drinking water for personal and domestic uses³. This access should be prioritized over other water uses –notably water for agriculture and industry- so that there is sufficient water available for domestic use, to live a life with dignity, and such access should be non-discriminatory. Water supply beyond that essential use should be accessible to all other users, including agriculture and industry.

A rights-based approach to water means that priority should be given to those who do not have access and requires that individuals and communities have access to information, justice and participation in decision-making processes concerning water-related issues. Several experts have argued that access to free water is a legal entitlement for all humans, and therefore should be prioritized over other uses, including trading water as a commodity, or viewing the delivery of water as a service. Governments must ensure access safe drinking water to people, and also ensure that companies do nothing to infringe on such access. While international law recognizes that states' obligations to fulfill economic, social, and cultural rights depend on available resources, states have core minimum obligations which they must fulfill.

A separate human right to water has yet to be explicitly affirmed in international law, though access to safe drinking water is referred to in a range of international human rights instruments such as the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the recently adopted Convention on the Rights of Persons with Disabilities and International Labor Organization Convention No. 161 of 1985 on Occupational Health Services.

Several UN instruments have *implicitly* referred to access to safe drinking water.⁴ The Universal Declaration of Human Rights of 1948 also contains rights, including *the right to life, the right to*

¹ For more on the Ruggie Framework, see: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

² For more background information, see: http://www.who.int/water_sanitation_health/rtwrev.pdf or <http://www.ceres.org/Document.Doc?id=406>

³ A/HRC/6/3.

⁴ See Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, para. 5(b).

health, the right to food, and the right to an adequate standard of living, all of which require access to clean fresh water to be fulfilled.

Article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) recognizes the right to the highest attainable standard of physical and mental health. The ICESCR's supervisory body, the U.N. Committee on Economic, Social, and Cultural Rights (Committee), is mandated to monitor Member States' implementation of their obligations under the Covenant. In 2000, the Committee interpreted the right to health as inclusive of factors that determine good health, namely *safe drinking water and sufficient sanitation*. And in 2002, the Committee addressed the right to water in its *General Comment 15* as derived from Art.11 (adequate standard of living) and 12 (health) of the ICESCR.⁵

General Comment 15 affirms that: "*The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.*" The Comment added that the right to water 'contains both freedoms and entitlements' – freedoms include the right to maintain access and freedom from contamination, and entitlements include the right to a system that provides equal opportunities for enjoyment of the right to water.

In March 2008, the UN Human Rights Council by its resolution 7/22, decided to appoint an Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation. At its September 2008 session, the Human Rights Council appointed Portuguese lawyer Catarina de Albuquerque as Independent Expert, for a period of three years. She took up her functions⁶ on 1 November 2008.

The international community has increasingly recognized that access to safe drinking water must be considered within a human rights framework, and many Governments have shown support for the notion that access to water is indeed a fundamental human right. Several governments (e.g. South Africa, Uruguay, and Ecuador) have explicitly recognized the right to water, in their constitutions or in national laws, and some businesses (e.g. SUEZ Environnement) have also pledged their commitment to the human right to water in the absence of binding international agreements.

In spite of these developments at the international level, a large proportion of the world's population still does not have access to safe water and sanitation, with States in many regions of the world being

⁵ The Committee publishes its interpretation of the treaty provisions in the form of General Comments. General Comments are considered by most States and organisations to provide authoritative guidance on the interpretation of thematic issues arising from the Covenant, though they are not legally binding on States.

⁶ The Independent Expert is tasked with the following:

- (a) To develop a dialogue with Governments, the relevant United Nations bodies, the private sector, local authorities, national human rights institutions, civil society organizations and academic institutions, to identify, promote and exchange views on best practices related to access to safe drinking water and sanitation, and, in that regard, to prepare a compendium of best practices;
- (b) 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;
- (c) To make recommendations that could help the realization of the Millennium Development Goals, in particular of Goal 7;
- (d) To apply a gender perspective, including through the identification of gender-specific vulnerabilities; and,
- (e) To work in close coordination, while avoiding unnecessary duplication, with other special procedures and subsidiary organs of the Council, relevant United Nations bodies and the treaty bodies, and taking into account the views of other stakeholders, including relevant regional human rights mechanisms, national human rights institutions, civil society organizations and academic institutions.

either unable or unwilling to ensure access to safe water to all. While business has played some role in the area of service delivery it does not have obligations under international human rights law concerning access to water. There are also legitimate questions about business' capacity, expertise, mandate, and authority to provide water to all.

There is a clear need clear for governments, business and civil society to take immediate and - where appropriate - collective action to meet the needs of the world's most vulnerable people to access safe water and sanitation. It is the shared view of this paper's authors that business should operate on the basis that access to safe drinking water is a human right.

Background on John Ruggie's Human Rights Framework⁷

John Ruggie, a Professor of International Affairs at Harvard University's Kennedy School of Government, has been at the center of international exploration and assessment of business' interface with human rights.⁸ In 2005, Ruggie was appointed as the UN Secretary-General's Special Representative for Business and Human Rights, and his mandate included, among other things, that he identify and clarify international standards on the human rights responsibilities of companies and elaborate the role of States in regulating and adjudicating corporate human rights behavior. Since his appointment, Ruggie has consulted widely with stakeholders across the world and conducted various research projects identifying, clarifying, and investigating the key legal and policy dimensions of the role of business in human rights issues.

The culmination of his work as Special Representative to date has been his report to the United Nations Human Rights Council entitled "*Protect, Respect, and Remedy: A Framework for Business and Human Rights*", released in April 2008. The report offers a policy framework that establishes companies' minimum responsibilities in ensuring human rights are realized and provides guidance to businesses, governments, and all other relevant actors. The framework is built around three core components:

1. Governments' **duty to protect** against human rights abuses by third parties, including businesses,
2. Businesses' **responsibility to respect** all human rights,
3. The need for more effective **access to remedies** to people affected by corporate related human rights abuses.

The rationale for the three principles of the framework is the following: The state duty to protect is critical because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business; and access to remedy is necessary, because even the most concerted efforts cannot prevent all abuses. The three

⁷ For more background information, see:

http://www.bsr.org/ClientFiles/BAS/Conference2008/Materials/BSR_Conf2008_In_Conversation_with_John_Ruggie.pdf

<http://www.hks.harvard.edu/m-rcbg/johnruggie/index.html>

<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

⁸ In his previous capacity as Assistant Secretary-General of the United Nations, Ruggie was also fundamental in the establishment of the UN Global Compact, the world's largest corporate citizenship initiative, and continues to provide oversight of the initiative. In addition, he played a key role in the proposal of the Millennium Development Goals (MDGs) to the UN General Assembly.

principles form a complementary whole in that each supports the others in achieving sustainable progress.

The United Nations Human Rights Council welcomed the framework and extended Ruggie's mandate for an additional three years with a view to further "operationalize" it.⁹ The Council also emphasized that corporations have a responsibility to respect human rights. This marked the first time an inter-governmental body has pronounced itself substantially on the human rights responsibilities of business.

Applying Ruggie's Human Rights Framework to Water

State Duty to Protect

The State has a duty to protect the human right to water at all times against corporate acts which interfere with the enjoyment of the right of access to safe drinking water. In practical terms this means a duty to adopt necessary and effective legislative and other measures to secure the right in all its dimensions as outlined above, including securing priority for water provision for personal and domestic use in a non-discriminatory manner which also takes into account the needs of vulnerable and marginalised groups.

Human rights do not dictate a particular form of ownership or management of service delivery of water and leaves it to States to determine the best ways to implement their human rights obligations. The key principles are equality, affordability, physical access, and quality of the water. In particular, States must establish an effective regulatory system which includes transparency, independent monitoring, opportunities for participation for the people, and provide remedies (including imposition of penalties where appropriate) in cases of non-compliance to the terms of contract that deal with the above principles. An implicit dimension of this duty to regulate is that privatization of water services should not take place in the absence of an effective regulatory framework.

The corporate responsibility to respect

Independently of States' duties, the baseline responsibility of companies is to ensure that their activities do not infringe on the enjoyment of the right of access to water. The corporate responsibility to respect applies to all rights, although some may weigh more heavily in particular contexts, and exists even where laws are absent or not enforced. Furthermore, it is also recognized as a social responsibility, by virtually every voluntary business initiative, soft law instruments such as the ILO Tripartite Declaration and the OECD Guidelines, and the UN Global Compact.

Because the responsibility to respect applies to all activities and business relationships of a company, it cannot compensate for human rights harms its activities may have caused by performing good deeds elsewhere. In other words, a company that does not respect the right of access to water in one community where it operates cannot compensate for that failure by having an extensive philanthropic/CSR program elsewhere.

⁹ Human Rights Council resolution 8/7.

To discharge the responsibility to respect requires companies to undertake a due diligence process whereby they become aware of, prevent, and address adverse human rights impacts on an ongoing basis throughout the life of the operation. A basic human rights due diligence process should include adopting a human rights policy, conducting impact assessments, integrating human rights policies throughout the company, and tracking their performance with regard to human rights.

Implications of the right to water for industrial water users

Building on the significant commitment to water stewardship contained in the CEO Water Mandate, all industrial water users are encouraged to ensure their activities have a favorable impact on the right of access to water. However, meeting the baseline responsibility to respect would include the following:

Abiding by national laws or complying with regulations giving priority to water for personal and domestic uses in water management: in those countries where priority in water management is given to water for personal and domestic uses, industries should abide by relevant laws, regulations and policies.

Ensuring efficient use of water: in many countries, governments have not prioritized access to safe-drinking water for personal and domestic use over other uses, nor integrated the right to water in their legislation and policies, and nor set an adequate balance between allowing sufficient water for industry and conserving water resources. Industrial users should ensure – though undertaking a human rights due diligence process which assess the impact of their activities on the right to water - that their activities do not undermine local populations’ access to safe-drinking water.

Ensuring socially and environmentally responsible waste disposal: industrial users should ensure that waste-water and industrial by-products are treated to minimize their impact on communities, aquatic systems, and water sources. Where national standards are not in place or insufficient, industrial users may have recourse to international guidelines, notably the WHO Guidelines for the safe use of wastewater, excreta and grey water.

Taking into account considerations related to the right to water when taking decisions about siting operations and selecting suppliers: as part of their human rights due diligence industries should undertake a human rights impact assessment before setting-up a facility in order to consider its potential impact on access to safe-drinking water by local communities, with a focus on marginalized and vulnerable groups and ensuring access to information, as well as genuine communities’ participation. They should also undertake assessments to ensure that they are not infringing on the enjoyment of the right to water indirectly through key suppliers who may be reducing access to safe-drinking water for local communities.

Working with national, regional and local governments and other stakeholders to ensure that priority in water management is given to water for personal and domestic uses for all: industries should work with the authorities and other stakeholders in order to ensure that water management policies prioritize access to safe-drinking water for personal and domestic uses, in line with the international human rights framework.

Implications for private water providers

Ruggie has indicated that when performing certain public functions, companies may have responsibilities in addition to the responsibility to respect.¹⁰ Water service providers would arguably fall into that category. For private water providers, the corporate responsibility may therefore entail responsibilities beyond respect as a result of the particular function they perform, and include the following:

Abide by the national regulatory framework for the provision of safe-drinking water: private water providers should abide by all laws, regulations, targets and benchmarks (including universal service obligations) applicable to them in this regard. Several private water providers have recognized the right to water.

Extend services to marginalized and vulnerable areas and groups: ensuring that the extension of water networks prioritizes those who do not have access, including within informal settlements and to other marginalized, excluded and vulnerable areas or groups.

Ensure affordability of water services: ensuring the affordability of their water services (connection and delivery costs) and by guaranteeing that cost-recovery objectives do not become a barrier to access to safe drinking water by poor people. Private water providers can contribute to ensuring affordability of water services notably by:

- Regularly monitoring the price of water services and ensuring their affordability and accessibility for the poorest and most vulnerable sectors of society;
- Ensuring that no community, ethnic group, constituencies supporting opposition parties, religious, linguistic, or any other group, or any other section of the population (such as disabled, or those distinct because of gender or sexuality) is excluded from access to the essential services.
- Establishing flexible payment terms, such as phased connection charges, removal of requirements for deposits or grace periods.

Prevent arbitrary disconnections from water services: Integrating considerations related to the ability to pay into disconnection policies and ensuring that where disconnections are carried out, they do not lead to the denial of the minimum essential amount of water for personal and domestic uses. The WHO standard for the minimum supply of water should be used as a benchmark, but it should be noted that the WHO standard is established for emergency assistance, and not for regular domestic use.

Ensure communities' access to information and participation in decision-making processes: private water providers are encouraged to ensure communities' access to information and participation in planning and decision-making processes impacting on their access to safe-drinking water.

¹⁰ A/HRC/8/5, paragraph 24.

Access to remedies

The State has a duty to effectively enforce such regulations and provide an effective remedy for individuals and groups that have been denied the right to water. Even where institutions operate optimally, disputes over the human rights impacts of companies, including as it relates to access to water, is likely to occur.

Non-judicial mechanisms play an important role alongside judicial processes. They may be particularly significant in a country where courts are unable, for whatever reason, to provide adequate and effective access to remedy. Yet they are also important in societies with well-functioning rule of law institutions, where they may provide a more immediate, accessible, affordable, and adaptable point of initial recourse.

State-based, non-judicial mechanisms include agencies with oversight of particular standards (for example, health and safety standards); publicly-funded mediation services, such as those handling labor rights disputes in the UK and South Africa; national human rights institutions; or government-led mechanisms such as the OECD's National Contact Points.

Non-state mechanisms may be linked to industry-based or multi-industry organizations; to multi-stakeholder initiatives ensuring member compliance with standards; to project financiers requiring certain standards of clients involved; or to particular companies or projects. Non-state mechanisms must not undermine the strengthening of state institutions, particularly judicial mechanisms, but can offer additional opportunities for recourse and redress.

Considering a Rights-based Approach to Water Issues

Beyond adhering to the responsibility to respect espoused in the Ruggie framework, there is ample scope for companies to take a more holistic right-based approach to water. Business' responsibilities include operating in ways that do not undermine the state's obligation to respect, protect, and fulfill human rights. Business also has the responsibility to undertake due diligence. The principles that should guide business conduct include transparency, respect for dignity, and inclusiveness.

Some of the key aspects of taking a rights-based approach to access to water and issues related to access to sanitation include:

- Ensuring that the fundamental principle of non-discrimination is upheld, with particular focus on disadvantaged, vulnerable, and marginalized communities.
- Understanding the relationship to the full range of rights contained in the International Bill of Human Rights and that these rights are inter-related and inter-dependent.
- Empowering affected individuals and communities by respecting their right to seek, receive, and impart information, and participation in planning and decision-making.

- Establishing accountability mechanisms so that victims are able to seek effective redress and adequate remedies.