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Office of the High Commissioner for Human Rights
United Nations Office
Geneva

Subject: Submission to the Office of the High Commissioner for Human Rights in relation to equitable access to safe drinking water and sanitation

Dear High Commissioner,

I teach law at the City University of Hong Kong. The primary focus of my current research is corporate social responsibility, an area in which I have published widely in scholarly journals. Recently, I also submitted to the Sydney Law School my doctoral thesis entitled "Violation of Human Rights by Multinational Corporations: An Integrated Theory of Regulation."

This letter is a response to the call of the Office of the High Commissioner for Human Rights to receive views of stakeholders regarding human rights obligation in relation to equitable access to safe drinking water and sanitation. Please find below a brief summation of my views on this issue.

The Human Right to Water

It is trite that access to water, whether for drinking, sanitation or irrigation purposes, is a human right in its own right, apart from being a backbone of several other human rights. The *access* (which should imply reasonable and adequate access) *to water* (which should imply the quality of water necessary for a given purpose) ought to be a human right simply because life itself cannot exist without it. The absence of specific enumeration of such an important right in the International Bill of Rights is explainable. Since water used to be a natural resource over which the state had no effective control or exclusive ownership, it did not require specific protection against state action. It is a historical fact that civilisations and settlements have developed around and near sources of water, without any approvals or licences from states. The access to

water – like access to air[1] – was an entitlement so natural and fundamental that it was probably inconceivable that the continued availability of this access had to be guaranteed as a human right.

However, in recent times, it became necessary to conceptualise the access to water as a human right. The express recognition of this right in the South African Constitution[2] or the implied recognition by the Indian judiciary[3] signifies this necessity. Several reasons account for this development. First of all, because of the power that the currency of human rights currently enjoys, it is fashionable to cast everything of importance in the language of human rights. Second, as states and other non-state actors (including because of privatisation) have gained control over water resources, a need is increasingly felt to ensure that people continue to have access to water without any unreasonable interference of these entities. Third, as with other human rights, it is no longer sufficient if states merely refrain from abridging the right to water; states also need to take various positive measures for the effective realisation of this human right. States, for example, are expected to make water accessible in those areas where water sources do not naturally or adequately exist, or take steps to ensure that private entities within their respective jurisdictions do not interfere with an adequate access to water.

Limitations of the Predominant Focus on States' Obligations

Given the historical evolution of the idea of human rights and its instruments, it is not surprising that most of the existing normative instruments relating to the human right to water focus predominantly on the obligations of states. In other words, the human rights obligations of non-state actors such as multinational corporations (MNCs) are only *indirect*, if at all. General Comment No. 15 of the Committee on Economic, Social and Cultural Rights,[4] and the Draft Guidelines for the Realisation of the Right to Drinking Water and Sanitation prepared by the Special Rapporteur Mr El Hadji Guissé are case in point.[5] The General Comment, for example, provides that states have an obligation to "protect" the human right to water, that is, "to prevent third parties from interfering in any way with the enjoyment of the right to water."[6] Quite notably, although the Comment briefly touches upon the obligations of "actors other than states",[7] MNCs find no reference in this paragraph along with international institutions such as WHO, UNICEF, ILO, UNDP, and WTO.

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[1] The International Bill of Rights makes no mention to the right to air. It is only because of pollution, the right to "clean" air is becoming important.

[2] Constitution of the Republic of South Africa 1996, art. 27(1)(b).

[3] See e.g., *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664; *AP Pollution Control Board v M V Nayudu* (2001) 2 SCC 62. One may also make a reference to Article 15(2)(b) of the Constitution of India 1950, which was a response to the peculiar social problems, in particular of untouchability. The provision reads: "No citizen shall, on grounds of only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to – … the use of wells, tanks, bathing ghats …."

[4] Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002) – The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2002/11.

[5] Commission on Human Rights, *Realisation of the Right to Drinking Water and Sanitation: Report of the Special Rapporteur, El Hadji Guissé*, E/CN.4/Sub.2/2005/25 (11 July 2005).

[6] General Comment No. 15, above note 4, para 23. See also *id*., para 33.

[7] *Id*., para 60.

No doubt, states have a primary obligation, both under international law and constitutional law, to realise human rights and this obligation rightly includes the duty to ensure that private actors within their respective jurisdictions do not violate human rights. However, the limitations of this indirect approach of international human rights law are increasingly coming to fore.[8] For instance, states (especially developing ones) may be *unable* or *unwilling* to act robustly against the mighty MNCs, on which they depend heavily for investment-driven-development.

In view of this general incapacity of the indirect approach and given the specific trend of privatisation of water resources, it is of utmost importance that international law is harnessed to impose obligations in relation to the human right to water on MNCs directly and not solely through states. A necessary corollary of adopting the "direct approach" and imposing human rights obligations on MNCs directly will be a process for the direct enforcement of such obligations, that is, without relying on states and their mechanisms.

Extending Obligations to MNCs and Beyond

Against this background, it is suggested that any discussion on the human right to water should not be confined to the obligations of states. Rather an attempt should be made to outline human rights obligations of MNCs and other non-state actors. To be specific, we need to determine the operating parameters within which MNCs could be allowed to extract water – a natural public good – from earth for profiting by selling bottled water or drinks. Similarly, the trend of privatisation of water also brings the issue of monopoly over collective good in private hands driven primarily by profit considerations, which is bound to raise concerns about the economic accessibility of water.

For reasons outlined above, such concerns cannot be dealt with adequately by simply imposing obligations on states. Assuming that there is a human right to water, it is arguable that MNCs should be subject to appropriate obligations because of their *relation with* and *position in* society. General Comment No. 15,[9] the Draft Guidelines the Realisation of the Right to Water[10] and the UN Human Rights Norms may provide the starting point to ascertain the content of MNCs' obligations – which need not, and should not, be identical to those of states – in relation to the right to water.[11] In terms of enforcing obligations against MNCs, it is vital that any regulatory framework that may be put in place at the international level should envisage relying on "social sanctions" against deviant corporate actors.

Last but not least, sustainable realisation of the goal of access to water would also require an active participation of all human beings – the users of water – in this project. For doing so, it

[8] See, e.g., Surya Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where from Here?' (2003) 19 *Connecticut Journal of International Law* 1, 48-49.
[9] Above note 4.
[10] Above note 5.
[11] Paragraph 12 stipulates that "Transnational corporations and other business enterprises shall *respect* economic, social and cultural rights as well as civil and political rights and *contribute* to their realisation, in particular the rights to … adequate food and drinking water …." Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2 (13 August 2003) (emphasis added).

may be imminent to impose duties on the bearers of rights (individuals), e.g., the duty to conserve water; the duty to share water. In short, whether the rhetoric about the human right to water (or any right for that matter) becomes a reality or not would depend, to a great extent, on the adaptability and flexibility shown by the existing human rights discourse to meet the new challenges posed by liberalisation, privatisation and globalisation.

I hope this brief submission will be of some help to the Office of the High Commissioner for Human Rights in preparing a study report on the human right to water. Should you need any further inputs or clarifications, please do not hesitate to contact me.

Yours sincerely,

Surya Deva 15.04.2007