



The CEO Water Mandate

BRINGING A HUMAN RIGHTS LENS TO CORPORATE WATER STEWARDSHIP

Results of Initial Research

August 2012



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Disclaimer

All of the views expressed in this publication are those of the CEO Water Mandate and do not necessarily reflect those of the technical experts or members of the HRWG.

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RESULTS OF INITIAL RESEARCH

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Bringing a Human Rights Lens to Corporate Water Stewardship: Results of Initial Research

A. Introduction

Expectations that business will respect, and in some cases support or help fulfill, internationally recognized human rights have increased over the past decade. Businesses have recognized the importance of effective management systems in responding to these expectations and protecting core resources needed in their own activities. As such, all endorsing companies of the UN Global Compact CEO Water Mandate have agreed to the UN Global Compact's Principles, the first two of which address human rights explicitly. With the unanimous endorsement of the United Nations Guiding Principles on Business and Human Rights ("Guiding Principles") by the UN Human Rights Council in June 2011, business now has an authoritative global reference point to turn to when seeking to understand how to meet their responsibility to respect human rights.

When it comes to the human right to water and sanitation (HRWS), CEO Water Mandate endorsing companies recognized early on that what was then an emerging concept would have important implications for all of the Mandate's six core elements: direct operations, supply chain and watershed management, collective action, public policy, community engagement, and transparency. Mandate endorsers further recognized that this is an evolving and complex area that is often not well understood by businesses and that it could therefore benefit from further exploration. With formal recognition by governments of the human right to water and sanitation in 2010, and the endorsement of the UN Guiding Principles in 2011, Mandate endorsers saw an opportune moment for the development of practical guidance on how businesses can meet their responsibility to respect this right. In particular, there is a perceived need for greater understanding of how companies can align their policies and processes with respect for the HRWS in the context of evolving corporate water stewardship practices.

To meet this need, the Mandate, together with key project partners, will seek to develop practical guidance for businesses on implementing their responsibility to respect the human right to water and sanitation. Recognizing the significant work already undertaken in relation to businesses as water service providers, the guidance will instead focus on businesses that are large-scale water users.

The project will proceed in two phases. The first, exploratory phase involves understanding and elucidating international and national legal trends relating to the HRWS, illustrating some of the current challenges businesses face in respecting this right, as well as the perspectives of potentially affected communities, and lastly identifying areas of potential synergy with companies' existing water stewardship efforts. The second, more substantial phase will incorporate this research into the process of developing robust practical guidance, with significant input from Mandate endorsing companies and expert stakeholders on implementing respect for the HRWS. This in no way implies that businesses can have only negative impacts on human rights – it is well recognized

that businesses can play a significant role in supporting human rights. However, the focus of the UN Guiding Principles is the responsibility to respect rights, and accordingly that will be the main focus of the guidance.

The guidance should assist large-scale water-using companies by providing useful approaches to, and concrete examples of, what respect for the human right to water and sanitation means in practice. The guidance will also help provide pointers on supporting the HRWS, for example by highlighting the ways in which meeting the responsibility to respect can lay the foundation for effective support of this right in the context of broader corporate water stewardship goals.

This paper summarizes the initial research conducted under the first exploratory phase of the project. It does not reflect the likely format or approach of the practical guidance to be developed during the second phase. The remainder of this paper is divided into six sections. Section B outlines key developments in the broader business and human rights field, focused on the endorsement of the UN Guiding Principles. Section C summarizes recent legal and policy developments relating specifically to the HRWS at the international and national levels. Section D draws on significant research in identifying some of the current expectations of stakeholders regarding business-related impacts on water. Section E discusses a number of cases relating to corporate respect for the HRWS drawing on actual corporate practice. Section F discusses some areas of potential difference, and also synergy, between the UN Guiding Principles and current corporate water stewardship practices. Finally, Section G concludes with possible areas for examination during the project's second phase.

The research was conducted and the paper developed by the Pacific Institute¹ and Shift² in close consultation with Oxfam America³ – and with input from almost a dozen technical experts and CEO Water Mandate Human Rights Working Group members who agreed to advise the project team.⁴

¹The Pacific Institute is a 501 (c)(3) nonprofit that conducts interdisciplinary research and partners with stakeholders to produce solutions that advance environmental protection, economic development, and social equity. It serves as the Secretariat for the UN CEO Water Mandate. See

http://pacinst.org/topics/globalization_and_environment/ceo_water_mandate/index.htm

²Shift is a 501(c)(3) nonprofit center on business and human rights practice, staffed by a team that was centrally involved in shaping and writing the UN Guiding Principles on Business and Human Rights and chaired by the former Special Representative of the UN Secretary-General for Business and Human Rights, Professor John Ruggie. See www.shiftproject.org.

³Oxfam America is an international relief and development organization that creates lasting solutions to poverty, hunger, and injustice. Together with individuals and local groups in more than 90 countries, Oxfam saves lives, helps people overcome poverty, and fights for social justice. Oxfam America is one of the 17 affiliates in the international confederation Oxfam.

⁴Lists of the technical experts and CEO Water Mandate Human Rights Working Group Members are included in Annex A. This paper does not represent the views of any of the technical experts or Human Rights Working Group members nor of their organizations.

B. Recent Developments in the Business and Human Rights Field

In June 2011, the UN Human Rights Council unanimously endorsed a set of Guiding Principles for the implementation of the UN “Protect, Respect and Remedy” Framework (described below), making them the authoritative global reference point on business and human rights. They were the product of a six-year process led by the former Special Representative of the UN Secretary-General for Business and Human Rights, Professor John Ruggie of Harvard Kennedy School.

The UN “Protect, Respect and Remedy” Framework

When Ruggie began his mandate in 2005, there was no agreed point of reference for states, business, or civil society on how to prevent and address business-related human rights abuses. Ruggie’s approach was to work to build consensus among stakeholders by holding consultations and conducting and receiving extensive research with and from experts around the world. Out of that process came the “Protect, Respect and Remedy” Framework, which was presented to the UN Human Rights Council in 2008. The Council unanimously welcomed the Framework, marking the first time that a UN intergovernmental body had taken a substantive policy position on this issue. The Council also extended Ruggie’s mandate as Special Representative until 2011 with the task of operationalizing and promoting the UN Framework.

The UN “Protect, Respect and Remedy” Framework rests on three pillars:

1. The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
2. The corporate responsibility to respect human rights, which means to avoid infringing on the rights of others and to address adverse impacts with which a business is involved;
3. The need for greater access by victims to effective remedy, both judicial and non-judicial.

One of the most significant contributions of Ruggie’s work was to clarify the respective obligations and responsibilities of states and business regarding human rights. The Framework’s three pillars are independent of one another but mutually reinforcing and essential: the state duty to protect lies at the core of the international human rights regime; the corporate responsibility to respect is the basic expectation society has of business in relation to human rights; and access to remedy recognizes that even the best efforts cannot prevent every harm.

The UN Guiding Principles on Business and Human Rights and the Corporate Responsibility to Respect Human Rights

The Guiding Principles make clear that companies should respect all internationally recognized human rights – understood at a minimum as including the Universal Declaration of Human Rights; the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights; and the eight core conventions of the International Labor Organisation (which address

child labor, forced labor, non-discrimination, and freedom of association).⁵ Thus the emerging international understanding of the human right to water and sanitation (discussed below in Section C) is captured within the definition of the corporate responsibility to respect under the Guiding Principles.

The corporate responsibility to respect establishes a clear baseline expectation of companies: that they will respect human rights. Companies may, and many do, choose to go beyond this and seek to support rights; but the Guiding Principles make clear that a failure to respect rights cannot be “offset” by efforts to support rights, philanthropic or otherwise. They also clarify that a company’s responsibility flows from its actual and potential impacts arising through its own activities and through its business relationships, not from its “influence” or leverage. However, the concept of leverage becomes a significant factor (though not the only one) in determining what the company can reasonably do to address those impacts.

The Guiding Principles focus on the kinds of policies and processes that are needed in order for any business “to know and to show” that it has done what can reasonably be expected to achieve respect for human rights in practice. They establish a blueprint for how to go about this challenge by setting out six procedural elements that are essential for a company to know and show that it is respecting human rights, four of which are grouped together under the concept of “human rights due diligence.” These elements are:

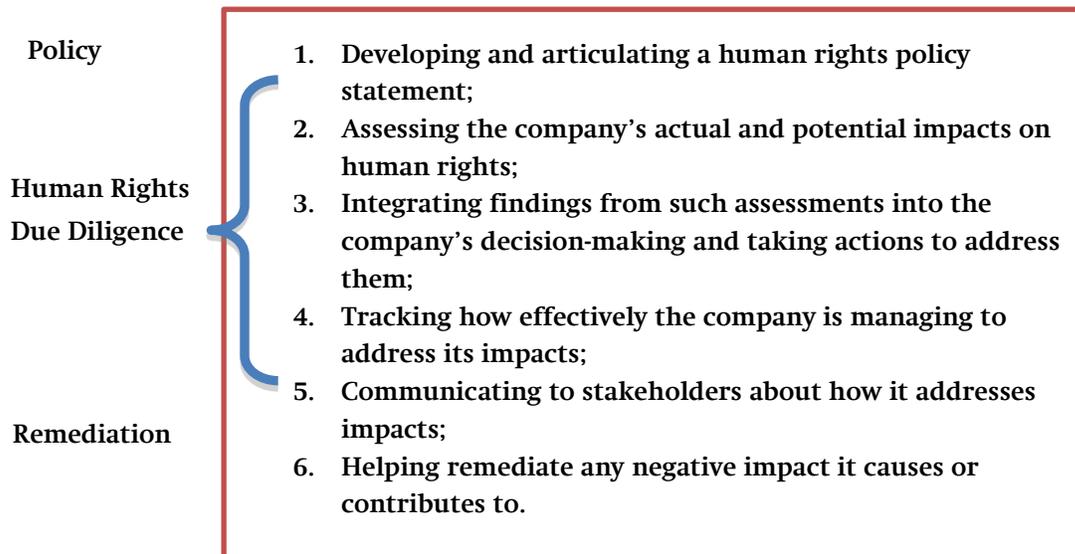


Figure 1. Procedural Elements for Implementing the Corporate Responsibility to Respect Human Rights

⁵ In certain situations, other international human rights standards may also be relevant, for example in situations where the rights of members of potentially vulnerable or marginalized groups may be affected.

The Guiding Principles do not require the re-labeling of everything that companies are already doing as “human rights”; rather, they seek to engage companies in reviewing the effectiveness of their existing policies and processes in preventing, identifying, mitigating, and remediating adverse human rights impacts. The relevance of these elements to companies seeking to meet their responsibility to respect in the context of the HRWS is discussed further below, in particular in Sections E and F.

C. Recent Developments Relating to the Human Right to Water Sanitation at the International and National Levels

This section briefly summarizes research into recent developments in international human rights law, as well as trends in national law and policy in relation to the HRWS, and considers their possible implications for business.

Developments in the Evolution of the Human Right to Water and Sanitation

The research considers over 35 key international sources in-depth, starting with international human rights treaties and UN resolutions, the work of UN human rights treaty bodies and independent human rights experts, as well as declarations and high-level conference outcome documents from the last three decades.⁶ The research identifies areas of consensus and divergence in states’ understanding of the HRWS, as well as relationships between this right and other human rights.

The purpose of the research is not to explore or assert the direct application of international human rights treaties to companies; rather, as the UN Guiding Principles make clear, such instruments are the main reference points to which companies should look for the content of their responsibility to respect human rights.

The research confirms that there has been an evolution in international treaties and their interpretation when it comes to the HRWS.⁷ The right is generally seen as grounded in Article 11 of the International Covenant on Economic, Social and Cultural Rights of 1966 (which sets out the right to an adequate standard of living) and in Article 12 (the right to health).⁸ The 2010 UN General Assembly⁹ and Human Rights Council¹⁰ resolutions on the recognition of the human right to water and sanitation as a distinct right are the latest step in a decades-long process of converging international expectations around the content and implications of this right.

⁶ Annex B contains a list of the sources reviewed.

⁷ See also Institute for Human Rights and Business, “More than a Resource: Water, Business and Human Rights,” 2011.

⁸ See in particular Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) of the Committee on Economic, Social and Cultural Rights on the Right to Water, Official Records of the Economic and Social Council, 2003, Supplement No. 2 (E/2003/22), Annex IV, paras 2, 10-12.

⁹ A/RES/64/292, July 28, 2010.

¹⁰ A/HRC/9, September 24, 2010.

The formal recognition of the human right to water and sanitation in 2010 can broadly be seen as arising from the combination of three factors: (i) an increasing number of laws giving rise to obligations with respect to water and sanitation both at the national and international levels and in specific contexts (such as in the fields of international humanitarian law and environmental law); (ii) a growing awareness of the extent to which human rights, environmental, and development objectives are reliant upon realization of the HRWS for their fulfillment; and (iii) mounting calls for the recognition of the HRWS as a distinct right.

While the debate in the General Assembly indicated that some disagreements remain,¹¹ there appears generally to be broad consensus among states on the content of the right and on the fact that safe and accessible water supplies are closely linked to the realization of a number of other human rights. Some of the main ways in which businesses may impact on the HRWS are set out at the beginning of Section D below.¹²

Developments at the National Level Relating to the Human Right to Water and Sanitation

Over the past two decades, state recognition that freshwater resources are under rising strain has led to more comprehensive water-related legislation. Often, this legislation reflects trends in international water law¹³ or international human rights law, including the recognition of the human right to water and sanitation. While the UN first pillar of the Guiding Principles focuses on states' obligations to protect against human rights harms by business, states' duties under international law include obligations to respect and to fulfill human rights. States are taking a range of measures to meet these in the context of the HRWS.

The project team's research in this area draws on three bodies of work: a recently released sourcebook of national laws and policies relating to water,¹⁴ an analysis of national legislation in

¹¹ While no state opposed the General Assembly resolution, during the debate, some commented on the proposed resolution querying the status and exact contours of the HRWS. However, subsequent public statements by the U.S. for example, indicate further nuancing: see speech by Michael H. Posner, Assistant Secretary of State, Bureau of Democracy, Human Rights and Labor, U.S. Department of State, "The Four Freedoms Turn 70", Washington, D.C., 24 March, 2011, available at <http://www.humanrights.gov/2011/04/20/assistant-secretary-michael-h-posner-the-four-freedoms-turn-70/>.

¹² The work of the UN Special Rapporteur on the human right to safe drinking water and sanitation (formerly the UN Independent Expert on the topic) has developed valuable guidance on the responsibilities of non-state water service providers in line with the UN Guiding Principles, and has helped to further international understanding of the responsibilities of business in relation to the HRWS. See generally

<http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx>.

¹³ For example, see the Berlin Rules, available at

http://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf. The Rules incorporate both environmental and human rights law principles in relation to the protection of water resources. For a more in-depth discussion of the Rules, please see Joseph Dellapenna, "The Berlin Rules on Water Resources: The New Paradigm for International Water Law" (2007).

¹⁴ WASH United, Freshwater Action Network, and Waterlex, *The Human Right to Safe Drinking Water and Sanitation in Law and Policy: A Sourcebook* (March, 2012). The sourcebook provides an overview of national-level legislation adopted to meet the human right to water and sanitation from around 100 countries. An analysis of the sourcebook provided a high-level understanding of general trends in how states were recognizing the HRWS and where, such as whether these were explicit recognitions in Constitutional amendments or other national legislation, or implicitly through interpretations of other rights that may have specific implications for businesses as large water users, as opposed to water service providers (i.e., priority in water use).

countries that have explicitly or implicitly recognized the human right to water and sanitation,¹⁵ and an examination of recent national jurisprudence relating to this right.¹⁶ It does not attempt to assess how effectively national legislation has been implemented and recognizes that the mere existence of legislation does not necessarily result in better outcomes; rather, the purpose is to contextualize the legal developments at the international level outlined in the last section with concrete examples of national action.

Trends in National Recognition of the Human Right to Water and Sanitation

During the past two decades, over 80 states have either explicitly recognized the through constitutional amendments and national legislation or implicitly through interpretations of existing provisions, such as those related to the right to life, the right to a safe environment, and/or the right to health. Countries in Africa and South America have been at the forefront of explicitly recognizing the HRWS and adopting new legislation in this area. Generally speaking, new legislation has been focused on access to safe drinking water, with less recognition being given to the right to sanitation.

For businesses as large water users, the legislative developments of perhaps the most relevance are those related to states' efforts to protect water resources and prioritize their use in order to provide necessary water and sanitation services. Some clear trends in national regulation can be observed, including: public trusteeship of water resources and the prioritization of meeting basic human needs in water use, enhanced protection of water resources to limit their degradation, and increased public participation and access to information in water resource management.

Public Trusteeship of Water Resources and Prioritization in Water Use

The recognition that every individual must have access to water in order to survive has led some states to designate water as a public good to ensure that it is managed for the benefit of all. These states have adopted legislation that explicitly prioritizes the allocation of water resources for domestic consumption, including through the creation of a reserve system that tasks water resource management authorities with ensuring adequate water is set aside for such purposes.¹⁷ Water use for other purposes (such as for agribusiness or industry) is then managed through a permit system.¹⁸ This shift toward clear prioritization of water for basic human needs by states as a step toward meeting their obligation to fulfill the HRWS has generated case law requiring water authorities to change water allocations to ensure such needs are met before providing water for business and other uses, as well as the suspension of company activities due to the risk that the

¹⁵ The countries include: South Africa, Kenya, Indonesia, Costa Rica, India, and Belgium. South Africa, Kenya, and Belgium explicitly recognize the HRWS, while Indonesia, India, and Costa Rica implicitly recognize the right. The countries chosen include countries recognized for their progressive water laws and those which may provide an indicator of regional trends. Appendix C includes the list of sources reviewed for these countries.

¹⁶ Drawing on some case examples of jurisprudence accumulated by The Center on Housing Rights and Evictions in, "Legal Resources for the Right to Water and Sanitation: International and National Standards" 2nd Edition, January 2008. The edition was never formally published but may be found here:

http://www.worldwatercouncil.org/fileadmin/www/Programs/Right_to_Water/Pdf_doct/RWP-Legal_Res_1st_Draft_web.pdf

¹⁷ For example, Kenya's Water Act of 2002, South Africa's National Water Act of 1998, Costa Rica's National Water Policy of 2009, and India's Draft National Water Policy of 2012.

¹⁸ Of course, states determine the rights and entitlements afforded by a permit. States also retain the ability to amend or cancel these water use permits in times of water scarcity, drought, or other emergencies.

company's water use could adversely affect local communities' ability to access sufficient water to meet their basic needs.¹⁹

Enhanced Protection of Water Resources

To meet their duty to protect, some states are also seeking to better protect water resources by adopting the "precautionary" and/or "polluter pays" principles in order to prevent third party activity that may interfere with others' enjoyment of the HRWS. This is reflected in regulations aimed at preventing water resource degradation, legislation requiring polluters to bear the costs of remediation, and fines or imprisonment for those found guilty of purposefully polluting water resources. For example, South African legislation provides that once pollution manifests, the polluting entity is responsible for all clean-up, even if the entity is no longer engaged in the activity.²⁰ A recent court decision under the National Water Act of 1998 held that a company was required to continue to pay for the pumping and treatment of acid mine water even though it had sold the mine several years earlier, and that it had to bear the costs of remediation for activities that caused pollution before the sale.²¹

Increased Public Participation and Access to Information

Some national water laws and policies are recognizing the importance of public participation in both water provision and resource management. Kenya offers the most progressive example of this trend through its adoption of a human-rights-based approach to water that resulted in the Water Act of 2002.²² The Act led to the creation of Water Resource User Associations and Catchment Area Advisory Committees. Both of these types of organizations require participation by local government, businesses, community groups, NGOs, and individuals with knowledge of local water issues. The organizations are tasked with a range of activities including collaborating on catchment-level allocation and management decisions, monitoring of water use and quality, and advising the Water Resource Management Authority on permits for water use. The Act also created a more transparent process in water-provision decisions that requires public consultation and access to relevant information.

Taken together, these trends suggest businesses are likely to face more robust (and in some cases complicated) water governance systems as states seek to meet their international obligations to protect sufficient water resources for basic human needs. Further, the involvement of more actors in water governance processes will increase the number of stakeholders with whom companies may need to engage.

¹⁹ See Fernando Agustin Delgado v. Administration Committee of the Regional Aqueduct "La Cuchilla," Seventh Chamber of Revision of the Constitutional Court of Colombia, File No. T-71043, decision No. T-413/95, (13 September, 1995) and Sindh Institution of Urology and Transplantation and Others v. Nestle Milkpak Limited and Others, High Court of Sindh at Karachi, Original Civil Jurisdiction, Suit No. 567 of 2004, (30 November 2004).

²⁰ National Water Act of 1998, Chapter 3, Protection of Water Resources, Article 19. A subsequent court decision highlighted in footnote 21 directly refers to this article.

²¹ Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs and Others (68161/2008) [2012] ZAGPPHC 127 (29 June 2012), available at: <http://www.saflii.org/za/cases/ZAGPPHC/2012/127.html>. There are a number of other cases related to pollution of water resources and the HRWS, including Vellore Citizens Welfare Forum v Union of India, Supreme Court of India, (28 August 1996) and Andhra Pradesh Pollution Control Board II v Prof MV Nayudu (Retd), 2000 (3) SCALE 354 (Supreme Court), (1 December 2000).

²² In 2010, Kenya explicitly recognized the human right to water and sanitation as Article 43 of its Constitution. "(1) Every person has the right: (b) to accessible and adequate housing, and to reasonable standards of sanitation; (d) to clean and safe water in adequate quantities."

D. Respecting and Supporting the Human Right to Water and Sanitation: Expectations of Local Communities

This section summarizes research into current expectations of civil society stakeholders – particularly local communities – with respect to business, water, and human rights. The research explores current expectations and concerns of local communities, national and international NGOs, and socially responsible and faith-based investors regarding actual and perceived business-related impacts on the HRWS and companies’ potential responses to such impacts.²³ While the activities of various other societal actors (e.g., smallholder farmers, municipalities, state-owned enterprises) can impact on water quality and availability, the research focuses on stakeholders’ expectations of businesses (as large-scale water users) when it comes to respecting and supporting the HRWS.

Broadly speaking, stakeholders report concerns about a range of water-related impacts that may occur in connection with company activities, including:

1. **Depletion:** Stakeholders report concerns related to excessive water use. Water is crucial for basic survival activities such as drinking, bathing, cooking, and cleaning, but water shortages also create problems for agricultural production and fishing, and can therefore have implications for the right to food. Excessive water use by companies is seen as creating problems in urban and rural areas alike (for example, through the lowering of water tables).
2. **Pollution:** Stakeholders report concerns related to the contamination of water due to chemical use, dumping of waste, and other practices, in relation to underground, surface, and even the water sources found in foliage. This contamination can create health problems for people, and for the animals that they depend on for food and income, as well as impacting negatively on crops and on the overall ecosystem of an area. Stakeholders report that in some cases communities or community members have been forced to relocate when their livelihood has been critically threatened due to a decline in availability and/or quality of water.
3. **Physical access:** Stakeholders report concerns related to blocking of their access to existing clean water resources as a result of company activities. This may include impacts related to access to water, such as impacts on livelihood activities like fishing or tourism (for example, due to seismic testing, exclusion zones around port or other facilities, dredging, etc.).
4. **Affordability:** Stakeholders report that depletion, pollution, and blocking access to water resources raise the additional issue of affordability. Communities deprived of traditional sources of water may find alternatives more expensive or unaffordable.

²³The project team reached out to more than 40 stakeholders, and was able to conduct over 20 interviews with individual representatives of these stakeholder groups in Africa, Central America, South America, Southeast Asia, and South Asia. In addition, the team interviewed Oxfam colleagues with experience and expertise on this subject from both headquarter and regional offices of Oxfam America and Oxfam affiliates.

5. **Conflict and repression:** Stakeholders report confrontations and conflict between communities and large-scale water-using companies that have included intimidation and violence by private security forces. The issue of conflicts between and within communities was also raised, with stakeholders accusing companies of fomenting divisions and conflict to undermine protests. Protests over water have led to violent reprisals by private and state security forces, and even killings. Where state security forces have been responsible for repression, stakeholders have often viewed companies as being complicit.
6. **Gender-related impacts:** Stakeholders report that women and girls are often disproportionately affected by the impacts of large-scale water-using companies, as they are typically responsible for fetching water and are often in charge of community water management systems. When the local water source is no longer available, they have to travel further to get water. This is a problem not only because women could be spending this time on other productive activities, but also because it exposes them to heightened threats to their personal safety through violence (including sexual violence) or abduction. In addition, in certain large water-using industries, such as the flower industry, women make up the majority of workers and the chemicals that they are exposed to can create serious health problems.

Expectations Regarding Potential Company Responses

Stakeholders highlight a number of actions that companies may take to address these impact-related concerns including:

- Ceasing harmful activities, minimizing local impacts, and mitigating or remediating impacts with which a company is involved (for example, taking appropriate steps to replenish water resources where excessive use or contamination has occurred, or to provide access to alternative sources of clean water where access to existing clean water sources is blocked);
- Engaging in meaningful consultation with potentially affected communities and other stakeholders on an ongoing basis, including providing equal opportunities for participation by community members and exploring ways in which to demonstrate how the company is using the information received through such processes to inform its activities;
- Putting effective grievance mechanisms in place to ensure recourse for affected individuals to raise and address concerns;
- Conducting human rights impact assessments and other social and environmental assessments to understand a company's actual and potential impacts, in particular for water-stressed areas;
- Employing public or community-based monitoring of water use and helping to build the capacity of local stakeholders to take part in such monitoring;
- Deploying independent third parties to conduct and evaluate impact assessments and monitor commitments;
- Measuring and reporting on water use in a timely and regular manner, particularly in water-stressed areas, framed by water use targets;

- Respecting the right to free, prior, and informed consent in the context of activities impacting upon indigenous peoples – a right which many stakeholders consider extends to other vulnerable populations;
- Providing potentially affected communities and other stakeholders with adequate information about impacts to enable them to evaluate the company’s responses, including communicating it in a way that ensures accessibility for its intended audiences (such as translating into local languages).

Relevant Considerations when Seeking to Support the Human Right to Water and Sanitation

The research highlights a number of considerations that stakeholders see as important when companies are seeking to support the HRWS, including:

- Providing support to the local economy by hiring local contractors to perform necessary services (such as maintenance, sub-processing tasks, and janitorial and catering services), as well as infrastructure that helps avoid dependency and builds the capacity of communities and local authorities;
- Supporting knowledge sharing and acting as conveners of other companies, civil society organizations, communities, and other relevant actors – including governments – to engage in joint problem-solving in order to contribute to responsible water stewardship by all;
- Advocating for recognition of the human right to water and sanitation and related issues such as universal access to water, effective sanitation, and improved governance of water resources;
- Investing in sustainable access to water by finding ways to decrease water use and contamination (such as through recycling of wastewater, effective use of rain and brown water, developing/adopting high efficiency irrigation methods, finding disposal mechanisms for waste that do not further burden public disposal systems, etc.); and
- Monitoring and sharing data with the government and communities about availability and quality of public water sources.

E. Respecting the Human Right to Water and Sanitation in Practice: Company Experiences in the Extractive Sector

This section presents three case examples to illustrate just some of the challenges that large-scale water-using companies have encountered as they seek to conduct their operations in line with their responsibility to respect human rights, and some of the initial responses they have adopted. These examples focus on cases in which companies have demonstrated a genuine interest in addressing their impacts responsibly. Given time and resource limitations in the project’s initial phase, the examples focus on companies in the extractive sector only; in the second phase of the project, the range of companies will be significantly expanded to ensure that whatever guidance is developed resonates to the greatest extent possible across different sectors and operating contexts.

Example 1 – Mining Company in India; Access to Water and Gender-related Impacts

The first example highlights stakeholder concerns around how excessive use of water by a company in a water-scarce area may adversely impact available water for local communities.

A mining company was seeking to operate in an area with water scarcity in which local women had to walk for about five hours a day to fetch water for household consumption. The company's production process would require large quantities of water, which it would pump from underground reservoirs. Early on, the company identified the risk that its project approval process would be blocked by local residents due to their concerns about perceived water-related impacts.

In this case, the company engaged with local communities during early stage exploration (i.e., before project impacts became apparent) in order to proactively address their concerns. The company hired an NGO with expertise in working with communities on water issues to help develop sustainable solutions. A water source was identified and the NGO provided the technical expertise and materials to provide piped water to households. The pumps were solar powered and were designed to require low maintenance. The community itself agreed to provide land for the water tanks and labor to dig trenches for the water pipes. The NGO helped the community establish a water committee to collect a user fee from each household that chose to have access to piped water. The ready availability of water in the community allowed women more time to focus on other activities, such as spending more time looking after livestock or tending to their farms.

In this case, engaging early and bringing in an expert third party enabled the company and community to find an approach that proactively addressed the community's water-related concerns before project impacts began to occur. As the Guiding Principles emphasize, effective human rights due diligence can help to identify and prevent impacts before they eventuate and mitigation or remediation is required. Further research into this case might identify interesting lessons about the sustainability of the company's approach, and how non-discrimination and affordability of access issues were addressed.

Example 2 – Oil & Gas Company in Tunisia: Conflict and Divisions within Local Communities

The second example highlights the importance of stakeholder engagement processes and the difficulties that may arise, particularly related to understanding divisions within local communities.

An oil and gas company planned to conduct seismic operations off-shore. It contacted the local fishing association as part of planning the operations, explained the impact on the local communities' ability to fish for a period of time and agreed on a compensation schedule for all fishermen who were members of the association. When the seismic vessels started to conduct their activities, they encountered local fishing vessels driving over their cables and interrupting the seismic operations. The company flew in a senior executive to investigate the situation (which was costing the company USD \$400,000 per day of delay).

The executive found that the company's stakeholder engagement processes had not identified schisms in the community, including the fact that the fishing association did not represent all local fishermen. Hence some locals were simply unaware of the seismic operations and of the agreement the company had concluded with the association. The company then engaged with the non-associated fishermen and agreed on an acceptable level of compensation, after which the seismic activities were able to proceed.

This case highlights again the importance of robust and ongoing stakeholder engagement processes, which could have helped the company identify the issue and avoid the costs of delayed operations. It also points to the issue of conflict: between communities and the company, between communities, and within individual communities.

Example 3 – Mining Company in Tanzania: Contamination and Supporting Access to Water

The last example highlights some of the dilemmas large-scale water-using companies face when dealing with water quality issues, and when they move toward supporting the HRWS.

A mining company had been providing local communities with “raw” river water from a nearby river, essentially relieving residents of the need to make the trip to the river to collect water themselves. However, the quality of water from the river was poor (this was unrelated to company operations). The company had excess water in its mine pits, which had to be discharged after being appropriately treated. The company built a water purification plant that would produce water for discharge of a much higher quality than the “raw” water it provided to the community from the river, but still of a lower quality than the water used by the company for its own staff.

This particular situation led to a number of questions for the company including:

- What was the company's responsibility to the community when discharging water that was cleaner than the “raw” river water it provided to the communities directly?
- If the company provided the communities with treated water, should it be providing them with the same quality of water as that used by company employees? What about the serious cost implications?
- What if the company provided the communities with treated water and health-related issues emerged, which were, or were seen to be, related to the quality of water provided?
- What if the company provided treated water, but then left the area after 10 years and the water provision system fell into disrepair? Would the company be accused of infringing on the communities' rights by failing to ensure that the quality of available water remained the same?

At the time of writing, the company was still exploring these questions through expert advice and stakeholder consultation.

Companies continue to grapple with a host of issues related to meeting their responsibility to respect, and the complexities that can arise where companies seek to support the HRWS, which will be further explored during the project's second phase.

F. The Relationship between Corporate Water Stewardship and Respect for the Human Right to Water and Sanitation

“Corporate water stewardship” lacks a widely accepted definition but generally refers to “actions on the part of companies who seek to improve the efficiency and cleanliness of their internal operations and in their supply chain, while also facilitating the sustainable management of shared freshwater resources through collaboration with other businesses, governments, NGOs, communities, and others.”²⁴ The concept is currently being implemented by a range of companies in order to mitigate their own risks. It is predicated on companies understanding their own operations, their water use, the local operating environment, and the potential impacts they may have on these operating environments. Emerging water stewardship practice calls on companies to respond to water-related risks through improvements in their own policies and processes, engagement with actors in their supply chain, and engagement with external stakeholders in order to understand the companies’ potential impacts, as well as to work collectively to improve water management at the catchment level.

There are a number of clear points of convergence between the UN Guiding Principles and current water stewardship practices, but there is one point of potential divergence that needs to be explicitly addressed in relation to the impact assessment process. The Guiding Principles are focused on proactively addressing risk to human rights, not risks to the company, although the latter is increasingly influenced by the former.²⁵ The Guiding Principles do not take a position on whether this requires stand-alone assessment processes, or whether it can be built into existing risk management and other relevant systems. What matters is that what is unique about human rights is preserved – meaning that the perspective of the potentially affected individual, the rights-holder, must remain at the center of such processes.

This is distinct from the approach taken in corporate water stewardship, which is predominantly oriented around business risks (generally categorized into physical, regulatory, and reputational risks in terms of their potential impact on the business), as well as business opportunities.²⁶ However, proactively managing and preventing a company’s impacts on external stakeholders are also considered as part of good practice in water stewardship, so there is clearly space to explore the extent to which a human rights lens (which takes into account a company’s impacts on

²⁴ World Wildlife Fund, “What is Stewardship?”, available at <http://waterriskfilter.panda.org/KnowledgeBase.aspx>.

²⁵ For example, recent research in the extractive sector highlights the extent to which companies currently under-estimate their costs arising from conflict with local communities: see Rachel Davis and Daniel Franks, “The Costs of Conflict with Local Communities in the Extractive Industry,” paper presented at the First International Seminar on Social Responsibility in Mining, Santiago, Chile, October 2011, available at <http://www.shiftproject.org/publication/costs-conflict-local-communities-extractive-industry>.

²⁶ Physical risks stem from having too little water (scarcity); too much water (flooding); or water of unacceptable quality. Regulatory risks can stem from ineffective, changing, or poorly implemented water policies. An ineffective regulatory environment may lead to degradation of water resources or an unappealing business environment. Reputational risks stem from how stakeholders view a company’s impacts on water resources, communities, and ecosystems as a result of the company’s water use and management practices. Perceived or real adverse impacts on water resources may affect a company’s reputation, resulting in “decreased brand value or consumer loyalty or changes in regulator posture, and can ultimately threaten a company’s legal and social license to operate.” See UN CEO Water Mandate’s *Guide to Responsible Business Engagement with Water Policy*, 2010, p.29.

employees as well as external stakeholders) can be brought to bear on existing water stewardship-related impact assessment processes.

There are other areas where potential overlap is more evident. For example, both the UN Guiding Principles and existing water stewardship approaches stress the centrality of engaging with local stakeholders in understanding a company's potential impacts, including, in the case of water stewardship, the social impacts that a company's operations may have. The Guiding Principles place meaningful consultation with stakeholders at the center of human rights due diligence processes dealing with assessing potential and actual impacts and tracking efforts to address impacts, as well as in processes for handling grievances (which must be complementary to, and not undermine, state-based forms of remedy).

In corporate water stewardship, understanding impacts goes beyond understanding the impacts associated solely with direct operations and extends to considering water issues throughout the business' value chain. The Guiding Principles similarly make clear that companies need to consider potential impacts arising through their own operations and through their business relationships, including adverse impacts that the company did not cause or contribute to, but which are directly linked to its operations, products, or services by a business relationship, and seek to prevent them wherever possible.

In order to build trust and engage meaningfully with external actors, water stewardship practice calls on companies to disclose their water use, impacts, and response strategies.²⁷ The Guiding Principles also place importance on the need for companies to communicate about their efforts to address their impacts in ways that are accessible to their intended audience(s).

While the Guiding Principles provide business with a blueprint for respecting human rights, they necessarily remain quite general, since they are applicable to all companies in all sectors, of all sizes, and in all situations. They are not a manual to direct the daily decisions and actions of a manager on the ground or in a particular division or department of a company. Rather, they provide the basis for developing such "manuals" or equivalent, tailored guidance in relation to specific human rights issues or impacts. That is, they indicate the questions that any company needs to be asking itself as it designs and implements its policies, procedures, and systems, to ensure that they are aligned with, enable, and advance respect for human rights within the company. Similarly, emerging water stewardship practice offers a way for all companies to understand their water related-risks and impacts, to respond to these risks and impacts, and to report (or disclose) what it is that they are doing and why.

²⁷ For more information about water related business risks and corporate water stewardship practices, please refer to the following documents and websites: Pacific Institute and Ceres, *Water Scarcity and Climate Change: Growing Risks for Businesses and Investors*, 2009; Pegram et al. *Investigating Shared Risk in Water: Corporate Engagement with the Public Policy Process*, 2009; JPMorgan Global Equity Research *Watching Water: A Guide to Evaluating Corporate Risks in a Thirsty World*, 2008; Pacific Institute and BSR, *At the Crest of a Wave: A Proactive Approach to Corporate Water Strategy*, 2007; Orr et al. *Understanding Water Risks*, 2009; Peter Schulte and Jason Morrison, "Corporate Water Management," *The World's Water*, Volume 7., 2011; Ceres, *Ceres Aqua Gauge*, 2011; and the Alliance for Water Stewardship, <http://www.allianceforwaterstewardship.org/>.

Phase two of this project will proactively explore the ways in which (and degree to which) application of the UN Guiding Principles and the tenets of corporate water stewardship can mutually reinforce one another.

G. Early Conclusions

The research for the first phase of this project highlights various questions about issues that may be particularly relevant to companies seeking to meet their responsibility to respect the human right to water and sanitation throughout their activities and business relationships, while pursuing broader water stewardship efforts. Key implementation issues on which the project's second phase will attempt to shed light include:

- How explicit policy commitments to respect the HRWS can be practically aligned with and/or integrated into a company's water-management-related policies and goals, as well as how such policies can be embedded effectively throughout the organization;
- The extent to which human rights due diligence processes can be incorporated into broader impact assessment processes and associated responses, helping to close conceptual and practical gaps between these activities;
- How companies can avoid and address human rights impacts arising through its business relationships, including as part of broader efforts to engage with suppliers to encourage and facilitate more sustainable water management, thereby also reducing risk to the company;
- How companies can engage in meaningful consultation with stakeholders, particularly affected communities, about actual and potential impacts related to the HRWS, including through broader water-related stakeholder engagement efforts that help to identify impacts on the right, determine the effectiveness and adequacy of existing response strategies, and explore new strategies and responses;
- How companies can appropriately integrate human rights considerations into their policy engagement and collective action projects that build catchment management capacity;
- How companies can put in place or support effective operational-level grievance mechanisms that enable a clear point of recourse for affected individuals to raise concerns and enable early identification of problems;
- How businesses can meet their responsibility to respect the HRWS and related human rights in situations where governments fail to meet their duty to protect – for example where the water governance system is dysfunctional, or local standards relating to HRWS are weak or silent; and
- How companies can incorporate human rights considerations in their corporate water disclosure practice in order to demonstrate that they are adhering to their responsibility to respect.

When it comes to supporting the HRWS, the Guiding Principles help companies lay effective groundwork for their relationships with local communities and other stakeholders. Many corporate water stewardship approaches emphasize the need to not only manage risk and respect rights but also support rights through the company's various actions. The guidance will seek to identify some key pointers for companies that are keen to use their water stewardship efforts to also support the HRWS.

The UN Guiding Principles and emerging water stewardship approaches call on companies to "know and to show" what they are doing to respond to potential catchment and human rights impacts. The findings from the first phase of the project, as summarized in this paper, suggest that there is significant scope to explore how the Guiding Principles can build on existing water stewardship good practice when it comes to respecting the human right to water and sanitation as well as bring new insights. The project team will seek to take this work forward in the second phase of the project.

Appendix A: Members of the CEO Water Mandate Human Rights Working Group and List of Technical Experts

Table 1. CEO Water Mandate Human Rights Working Groups Members

| Name | Company |
|-----------------------------|------------------------------|
| Bennett Freeman | Calvert |
| Julie Frieder | Calvert |
| Denise Knight | The Coca-Cola Company |
| Greg Koch | The Coca-Cola Company |
| Lisa Manley | The Coca-Cola Company |
| Nicole Lovett | Diageo |
| Elsa Favrot | GDF Suez |
| Michael Kobori | Levi |
| Anna Walker | Levi |
| Mary Buzby | Merck |
| Michael Glade | Molson Coors |
| Emilio Tenuta | Nalco |
| Christian Frutiger | Nestle |
| Naty Barak | Netafim |
| Dan Bena | Pepsi Co. |
| Kevin Agnew | Reed Elsevier |
| David Grant | SAB Miller |
| Andy Wales | SAB Miller |
| Martin Ginster | Sasol |
| Andrew Vickers | Shell |
| Nate Morr | Sunopta |
| Juan Gonzalez-Valero | Syngenta |
| Priya Sharma | Tata Steel |
| Lynne Hall | Unilever |

Table 2. Technical Experts

| Name | Organization |
|-----------------|--|
| Jack Moss | Aquafed |
| Lovleen Bhullar | Environmental Law Research Society |
| Inga Winkler | German Institute for Human Rights |
| Patricia Jones | Interfaith Council for Corporate Responsibility |
| Sumi Dhanarajan | Doctoral Candidate, National University of Singapore School of Law |
| Lene Wendland | Office of the UN High Commissioner for Human Rights |
| Jackie Dugard | Socio-Economic Rights Institute of South Africa |
| John Oldfield | WASH Advocacy Initiative |
| Hannah Neumeyer | WASH-United |
| Daniel Yeo | WaterAid |

Appendix B: Key International Sources Reviewed

International Human Rights and Other Conventions:

- a. Universal Declaration of Human Rights, 1948
- b. International Covenant on Civil and Political Rights, 1966
- c. International Covenant on Economic, Social and Cultural Rights, 1966
- d. International Convention on the Elimination of All Forms of Racial Discrimination, 1966
- e. Convention on the Elimination of All Forms of Discrimination against Women, 1979
- f. Convention on the Rights of the Child, 1989
- g. Convention on the Rights of Persons with Disabilities, 2006
- h. Geneva Conventions, 1949 and the Additional Protocols
- i. Convention on the Law of Non-navigational Uses of International Watercourses 1997
- j. UNECE Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes 1992

UN Resolutions:

- a. General Assembly Resolution 54/175 on the Right to Development, A/RES/54/175, December 17, 1999
- b. General Assembly Resolution 55/2 on Millennium Declaration Resolution, A/RES/55/2, 8 September 2000
- c. General Assembly Resolution 58/217 on the International Decade for Action, "Water for Life," 2005-2015, A/RES/58/217, 23 December 2003
- d. General Assembly Resolution 59/228 on Activities undertaken during the International Year of Freshwater 2003, preparations for the International Decade for Action, "Water for Life," 2005-2015, and further efforts to achieve the sustainable development of water resource, A/RES/59/228, 22 December, 2004
- e. General Assembly Resolution 61/192 on International Year of Sanitation, A/RES/61/192, 20 December, 2006
- f. Human Rights Council Resolution 12/8, Human rights and access to safe drinking water and sanitation A/HRC/12/50, 1 October 2009
- g. Human Rights Council Resolution 64/198 on the Midterm comprehensive review of the implementation of the International Decade for Action, "Water for Life," 2005-2015, A/RES/64/198, 21 December 2009
- h. General Assembly Resolution 64/292 on Human rights and access to safe drinking water and sanitation, A/RES/64/292, July 28, 2010
- i. Human Rights Council Resolution on Human rights and access to safe drinking water and sanitation, A/HRC/15/9, September 24, 2010

Reports and other documents from UN Human Rights Treaty Bodies, Expert Procedures, etc.:

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- b. Committee on Economic, Social and Cultural Rights, General Comment No. 19 (2008) on the right to social security, E/C.12/C/19, 4 February 2008

- c. Committee On Economic, Social And Cultural Rights, Reports on the Twenty-Eighth and Twenty-Ninth Sessions, E/2003/22; E/C.12/2002/13, 29 April-17 May 2002, 11-29 November 2002
- d. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, The relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation: Preliminary Report by Mr. Hadji Guissé, E/CN.4/Sub.2/2002/10, 25 June 2002
- e. Report of the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation on Human Rights Obligations Related to Access to Sanitation, A/HRC/12/24, 1 July 2009
- f. Report by the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation on Human Rights Obligations related to Non-State Service Provision in Water and Sanitation, A/HRC/15/31, 29 June 2010
- g. 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, A/HRC/6/3, 16 August 2007

Conference Outcomes and Related Documents:

- a. Berlin Rules on Water Resources, International Law Association, 2004
- b. UN Habitat Conference on Human Settlements, 11 June 1976
- c. Mar del Plata Actino Plan, 1977
- d. International Conference on Water and the Environment, Dublin, 26-31 January 1992
- e. Agenda 21, adopted at the United Nations Conference on Environment and Development, 1992
- f. Programme of Action of the International Conference on Population and Development, 1994
- g. Recommendation 14 of the Committee of Ministers of the Council of Europe to Member States on the European Charter on Water Resources, 2001
- h. Johannesburg Declaration on Sustainable Development and Implementation Plan, September 2002
- i. Abuja Declaration, adopted by 45 African and 12 South American States at the 1st Africa-South America Summit, 2006
- j. "Message from Beppu" adopted by 37 States from the wider Asia-Pacific region at the 1st Asia-Pacific Water Summit, Beppu, Japan, December 2007
- k. Delhi Declaration, adopted by eight South Asian States at the 3rd South Asian Conference on Sanitation (SACOSAN III), Delhi, India, November 2008
- l. Sharm el-Sheikh Final Document, agreed by the Heads of State and Government of the Movement of Non-Aligned Countries, July 2009

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The CEO Water Mandate's six core elements:

DIRECT OPERATIONS

Mandate endorsers measure and reduce their water use and wastewater discharge and develop strategies for eliminating their impacts on communities and ecosystems.

SUPPLY CHAIN AND WATERSHED MANAGEMENT

Mandate endorsers seek avenues through which to encourage improved water management among their suppliers and public water managers alike.

COLLECTIVE ACTION

Mandate endorsers look to participate in collective efforts with civil society, intergovernmental organizations, affected communities, and other businesses to advance water sustainability.

PUBLIC POLICY

Mandate endorsers seek ways to facilitate the development and implementation of sustainable, equitable, and coherent water policy and regulatory frameworks.

COMMUNITY ENGAGEMENT

Mandate endorsers seek ways to improve community water efficiency, protect watersheds, and increase access to water services as a way of promoting sustainable water management and reducing risks.

TRANSPARENCY

Mandate endorsers are committed to transparency and disclosure in order to hold themselves accountable and meet the expectations of their stakeholders.