The realisation of constitutional environmental-related rights by private sector actors in South Africa

CJ Haigh
21643180

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Supervisor/Promotor: Prof LJ Kotze

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I blame all of you. Writing this dissertation has been an exercise in continuous suffering. The normal reader may, perhaps, exempt themselves from excessive guilt, but for those of you who have played the larger role in prolonging my agonies with your encouragement and support, well... you owe me.

I deeply thank my parents, Ann Haigh and John Haigh, with all the admiration and affection for their unconditional trust, unfailing support, timely encouragement, and endless patience. It was their love that helped me get through this agonizing period in the most positive way.

I cannot forget my sisters, Tammylyn and Michaela Haigh, and dearest friend, Bianca Ungerer, who went through hard times together, cheered me on, celebrated each accomplishment, and has been part of the birth and growth of this dissertation.
ABSTRACT

The engagement and influence of actors in the private sphere is often highly contested as these actors, through their operations, have the potential to contribute towards the realisation and/or violation of human rights, particularly environmental-related human rights. There has been ample evidence of corporations taking advantage of situations of weak environmental regulation, such as can be seen within South Africa, and the devastating effects thereof. Both international and domestic law has failed to articulate the human rights obligations of corporations and to provide binding and mandatory mechanisms for regulating corporate conduct in the field of human and environmental-related rights. Traditionally, states are viewed as the only entities capable of bearing legal rights and duties. Given the unprecedented level of globalisation and the ascent of corporate economic power, there is an increasing realisation that states cannot be the only bearers of such rights and duties. The development of mandatory forms of direct corporate human rights responsibility is essential to ending such corporate impunity for gross violations of human and environmental-related rights and advancing justice. This study seeks to extend the discussion of corporate responsibility by addressing the basis on which private sector actors, such as corporations, can be held responsible to respect, protect, promote and fulfil environment-related rights, such as the rights included in section 24 and 27 of the Constitution of the Republic of South Africa, 1996.

Key words: Environmental law, environmental governance, corporate governance, corporate social responsibility, environment-related constitutional rights, corporate accountability.
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<tr>
<td>AMD</td>
<td>Acid mine drainage</td>
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<tr>
<td>CER</td>
<td>Corporate environmental responsibility</td>
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<td>CSR</td>
<td>Corporate social responsibility</td>
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<tr>
<td>FSE</td>
<td>The Federation for a Sustainable Environment</td>
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<td>GIZ</td>
<td>Deutsche Gesellschaft für Internationale Zusammenarbeit</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>NEMA</td>
<td>National Environmental Management Act 107 of 1998</td>
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<tr>
<td>NO₂</td>
<td>Nitrogen dioxide</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<td>PELJ</td>
<td>Potchefstroom Electronic Law Journal</td>
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<td>SAJHR</td>
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<td>SAYIL</td>
<td>South African Yearbook of International Law</td>
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<td>SDCEA</td>
<td>South Durban Community Environmental Alliance</td>
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<td>SO₂</td>
<td>Sulfur dioxide</td>
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<td>TD</td>
<td>The Journal for Transdisciplinary Research in Southern Africa</td>
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<tr>
<td>THRHR</td>
<td>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</td>
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<tr>
<td>TSAR</td>
<td>Tydskrif vir die Suid Afrikaanse Reg</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UNSCHR</td>
<td>United Nations Sub-Commission on Human Rights</td>
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<tr>
<td>VOCs</td>
<td>Volatile organic compounds</td>
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<td>WSA</td>
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1 Introduction

Societies have long been formed by their interaction with the environment, and have engaged in some form of depredating the environment to which South Africa is no exception.¹ South Africa’s economy and society has been formed by centuries of colonial rule that culminated in the apartheid system.² This has had an enormous negative impact on the interaction between people and the environment.³ For example, industrial developments in the apartheid era were often distorted for political reasons, which led to serious implications for environmental management and protection. Maintaining the apartheid system often took precedence over threats to human health and adverse environmental impacts. This is evident from the low priority that was given to environmental issues and the paucity in the environmental law and institutional governance framework of the apartheid era to properly regulate environmental issues.⁴

A remarkable development of environmental law can, however, be seen in South Africa since the enactment of the Constitution of the Republic of South Africa, 1996 (Constitution).⁵ This is apparent from the enactment of wide-ranging environmental legislation by government which essentially aims to codify section 24 of the Constitution by means of the legislative process.⁶ Section 24 provides that “(e)veryone has the right to an environment that is not harmful to their health or wellbeing”.⁷ Section 24 espouses a duty on government to protect the environment for present and future generations through reasonable legislative and other measures.⁸ These obligations should be considered in conjunction with section 7(2) of the Constitution, which imposes a duty on

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² Ako Environmental Justice in Developing Countries 41 and 59; Steyn 2005 Globalizations 392-393; and Lumby 2005 South African Journal of Economic History 65.
³ Under the apartheid regime, environmental protection was generally aimed at upholding a strong biodiversity conservation ethic rather than the well-being of the South African majority (black citizens). This resulted in law and policies which divided access to and control over South Africa’s natural resources along racial lines. See Rossouw and Wiseman 2012 Impact Assessment and Project Appraisal 131; Steyn 2005 Globalizations 394; Christiansen 2013 Stanford Environmental Law Journal 231; and Patel 2009 Social Dynamics 94.
⁴ The environmental protection afforded during the apartheid regime was shaped in the context of the general lack of rule of law and constitutionalism; the supreme reign of the system of apartheid, parliamentary sovereignty; and lack of respect and protection of human rights. See Kotzé 2007 Direitos Fundamentals 38; and Olenasha The Enforcement of Environmental Rights 32.
⁸ Christiansen 2013 Stanford Environmental Law Journal 243-244.
the state and all its organs to “respect, protect, promote and fulfil the rights of the Bill of Rights”. The state fulfils the primary role in the realisation of rights, but the state’s duty in relation to constitutional environmental-related rights is sometimes qualified. For example, section 27 which deals with the right of access to health care, food, water and social security, expressly provides that “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”. A similar provision can be found in section 24(b), which provides that “(e)veryone has the right to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measure”.

When these provisions are read with section 8(2) which stipulates that “(a) provision of the Bill of Rights binds a natural or a juristic person if and to the extent that, it is applicable”, it becomes clear that the Constitution finds application in two ways. The first is that the provisions of the Bill of Rights could apply not only vertically (protecting the individual against the state), but also - to continue the spatial metaphor – diagonally, (protecting individuals against a variety of semi-private actors sufficiently linked to the state), and horizontally (controlling private actors’ relations with each other). The extension of the scope of application to private and semi-private actors has been confirmed in McCarthy and Others v Constantia Property Owners’ Association and Others 1999 (4) SA 847 (C). Thus, section 8(2) serves as an innovative constitutional

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9 S 7(2) of the Constitution of the Republic of South Africa, 1996.
13 Semi-private actors sufficiently linked to the state can, in light of s 8(1) of the Constitution of the Republic of South Africa, 1996 be identified as “functionaries or institutions” that perform “public functions”. Within the South African context, state owned enterprises actors such as Eskom and Telkom can be regarded as semi-private actors. See Ellmann 2001-2002 New York Law School Law Review 21.
15 The Court held in McCarthy and Others v Constantia Property Owners’ Association and Others that:

Whatever the interpretation of this opaque phrase, it is clear that its intention was to extend the scope of application of the Bill of Rights. In short, the Bill of Rights was not only designed to introduce the culture of justification in respect of public law but intended to ensure that the exercise of private power should similarly be justified.

In addition to the McCartney-case, the Court conceded in Government of the Republic of South Africa and Others v Grootboom and Others 2001 1 SA 46 (CC), that:

It is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.

2
feature in which the duties espoused by constitutional environmental-related rights, such as sections 24 and 27, could apply not only to the state, but also to private sector actors such as individuals and companies. For purposes of this discussion, the concept of private sector actors will be used to refer to both private and semi-private actors unless the context indicates otherwise.

From this, it can be derived that a notion of environmental governance is captured in sections 24(b) and 8(2). Environmental governance can be defined as:

A normative institutional regulatory intervention and social construct that is predominantly based on law and that aims to influence how people interact with the environment. It entails a pluralistic, dynamic, multi-level, multi-actor response and process of chance which pragmatically aims to change human behaviour vis-à-vis the environment, and idealistically to optimise environmental benefits and use, while at the same time seeking to protect and preserve sufficient environmental capital for present and future generations.

Globalisation has given rise to a widely diversified array of state and non-state actors that are involved in environmental governance. Where these actors act together in environmental governance, as they generally do, one could speak of a hybrid form of authority that is both public (pure state) and private (non-state). This so-called hybrid form of authority suggests that the state is not the only, and increasingly not the most important, actor in environmental governance.

Currently, most private sector actors making an effort to become more environmentally responsible are primarily focused on reducing the adverse impacts of their corporate activities, whether on consumers, communities, employees, and/or the environment.

Thus, within the human rights regime, it is permissible for private actors to play a role in the realisation of human rights. See McCarthy and Others v Constantia Property Owners’ Association and Others 1999 (4) SA 847 (C) 855B-E; and Government of the Republic of South Africa and Others v Grootboom and Others 2001 1 SA 46 (CC) 35 in this regard. Thus s 8(2), in essence, places affirmative obligations on state organs and extends restrictions to private sector actors. See Christiansen 2013 Stanford Environmental Law Journal 247; and Cheadle and Davis 1997 South African Journal on Human Rights 55.


Kotzé Global Environmental Governance 250; and Delmas and Young Governance for the Environment 73 and 127.

Kotzé Global Environmental Governance 200.

From this, a sense of corporate environmental responsibility (CER), as a sub-category of the broader corporate social responsibility (CSR) paradigm, emerges which seeks to provide a step towards improved multi-actor hybrid environmental governance. In light of this, it can be said that a broader multi-actor environmental governance paradigm holds the promise not only of innovative governance mechanisms and strategies, but also of expanded cooperation between private and public actors, as well as among private sector actors that could positively shape power relations within the environmental governance arena.

Actors in the private sphere, and specifically industries, play a vital role in South Africa’s economy, but they are also a major cause of environmental degradation which has the potential to lead to various environmental human rights violations. At the same time private actors have the capacity to contribute towards the realisation of environmental rights. An example is private water service providers that provide many South Africans access to water. From this the question arises: on what basis can private sphere actors be held responsible to respect, protect, promote and fulfil environment-related rights, such as the rights included in section 24 and 27 of the Constitution? For example, access to water is not only dependent on the policies and actions of the state, but also on the actions of private corporations. Further, recent experiences have demonstrated that private actors, can, and often do, violate environment-related human rights. Mines, for instance, have been implicated in corruption and violations of numerous human rights and more specifically environmental-related rights such as the right to have access to health care, food, water and social security. Moreover, there is a realisation that government cannot realise these rights alone, given the enormity of

22 Portney “Corporate Social Responsibility” 240-241.
23 Paterson and Kotzé Environmental Compliance and Enforcement 271; Portney “Corporate Social Responsibility” 240-241; and Delmas and Young Governance for the Environment 127.
25 Refer to Chapter 3.3 for a full discussion (followed by examples) in this regard.
28 Amann 2000-2001 Hastings International & Competition Law Review 330-331. An example of this can be found in the operations of various gold mines in parts of the West Rand in western Gauteng and parts of the Far West Rand in the North West Province. Due to their failure to comply with the necessary legislation and requirements, toxic and radioactive material was found in the Wonderfonteinspruit and Tweelopiespruit that derived from the operations of gold mines. Communities adjacent to Wonderfonteinspruit and Tweelopiespruit rely on these water sources for drinking purposes, to water livestock, and to irrigate crops. Due to the toxic and radioactive material found in the sources, many of these communities experienced various health and social complications. Refer to Chapter 3.3 for a full discussion in this regard.
the obligation on government to address past and present environmental injustices; its international, regional and national obligations to secure sustainable development; and the enormous environmental (notably climate change, water scarcity and acid mine drainage), social (human capital) and economic (a dwindling economy) governance challenges it faces.\textsuperscript{29} It has consequently become increasingly clear that state action alone is not sufficient to guarantee the enjoyment and protection of human rights generally, and there is a case to be made for the extension of specifically environmental rights' (particularly sections 24 and 27) application to private entities.

The debate on the application of constitutional environmental-related rights to private actors also emerges from an international context. For instance, the recently adopted \textit{United Nations ‘Protect, Respect and Remedy’ Framework} (PRR Framework) and its implementation guidelines, the \textit{Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework} (PRR Guidelines) signals a formidable step forward to holding private actors to account for human rights violations.\textsuperscript{30} The private sector clearly has a broader responsibility to the society in which it functions, especially when it is a corporate entity, from which it makes it profits.\textsuperscript{31} From this, it becomes necessary for those concerned with constitutional environmental-related rights, to explore and examine the extent to which private sphere actors could be held liable to respect, protect, promote and fulfil such rights. This is also the main objective of this study. It seeks to answer the following research question: To what extent could private sector actors such as corporations be held to account to protect, promote, respect and fulfil constitutional environmental-related rights in South Africa?

In answering this question, Chapter 2 of this dissertation assesses the increasing need for governance of cross-scale issues resulting from globalisation within the environmental context. This part is particularly interested in the idea that private sector actors could become active partners in the realisation of environmental rights through the conceptual flexible regulatory prism of environmental governance. Furthermore, attention will be paid to the development of international initiatives that call for more


\textsuperscript{31} Miles and Jones 2009 \textit{Deakin Law Review} 58.
binding obligations, often based on CSR, to be placed on corporations in relation to human rights.

Chapter 3 assesses the current level of constitutional protection provided for by the Constitution of the Republic of South Africa, 1996, specifically in terms of environmental-related constitutional rights (sections 24 and 27). Close attention will be paid to how sections 24 and 27 have been applied in South Africa and how activities of corporations led to the violations of such rights and/or to the protection, fulfilment and promotion of these rights. Due to length restrictions, while the study acknowledges that a multitude of other rights in the Constitution also indirectly relate to the environment (e.g. the rights to life, equality and human dignity), it solely focuses on the foregoing two rights that directly relate to environmental matters.

Chapter 4 seeks to analyse how constitutional rights function in terms of corporate responsibility and it fleshes out the implications of the latter for environmental-related human rights obligations of corporations. In doing so, it commences by considering the largely voluntary framework in which corporate responsibility has been embedded in South Africa. It notes the general lack of a discussion about the binding responsibilities of corporations in respect of the realisation of environmental rights in South Africa and how peculiar this is, given the fact that the South African Bill of Rights contemplates the horizontal application of some fundamental rights to juristic persons in certain circumstances (Drittwirkung). The discussion then turns to consider the manner in which corporate obligations should be conceived in South African law, outlining the two main factors that determine corporate responsibility, namely the impact that corporations may have on environmental rights and the capabilities of such corporations to protect, promote, fulfil or to violate environmental rights.

Chapter 5 concludes the discussion with recommendations that could assist in framing binding obligations for corporations in the context of environmental rights.

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2 Environmental governance and corporate environmental responsibility

There are few pursuits today that do not, to some extent, bear traces of corporate influence. Whether it is providing access to water and food to people, the reach of corporations has grown and developed to such an extent that corporations have the power and authority to shape economies and even political policies. Given this immense power of corporations, mechanisms of accountability and governance need to evolve to build a culture of corporate accountability and to shift some of the burden of protecting the rights of the individuals that usually falls upon states onto corporations.

The aim of this chapter is to assess whether private sector actors, through environmental governance, could become active partners in the realisation of environmental rights. In light of the fact that corporate operations often have profound impact on the environment, attention will be paid to the increasing number of hybrid forms of environmental governance and voluntary action (as seen in various international initiatives) that require more binding human rights obligations be placed on corporations.

2.1 Impact of the operations of corporations on the environment

Private sector actors can, and often do, have a profound impact on the human rights of employees, consumers and communities in all stages of their operations.¹ Led by the competitiveness for corporate investment, many corporations during the course of their operations have increased the severity of environmental destruction and concomitant harm to humans.² Such glaring cases include environmental pollution and inhumane treatment of local population groups by Shell in Nigeria;³ in South Africa, the toxic and radioactive material found in the Wonderfonteinspruit and Tweelopiespruit as a result of the operations of the gold mines in parts of the West Rand;⁴ the use of poisonous

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¹ Aguirre 2004-2005 California Western International Law Journal 61; and Smith 2010 Columbia Journal of Law and Social Problems 149.
³ See Chapter 2.5.3 and Teubner 2006 The Modern Law Review Limited 328 in this regard.
⁴ The contaminated water found in these two water sources resulted in various environmental, health and social problems for several of the communities living in the rural areas adjacent to the mines in
pesticides in banana plantations in Costa Rica;⁵ and environmental damage arising from several big construction projects; to name but a few.⁶

In South Africa, private parties such as corporations, have a negative obligation not to interfere with or obstruct the realisation of human rights.⁷ This view had been confirmed by the Constitutional Court held in Governing Body of the Juma Masjid Primary School and Others v Essay N.O. and Others 2011 (8) BCLR 761 (CC).⁸

Section 2 of the National Environmental Management Act 107 of 1998,⁹ provides that private sector actors have the negative duty to prevent, control and/or minimise environmental damage and adverse health effects caused by their operations.¹⁰ More specifically, in terms of section 28 of NEMA and section 19 of the National Water Act 36 of 1998, corporations must take reasonable measures to prevent any pollution or

question. These communities are reliant on the ground and surface water emanating from these water sources for drinking purposes, to water livestock, and to irrigate crops. Water and sediment analyses indicated that some of the metals contained in the mine affluent included, amongst others, uranium, thorium, radium, polonium, and some isotopes of lead. Despite being chemically toxic, these metals are also radioactive which lead to a wide array of health and environmental problems, such as chronic radiotoxicity. In addition, analyses indicated that the mining effluent found in the water sources exceeded average surface abundances whereby uranium was identified as the principal contaminant of concern emitted by the gold mines. Uranium has a long-term impact on the environment as it accumulates in the sediments and continue to leach out of the mine tailings and slimes dams for many years to come. Plants absorb these metals which, in turn, affect animals and humans that are dependent on these resources for continuing living. Refer to FSE 2013 http://bit.ly/1qUXQLC 4; and Van Eeden et al 2009 TD 52-53 and 55 for a full exposition in this regard.

In Dow Chemical Company v. Castro Alfaro 786 S.W.2d 674 (Tex. 1990), victims exposed to the pesticide dibromochloropropane used on banana plantations in Costa Rica had been rewarded by a Texan court a substantial recovery for the human rights violations suffered due to corporate operations. In this case, the court rejected the motion to dismiss the doctrine of forum non conveniens. The forum non conveniens doctrine provides courts with the discretion to dismiss or transfer cases brought by foreign plaintiffs to another jurisdiction. This is subject to the conditions that an adequate alternative forum exists and by dismissing the case to a more convenient or proper forum would be more favourable (after weighing up the private and public interest factors). See Manzi 1990 Fordham International Law Journal 820-822 and 839-850; Smith 2010 Columbia Journal of Law and Social Problems 168; and Teubner 2006 The Modern Law Review Limited 328, for a full discussion of the Castro Alfaro-case. See Smith 2010 Columbia Journal of Law and Social Problems 162-165 for a full discussion on the application of the forum non conveniens doctrine.

¹⁰ This negative duty imposed on corporations comprises of the "polluter pays", precautionary and preventative principles. In essence these principles entail that users (and polluters) of natural resources should bear the full environmental and social costs that result from their operations. See Vorster The Liability of Mines 13-16.
degradation from occurring, continuing, or recurring as a result of its activities of environmental resources, such as water resources.\textsuperscript{11}

Despite occasionally having adverse effects on the environment and upon human rights, corporate operations can also be positive. For instance, operations have the potential to increase access to employment, generate revenue and innovation and improve public services – which are all prerequisites for the realisation of human rights.\textsuperscript{12} An example of this can be found in the Engen Petroleum Refinery in Wentworth and the South Durban Community Environmental Alliance (SDCEA) agreement concluded in 1998, which resulted from community pressure on the corporation in respect of the health impacts of high levels of air pollution suffered by the South Durban community.\textsuperscript{13} The agreement aimed to address the high levels of air pollution by way of sulphur dioxide emission reductions,\textsuperscript{14} and general commitments to evaluate pollution from particulates, including nitrogen dioxide,\textsuperscript{15} volatile organic compounds,\textsuperscript{16} hydrocarbons, and fugitive emissions.\textsuperscript{17} In addition, the agreement made provision for regular monitoring, reporting and liaison with the local community.\textsuperscript{18}

\begin{itemize}
  \item \textsuperscript{11} See s 28 of the \textit{National Environmental Management Act} 107 of 1998 and s 19 of the \textit{National Water Act} 36 of 1998.
  \item \textsuperscript{12} Aguirre 2004-2005 \textit{California Western International Law Journal} 61; and VBDO Looking Closer 6.
  \item \textsuperscript{13} The Engen-SDCEA agreement consisted of a five-year environmental improvement plan for the Refinery and considered a type of negotiated settlement or “good neighbour agreement”. In addition, The Engen-SDCEA agreement marked the first voluntary agreement to be concluded between a corporation and a local community within South Africa. See Acutt \textit{Perspectives on Corporate Responsibility} 12; and Figg 2005 \textit{International Affairs} 607.
  \item \textsuperscript{14} Sulfur dioxide (SO\textsubscript{2}) is a highly reactive gas known as “oxides of sulfur” which is largely found from fossil fuel combustion at power plants and other industrial facilities. SO\textsubscript{2} reacts with other compounds in the atmosphere to form small particles, which penetrate deeply into sensitive parts of the lungs. Current scientific evidence show that short-term exposures to SO\textsubscript{2}, ranging from 5 minutes to 24 hours, can cause or worsen respiratory disease, such as emphysema and bronchitis, and can aggravate existing heart disease. This leads to increased hospital admissions and premature death. See EPA 2014 \texttt{http://1.usa.gov/109KPbR}.
  \item \textsuperscript{15} Nitrogen dioxide (NO\textsubscript{2}) is a highly reactive gas known as “oxides of nitrogen” which forms quickly from emissions from vehicles, power plants and off-road equipment. Scientific evidence links short-term NO\textsubscript{2} exposures, ranging from 30 minutes to 24 hours, with adverse respiratory effects including airway inflammation in healthy people and increased respiratory symptoms in people with asthma. In addition, studies show a link between breathing elevated short-term NO\textsubscript{2} concentrations, and increased visits to emergency departments and hospital admissions for respiratory issues, especially asthma. See EPA 2014 \texttt{http://1.usa.gov/1wPJDoY}.
  \item \textsuperscript{16} Volatile organic compounds (VOCs) are emitted as gases from certain solids or liquids, which include a variety of chemicals, some of which may have short- and long-term adverse health effects. For example, eye, nose, and throat irritation; headaches, loss of coordination, nausea; damage to liver, kidney, and central nervous system; and in certain circumstances VOCs are suspected or known to have caused cancer in humans and animals. See EPA 2012 \texttt{http://1.usa.gov/1qHiNu7}.
  \item \textsuperscript{17} Acutt \textit{Perspectives on Corporate Responsibility} 12-13.
  \item \textsuperscript{18} Acutt \textit{Perspectives on Corporate Responsibility} 12.
\end{itemize}
agreement, Engen acquired certain negative duties to avoid, minimise and remediate the environmental destruction caused by its operations.19

2.2 Governance

Ecosystems and their services are the foundation upon which human life and all human activities are established.20 Marked by advancements in technology, commercial activities, population expansion and migration, and relentless environmental exploitation, the increasing pace of development, if not minimised, poses an imminent danger for the environment and humanity.21 Therefore, when examining the human impacts on the environment, it is not surprising that the need for governance to address these impacts is critical if we are to avoid drastic changes to the environment and if we wish to continue to enjoy environmental services sustainably.22

2.3 New approaches to governance

The concept of “governance” is capable of a wide range of interpretations as it is used in many disciplines and contexts, such as law, economics and politics.23 One definition of governance is that it is a social function centred on efforts to direct societies or individual groups away from collectively undesirable outcomes and toward socially desirable outcomes.24 Governance can also be viewed as an outcome of strategic negotiating and interaction among various actors over particular issue areas or problems (such as global economics, or the environment), in a process that is consistent over time and that occurs within an institutional framework.25 It is important to

19 Acutt Perspectives on Corporate Responsibility 13; and Figg 2005 International Affairs 607.
20 Kotzé Global Environmental Governance 1.
21 In order to better understand the concept of “globalisation”, Kotzé suggests that globalisation should be considered as a process which leads to the world becoming one. What this entails is that globalisation is a process of social change that is identifiable and triggered by a change in the environment in which social activity is conducted. This process is greatly supported by innovations in technology, transportation, the Internet and telecommunications. For a brief overview, see Kotzé Global Environmental Governance 32-34 and 48; Olowu 2007 SAYIL 262; and Tisdell “Environmental Governance, Globalisation and Economic Performance” 23 in this regard.
22 Delmas and Young Governance for the Environment 93; Mazi 2009 Elektronik Sosyal Bilimler Dergisi 301; and Kotzé Environmental Compliance and Enforcement 2.
23 Despite several attempts to define the concept of “governance” it remains a vague concept as a variety of disciplines have attached a different meaning to the concept. See Paterson and Kotzé Environmental Compliance and Enforcement 104; Müller “Environmental Governance” 71; Tisdell “Environmental Governance, Globalisation and Economic Performance” 24; and Kotzé Global Environmental Governance 51.
24 Delmas and Young Governance for the Environment 6 and 12.
25 Delmas and Young Governance for the Environment 119.
note that the concept of governance is not synonymous with the concept of “government”. Government, by contrast, refers to an organisation or collection of organisations specialised to address problems of governance in a well-defined setting, for example, a government or a government department. The most distinct difference between these two concepts is that “government” generally relates to institutional structures of the state at multiple levels, namely national, provincial and local, whereas, “governance” relates to a process of governing that includes the actions of these structures and the contributions of non-state entities.

Despite it being logical to assume that government will traditionally take steps to realise governance, the strain that globalisation now and other regulatory challenges put on governments does not necessarily imply that governance is only to be confined to governments. For instance, many governments no longer have the resources to govern in the way they did, due to economic pressures that in turn challenge political and economic capacities of the state. As a result, various non-state actors have emerged as key players in the shift towards broadened forms of governance through higher levels of participation, influence and greater involvement in regulation.

Non-state actors play an increasingly important role and are gradually becoming influential in the practice and structures of governance, which in turn exposes them to a range of actors through market interactions and increasingly through social and political networks. For instance, non-state actors such as large multinational

26 From a legal perspective, the concept “government” relates to the legal structure of a state or organisation, a form of political authority, or to the functionaries which are responsible for governance. See Delmas and Young Governance for the Environment 6-7; and Kotzé Global Environmental Governance 84.
27 Paterson and Kotzé Environmental Compliance and Enforcement 106; and Kotzé Global Environmental Governance 84.
28 Non-state actors are not regarded as states nor do they act with public (state) authority. Non-state actors could include a wide array of specific manifestos such as the media, non-governmental organisations, community-based organisations, multinational corporations, epistemic communities, and networks. See Paterson and Kotzé Environmental Compliance and Enforcement 106; Kotzé Global Environmental Governance 84; and Delmas and Young Governance for the Environment 71.
29 Lemos and Agrawal 2006 Annu. Rev. Environ. Resour. 300; and Delmas and Young Governance for the Environment 22.
30 Economic pressures on states result from greater integration of economic activities across national boundaries, and a decline in aid flows, which have been supplemented by fiscal crises. Lemos and Agrawal 2006 Annu. Rev. Environ. Resour. 302.
32 Kotzé Global Environmental Governance 108; and Falkner 2003 Global Environmental Politics 72.
33 Delmas and Young Governance for the Environment 127.
corporations, interact with a wide array of organisations and individuals (both public and private) in a type of modern corporate diplomacy on both an international and national scale to address the inefficiencies of governance.\textsuperscript{34} Non-state actors also increasingly agree upon, implement, and monitor different forms of governance mechanisms, including general codes of conduct, management standards, and certified product labels as normative means that facilitate governance in the private sphere.\textsuperscript{35} Thus, the emergence of non-state actors in the arena of governance is of particular significance as they may be able to play an essential role in mobilising public interest and generating innovative governance solutions in a manner that goes beyond the state, as it were.\textsuperscript{36}

When situated within the environmental context, the notion of environmental governance is generally defined as encompassing the relations and interactions among governmental and non-governmental actors, processes and normative frameworks to shape (directly or indirectly) and regulate behaviour towards greater accountability and responsibility for environmental security.\textsuperscript{37} Environmental governance thus refers to the multiple channels through which human impacts on the natural environment are ordered and regulated.\textsuperscript{38} It implies rule creation, institution-building, and monitoring and enforcement.\textsuperscript{39} But it also implies a “softer” infrastructure of norms, prospects, and social understandings of acceptable behaviour towards the environment through processes that engage the participation of a wide range of actors, and that are not confined to strict notions of the state and hard law (legislation, for example), but which increasingly find resonance in non-state sources of private authority and softer, law-like normative arrangements such as codes of conduct.\textsuperscript{40}

\footnotesize{\textsuperscript{34} Delmas and Young \textit{Governance for the Environment} 124; and Falkner 2003 \textit{Global Environmental Politics} 75.}
\footnotesize{\textsuperscript{35} Falkner 2003 \textit{Global Environmental Politics} 75; and Lemos and Agrawal 2006 \textit{Annu. Rev. Environ. Resour.} 300 and 305-307.}
\footnotesize{\textsuperscript{36} Delmas and Young \textit{Governance for the Environment} 74 and 124; and Falkner 2003 \textit{Global Environmental Politics} 75.}
\footnotesize{\textsuperscript{37} Generic descriptions of environmental governance, as discussed in Kotzé \textit{Global Environmental Governance} 193-200, suggests that environmental governance (as an institutional response) aims to influence human behaviour with respect to the environment. See further Olowu 2007 \textit{SAYIL} 263; Levy and Newell \textit{The Business of Global Environmental Governance} 2; and Sarkar 2011 \textit{IJBIT} 68.}
\footnotesize{\textsuperscript{38} Levy and Newell \textit{The Business of Global Environmental Governance} 2; and Delmas and Young \textit{Governance for the Environment} 71.}
\footnotesize{\textsuperscript{39} Levy and Newell \textit{The Business of Global Environmental Governance} 2.}
\footnotesize{\textsuperscript{40} Levy and Newell \textit{The Business of Global Environmental Governance} 2-3.}
2.4 Emerging hybrid environmental governance

Clearly, the nature of environmental governance is changing, and the confidence in the capacity of governments to address governance exigencies is dwindling at the same time.\textsuperscript{41} Globalisation is placing unprecedented pressure on many governments to effectively meet the demand for governance, especially in terms of environmental challenges that have become global.\textsuperscript{42} As a response, organisations other than governments can, and often do, emerge as important actors in efforts to meet the demand for environmental governance and to address the governance challenges that are caused by globalisation.\textsuperscript{43} Thus, as confidence in the ability of governments to meet the demand for governance wanes, the allure of new forms of governance rises.\textsuperscript{44}

A particularly interesting and potentially effective option to meet the diverse demands of environmental governance, involves a so-called hybrid form of authority.\textsuperscript{45} The emergence of this hybrid form of authority is primarily founded upon the acknowledgment that, within a globalised world, and in countries, no single governance actor possesses the capabilities to address the multiple facets, interdependencies, and scales of environmental challenges, environmental change and the challenges of ensuring socio-ecological security.\textsuperscript{46} This suggests that the state is not the only, and arguably not even the most important, actor in governance. There is accordingly a distinct emergence of forms of environmental governance that is characterised as being public, private, or both.\textsuperscript{47}

\textsuperscript{41} This is due to the ongoing and fundamental alterations in the relationships between humans and ecosystems which pose a complex set for environmental governance. See Delmas and Young \textit{Governance for the Environment} 3 and 93 in this regard.
\textsuperscript{42} Kotzé 2006 \textit{PELJ} 1; Feris 2010 \textit{PELJ} 73; Lemos and Agrawal 2006 \textit{Annu. Rev. Environ. Resour.} 300; and UNEP 2009 http://bit.ly/UoSmQz.
\textsuperscript{43} Delmas and Young \textit{Governance for the Environment} 7; and Vandenbergh 2013 \textit{Cornell Law Review} 141-146 in this regard.
\textsuperscript{44} Delmas and Young \textit{Governance for the Environment} 7; and Müller 2008 \textit{Politeia} 88.
\textsuperscript{45} Delmas and Young \textit{Governance for the Environment} 8-9.
\textsuperscript{46} Delmas and Young \textit{Governance for the Environment} 79; and Vandenbergh 2013 \textit{Cornell Law Review} 135 and 170.
\textsuperscript{47} Traditionally, governments (public sector) have assumed the principal responsibility for developing, implementing and enforcing important public environmental regulations. For example, governments have directed private sector actors to adopt environmentally sound behaviour through a mix of regulations and incentives. Furthermore, the public sector generally bears the responsibility to mitigate any damage that may arise from environmental problems. Due to insufficient resources, the inability to promulgate sufficient law, or lack of enforcement capacity of governments, many private actors has emerged as active participants in filling such “gaps”. According to Vandenbergh, private environmental governance refers to the development and enforcement of requirements designed to achieve traditionally (public) governmental ends by private actors. Private environmental governance includes a wide range of measures, such as collective standard setting (certification and labelling
In light of the above, environmental governance is a function for both public (state) and private sector actors.\textsuperscript{48} As no single actor possesses the capabilities to address the “multiple facets, interdependencies, and scales of environmental problems that may appear at first blush to be quite simple”, the assumption that only the state is required to perform this social function must be set aside.\textsuperscript{49} At present, many private sector actors are making an effort to become more accountable by reducing the adverse impacts of their corporate activities, whether on consumers, employees, communities, or the environment.\textsuperscript{50} From this, a sense of CER is captured which simultaneously invites improved modes of corporate responsibility.

\subsection*{2.5 Corporate (environmental) responsibility}

The emergence of hybrid forms of environmental governance and voluntary action by corporations responding to demands for improved environmental performance, are reflected and shaped by the discourse on CSR. CSR involves voluntary action by corporations that go beyond complying with existing law, and seeks to adhere to existing and additional regulatory standards and global norms.\textsuperscript{51} In addition, CSR involves the private sector directly in governance activities as it permits them to “participate in establishing or negotiating standards, monitor and report on compliance, and in some cases undertake enforcement”.\textsuperscript{52} CER, as a sub-division of CSR, refers to voluntary actions by a consistent pattern of private firms, that at the very least, go

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\item systems, lending standards, and environmental management standards), and bilateral standard setting (supply chain contracting, resource agreements, and good neighbour agreements). In addition, private governance measures may also complement public governance measures, resulting in public-private governance. For instance, incentives for higher performance can be offered to private actors or existing enforcement measures can be supplemented by private actors. See Olowu 2007 \textit{SAYIL} 263; Falkner 2003 \textit{Global Environmental Politics} 72-73; Lemos and Agrawal 2006 \textit{Annu. Rev. Environ. Resour.} 305-306; and Vandenbergh 2013 \textit{Cornell Law Review} 135, 147 and 148-161 for a full discussion in this regard.
\item Lemos and Agrawal 2006 \textit{Annu. Rev. Environ. Resour.} 311.
\item Lemos and Agrawal 2006 \textit{Annu. Rev. Environ. Resour.} 311.
\item Delmas and Young \textit{Governance for the Environment} 127; and Vandenbergh 2013 \textit{Cornell Law Review} 131.
\item Delmas and Young \textit{Governance for the Environment} 127.
\item For instance, an example of where private sector actors have gone “go beyond complying with existing law” can be found in the operations of Nestlé. Nestlé, for example, works directly with small farmers in developing countries (such as South Africa) to source basic commodities such as milk, coffee and cocoa, on which most of its global business is determined on. Moreover, Nestlé’s CSR investment in local infrastructure and its transfer of knowledge and technology has produced huge social benefits through improved health care, education and economic development. See Delmas and Young \textit{Governance for the Environment} 128; Portney “Corporate Social Responsibility” 228 and 233; and Chapter 3.3.2 of this discussion.
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beyond complying with existing law and regulations governing the environment, and seeks to adhere to higher standards and norms by communicating its social effects within.\textsuperscript{53} CER also refers to practices that benefit the environment (or mitigate the adverse impacts of business on the environment) that surpass what firms are legally obliged to do to contribute to sustainable development.\textsuperscript{54} For purposes of this discussion CSR will be regarded as including CER. While there is no direct link in the discourse between environmental rights and CER, the nature of the CER paradigm urges one to argue intuitively for its being an ethical-moral imperative, if not legally binding obligation, for private corporations to observe and actively participate in the protection and realisation of environmental rights. Since the 1970s, a number of global attempts have been made to draft voluntary guidelines, declarations and codes of conduct to regulate the activities of corporations.\textsuperscript{55} The most important are outlined below.

2.5.1 \textit{International guidelines, declarations and codes of conduct relating to corporate responsibility}

2.5.1.1 Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises

In 1976, the Organisation for Economic Co-operation and Development (OECD) developed and approved the \textit{Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises} (OECD Guidelines).\textsuperscript{56} The OECD Guidelines serves as recommendations to corporations, specifically multinational corporations, on how they ought to conduct their activities in countries they operate.\textsuperscript{57} These guidelines cover a variety of issues, such as information disclosure, consumer interests, science and technology, environmental concerns, competition, employment, and taxation.\textsuperscript{58}

In 2000, the OECD Guidelines were reviewed to include the provision that corporations should “respect the human rights of those affected by their activities” in the area of

\textsuperscript{53} See Paterson and Kotzé \textit{Environmental Compliance and Enforcement} 271; Portney “Corporate Social Responsibility” 240-241; and Delmas and Young \textit{Governance for the Environment} 127.

\textsuperscript{54} See Portney “Corporate Social Responsibility” 240-241; and Delmas and Young \textit{Governance for the Environment} 127 for a full discussion in this regard.


\textsuperscript{57} Clapp 2005 \textit{Global Environmental Politics} 28; Bilchitz 2008 \textit{The South African Law Journal} 757.

\textsuperscript{58} Clapp 2005 \textit{Global Environmental Politics} 28; Bilchitz 2008 \textit{The South African Law Journal} 757; and Nolan 2010 \textit{UNSW Law Journal} 586.
employment standards and environmental governance.\textsuperscript{59} It is important to note that despite these Guidelines being purely voluntary and non-binding upon corporations, they have been widely used and have had a significant influence on the development of CSR.\textsuperscript{60} In addition, the Guidelines have influenced other international mechanisms and they denote a rare example of influential governance actors seeking to address the management of multinational corporations directly in a multilateral setting.\textsuperscript{61}

2.5.1.2 The United Nations Global Compact

In 2000, the United Nations established the Global Compact whereby corporations were called to voluntarily “embrace and enact” a set of ten principles relating to human rights, labour rights, the protection of the environment, and corruption in their individual corporate practices.\textsuperscript{62} These principles aim to reflect the norms laid out in the \textit{Universal Declaration of Human Rights},\textsuperscript{63} the \textit{ILO Tripartite Declaration on Fundamental Principles and Rights at Work},\textsuperscript{64} the \textit{United Nations Conference on Environment and Development},\textsuperscript{65} and the \textit{United Nations Convention Against Corruption}.\textsuperscript{66}

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\item The Guidelines encourage strengthening existing environment management measures taken by corporations, such as CSR initiatives. In addition, the Guidelines go a little further in that it promotes the adoption of “measurable objectives, and where appropriate, targets for improved environmental performance,” as well as “regular monitoring and verification of progress” on environmental and other measures. Thus, the Guidelines aim to improve environmental performance rather than just improved management. See Bilchitz 2008 \textit{The South African Law Journal} 757; and Clapp 2005 \textit{Global Environmental Politics} 29 in this regard.
\item Bilchitz 2008 \textit{The South African Law Journal} 757; and Clapp 2005 \textit{Global Environmental Politics} 28.
\item It is important to note that South Africa is one of the many non-member states with which the OECD has working relationships in an attempt to strengthen the co-operation with South Africa and its 34 member states. The OECD’s collaboration with South Africa spans a wide array of policy issues, including macroeconomic policy and structural reform, debt management, fiscal policy, domestic resource mobilisation, competition policy, agricultural policy, public governance, rural and urban development, the fight against bribery, development, science, technology and innovation, chemicals testing and tourism. See Bilchitz 2008 \textit{The South African Law Journal} 757.
\item During the 1999 World Economic Forum, a pact between the United Nations and global businesses on corporate behaviour was proposed by then UN Secretary General Kofi Annan (Annan 1999 \textit{http://bit.ly/1m1Bqd}), and officially launched in 2000. The Compact contains a set of ten principles, two of which deal with human rights, four with labour standards, three with environmental standards and one with anti-corruption. For a full discussion, refer to Bilchitz 2008 \textit{The South African Law Journal} 758; Nolan 2010 \textit{UNSW Law Journal} 587; Clapp 2005 \textit{Global Environmental Politics} 27; and Aguirre 2005 \textit{African Human Rights Law Journal} 251 in this regard.
\item Universal Declaration of Human Rights 217 A (III) (1948).
\item ILO Tripartite Declaration on Fundamental Principles and Rights at Work GB.320/INS/4 (1998).
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The key objectives of the Global Compact, include: to identify problems and solutions regarding social and environmental issues through a multi-stakeholder approach; and to provide outreach systems for action at a national, regional and/or sectoral level through examples and identifying best practice. In addition, corporations are urged to “support and respect the protection of internationally proclaimed human rights” within their sphere of influence and to ensure that they are not “complicit in human rights abuses”. Likewise, Principles 7, 8 and 9 of the Global Compact encourage corporations to support the precautionary approach, undertake initiatives to promote greater environmental responsibility, and to develop and apply environmentally friendly technologies.

Within South Africa, the principles encompassed in the Compact have been incorporated in the national standards advanced by the King Report on Corporate Governance for South Africa 2002 (King II Report), and King Report on Corporate Governance for South Africa 2009 (King III Report). The King II Report requires corporations to report on all the impacts of doing business as well as their apparent and known effects on communities and the environment. In addition, the United Nations Global Compact Local Network in South Africa, together with the National Business Initiative, provide corporations with a platform and strategic framework for implementing, reporting and meaningful participation in the Compact.

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70 Currently, there is no universally accepted definition of the precautionary approach. However, organisations such as the Interdepartmental Liaison Group on Risk Assessment has defined the concept as “applying broadly where there is threat of harm to human, animal or plant health, as well as in situations where there is a threat of environmental damage”. The World Health Organization has defined the precautionary approach as “a tool to bridge uncertain scientific information and a political responsibility to act to prevent damage to human health and to ecosystems”. Moreover, the precautionary principle indicates that, in cases of serious or irreversible threats to the health of humans or ecosystems, acknowledged scientific uncertainty should not be used as a reason to postpone preventive measures. See Interdepartmental Liaison Group on Risk Assessment 2002 http://bit.ly/1Ei09D 5; and World Health Organization Europe 2004 http://bit.ly/1vDhwie 7-8.
72 See Chapter 3.1 in this regard.
73 See Chapter 3.1 in this regard.
Regardless of being voluntary and non-binding in nature, the Compact’s principles have assisted to increase awareness of and obligations under CSR, especially within a social and environmental context. It is regarded as an innovative, consent-based response to the challenges of globalisation and has come to represent the core embodiment of the voluntary CSR regime.\textsuperscript{76}

2.5.1.3 The United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

There have been numerous attempts to regulate the impact of corporate activity on human rights. Despite playing a substantial role in the development around the responsibilities of corporations for human rights specifically, most have not succeeded due to their voluntary nature, lack of political will by states and/or through strong resistance by corporations.\textsuperscript{77} In an attempt to address this problem, the United Nations Sub-Commission on Human Rights (UNSCHR) established a working group in 1998 to examine and report on the prospect of developing a code of conduct for corporations based on human rights principles.\textsuperscript{78} The UNSCHR reported that an exclusively voluntary system was inadequate and the working group was mandated to draft binding norms concerning human rights and corporations.\textsuperscript{79} What followed in 2003 was the adoption of the \textit{United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights} (UN Norms) by the UNSCHR.\textsuperscript{80}

The UN Norms signify an attempt to definitively “outline the human rights and environmental responsibilities attributable to business”.\textsuperscript{81} According to the UN Norms, the realisation of human rights will remain the primary responsibility of states and

\textsuperscript{76} Aguirre 2005 \textit{African Human Rights Law Journal} 251-252.

\textsuperscript{77} Bilchitz 2010 \textit{SUR - International Journal on Human Rights} 199; and McCorquodale 2009 \textit{Journal of Business Ethics} 385.

\textsuperscript{78} Bilchitz 2008 \textit{The South African Law Journal} 765; and Cragg \textit{et al} 2012 \textit{Business Ethics Quarterly} 2.


corporations will have an obligation to “promote, secure the fulfilment of, respect, ensure respect of, and protect human rights in their respective spheres of activity and influence”.

Consequently, all corporations, irrespective of their size, should in terms of the UN norms have some responsibility for the realisation of human rights standards based on their activities and capacity to influence markets, governments, stakeholders and communities.

With regard to environmental protection, the UN Norms require corporations to observe national and international law, regulations, policies and standards relating to the protection of the environment as well as human rights, public health and safety, bioethics and the precautionary principle. Corporations must respect the right to a clean and healthy environment in light of the relationship between the environment and human rights. In addition, corporations are required to assess the impact of their activities and be fully accountable for any adverse environmental consequences that may arise therefrom.

The standards adopted in the Norms could be linked to corporate public reporting requirements, whether in annual reports or as mandated by specific legislation. In South Africa, this can be seen in the “Code of Corporate Practices and Conduct” implemented by the Johannesburg Securities Exchange (JSE) that requires all publicly listed corporations to disclose non-financial information in accordance with the Global Reporting Initiative Sustainability Reporting Guidelines. This initiative indicates a willingness of corporate regulatory agencies to adopt a more extensive view on human

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rights issues that are considered material to a corporation’s performance and, in turn, increasing corporate transparency in its public reports.\footnote{Nolan 2005 UNSW Law Journal 608.}

As such, the UN Norms (envisioned as an evolving document), moved beyond the voluntary initiatives that had until this point been the central framework in which corporate responsibility for the realisation of human rights had been articulated, as it sets forth in more concrete and assertive terms several duties owed by corporations to humans whose lives, health and environment they effect.\footnote{Bilchitz 2010 SUR - International Journal on Human Rights 201; Hillemanns 2003 German Law Journal 1070; and Campagna 2003-2004 The John Marshall Law Review 1248 and 1252.} Despite not being binding, the Norms are aimed at assisting governments identify the types of laws that should be enacted, and helping them to choose the appropriate enforcement mechanisms to ensure that the Norms have a positive influence. They were further designed to encourage corporations to implement the Norms and to lay the groundwork for a possible foundation for binding law to develop on in the future.\footnote{Hillemanns 2003 German Law Journal 1070; and Aguirre 2005 African Human Rights Law Journal 257.}

2.5.1.4 The “Respect, Protect and Remedy” Framework and Guidelines

As a result of the contentious nature of the UN Norms and its failure to garner widespread support, many states still felt that the human rights responsibilities of corporations were important and required further normative development.\footnote{It is important to note that the UNSCHR referred the UN Norms to the Commission on Human Rights. However, as a result of various objections from international corporations and certain states, the Commission on Human Rights did not adopt the norms and referred to them as simply a draft proposal. See Bilchitz 2008 The South African Law Journal 765; and Bilchitz 2010 SUR - International Journal on Human Rights 199 for a full discussion in this regard.} As a result, the UNSCHR mandated former Special Representative (SRSG) on business and human rights, John Ruggie, to further investigate a number of issues relating to corporations and human rights.\footnote{The mandate required the SRSG to present his views and recommendations for consideration with regard to:}

(a) to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
(b) to elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights including through international co-operation;
(c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as ‘complicity’ and ‘sphere of influence’;
clarifying standards of corporate responsibility and accountability with regard to human rights.\(^9^4\) After much consultation and a series of reports,\(^9^5\) the SRSG proposed the *United Nations ‘Protect, Respect and Remedy’ Framework* (PRR Framework) and its implementation guidelines, the *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (PRR Guidelines).\(^9^6\)

2.5.1.5 United Nations ‘Protect, Respect and Remedy’ Framework

The PRR Framework indicates that “the root cause of the business and human rights predicament today lies in the governance gaps created by globalisation” which have provided a “permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation”.\(^9^7\) The framework offers a possible solution to such governance gaps that rests on corporate “differentiated responsibilities” and provides a basis on which the specific responsibilities of corporations in relation to the human rights they may impact is set out.\(^9^8\) This is encapsulated in three main principles:

\((d)\) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises; and

\((e)\) To compile a compendium of best practices of States and transnational corporations and other business enterprises.

Refer to Bilchitz 2010 *SUR - International Journal on Human Rights* 201; and Backer 2011 *Santa Clara Journal of International Law* 45.


\(^9^5\) United Nations 2008 [http://bit.ly/Vn71wr_3](http://bit.ly/Vn71wr_3), According to the PRR Framework, “governance gaps” refers to the growing gulf “between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences”. Over the last several decades, such governance gaps have grown wider as corporations have amassed increasingly expansive rights within the global economic structure. Such rights, together with new technologies have allowed corporate interests to circumvent, override, capture or dis-incentivise state regulatory authority with increasing facility. See Melish and Meidinger “Protect, Respect, Remedy and Participate” 305; and Backer 2011 *Santa Clara Journal of International Law* 58 for a full discussion in this regard.

First, the framework underlines the state’s duty to protect individual rights against abuse by non-state actors. In order to achieve this, states are encouraged to introduce regulatory measures to strengthen the legal framework governing human rights and corporations, in addition to providing mechanisms for the enforcement of such obligations.

The second principle entails a corporate responsibility to respect human rights. What this requires is that corporations may not infringe the rights of others – simply put, to do no harm – under a “due diligence” approach. According to this approach, corporations are expected to take the necessary steps to become aware of, prevent and mitigate adverse human rights impacts. This can be compared to the negative duties a state would have to protect individuals against the abuse of their rights by third parties. For example, the state’s obligations in relation to the right to a clean environment that urges states to ensure the protection and fulfilment of the right to a clean and healthy environment. In fulfilling this right, the state would be required, among other duties, to protect individuals against an environment that may be harmful to their health or wellbeing. This would entail, among others, the state setting up proper enforcement agencies, seeking to understand the causes of environmental degradation and addressing these through carefully designed policies and laws.

100 The PRR Framework acknowledges that while the duty to protect is well-established in international law and custom, the focus is on how the state is to protect against human rights abuses by corporations. See United Nations 2008 http://bit.ly/Vn71wr 7; and Bilchitz 2008 The South African Law Journal 769.
101 Such regulatory measures should aim to protect, prevent, investigate, and punish any human right abuse, and to provide access for redress. See United Nations 2008 http://bit.ly/Vn71wr 5-7; and Bilchitz 2008 The South African Law Journal 769.
103 United Nations 2008 http://bit.ly/Vn71wr 17; and Bilchitz 2010 SUR - International Journal on Human Rights 204; and Cragg et al 2012 Business Ethics Quarterly 3. There are various definitions regarding the notion of due diligence. For instance, Fasterling proposes that due diligence can be defined as a process that requires corporations to identify, analyse and mitigate risks. According to Graetz and Franks, due diligence implies that corporations have a sound understanding of the potential human rights impacts and consequences that their operations may pose, and that such corporations have taken (or are at least willing to take) the necessary steps to prevent or mitigate adverse rights impacts. Taylor et al suggest that due diligence comprises of two distinct conceptual processes, namely (i) an investigation of facts, and (ii) an evaluation of the facts in light of the relevant standard of care. They further propose that the notion of due diligence be undertaken for the purpose of identifying potential risks and preventing harm in connection with proposed projects and ongoing activities such as procurement. Refer to Fasterling 2012 Business Management Review 200; Graetz and Franks 2013 Impact Assessment and Project Appraisal 100-101; and Taylor et al Due Diligence for Human Rights 2 and 3 for a full discussion in this regard.
In relation to corporations, the PRR Framework recognises that many corporate human rights issues arise because corporations often fail to consider the potential implications of their activities before they even commence.\textsuperscript{107} Accordingly, the due diligence analysis that the framework proposes requires corporations to assess actual and potential human rights impacts it “may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships”.\textsuperscript{108} Such assessments, as proposed by the framework, are interconnected with other processes such as risk assessments and environmental and social impact assessments, which should include explicit references to internationally recognised human rights.\textsuperscript{109}

In addition, the framework seems to imply that corporations should also consider how they could minimize their contribution to human rights violations through abuses caused by third parties.\textsuperscript{110} The framework is clear that the corporate responsibility to respect would imply avoiding “complicity” which “refers to the indirect involvement by companies in human rights abuses – where the actual harm is committed by another party, including governments and non-State actors”.\textsuperscript{111} Thus, one can infer that the framework envisages moving beyond the traditional meaning of a responsibility to respect in human rights law by not merely confining corporations to take steps to avoid violating rights through its own actions,\textsuperscript{112} as it actually requires corporations to avoid infringing on the rights of others and to reduce or even potentially eliminate the adverse impacts with which they are involved.\textsuperscript{113}

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\textsuperscript{109} Human rights impact assessments are crucial when determining whether adopted policies are having any effect. The scale of such impact assessments will depend on the industry and the context (whether national and local) it is placed in. See Backer 2011 \textit{Santa Clara Journal of International Law} 57 (emphasis added); and United Nations 2008 \url{http://bit.ly/Vn71wr} 18.
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\textsuperscript{110} Bilchitz 2010 \textit{SUR - International Journal on Human Rights} 207; Blitt 2012 \textit{Texas International Law Journal} 47; and Cragg \textit{et al} 2012 \textit{Business Ethics Quarterly} 3.
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\textsuperscript{111} This includes the responsibility to protect individuals against abuses by third parties with whom corporations may have some form of contact. United Nations 2008 \url{http://bit.ly/Vn71wr} 20.
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\textsuperscript{112} See Bilchitz 2010 \textit{SUR - International Journal on Human Rights} 207; Bilchitz 2008 \textit{The South African Law Journal} 769; and Cragg \textit{et al} 2012 \textit{Business Ethics Quarterly} 3 for a full discussion in this regard.
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\textsuperscript{113} Muchlinski argues, as referred in Cragg \textit{et al}, that the notion of due diligence will lead to the advancement of legally binding duties under both national and international law. In order to achieve this, he suggests that the development of binding duties will be of particular value to involuntary stakeholders. This may play a significant role within the environmental context, as corporations that are involved in various environmental human right violations will be held liable to conduct their
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Finally, the third principle requires that there must be *access to remedies*. According to the framework, “effective grievance mechanisms” should be put in place where violations are alleged and provisions for redress and punishment are required. Such mechanisms include a variety of judicial and non-judicial mechanisms to improve and strengthen enforcement, such as CSR and criminal sanctions for corporations. This principle is integral to the entire framework as it is used to enforce the other duties and responsibilities to ensure access to remedies for victims of corporate human rights violations.

2.5.1.6 Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework

In 2011, the UN Human Rights Council unanimously endorsed the PRR Guidelines that operationalize the PRR Framework and further defined the key duties and responsibilities of states and corporations with regard to corporate-related human rights violations as set out in the PRR Framework by way of the introduction of the PRR Guidelines. The PRR Guidelines constitute a baseline standard of conduct that applies to all corporations, irrespective of their sector, size, ownership or structure, and wherever they operate.

The PRR Guidelines outlines three specific responses that corporations should follow once an operational due diligence mechanism is put in place in addressing adverse

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117 At a corporate level, grievance mechanisms serve as an important part of the corporate responsibility to respect. See Backer 2011 *Santa Clara Journal of International Law* 63 and 64 in this regard.


human rights impacts. First, where a corporation “causes or may cause an adverse impact, it should take the necessary steps to cease or prevent the impact”. Second, where a corporation contributes or may contribute to an adverse impact, it should act “to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible”. Third, where a corporation did not contribute to an adverse human rights impact, but its operations, products or services directly linked to another corporation responsible for such adverse human rights impacts, the situation is more complex. When determining the appropriate action that should apply in the third situation, the guidelines identify several variable factors that must be considered, such as the leverage a corporation has over another, how crucial the relationship is to the corporation, the severity of the abuse, and whether terminating the relationship with the other corporation would have human rights consequences.

Unlike the first two situations identified above, the PRR Guidelines do not impose a remediation responsibility upon corporations in the event that the adverse impact is directly related to a corporation and its operations, products, or services. Thus, the Guidelines aim to elaborate and clarify how corporations, states, and other stakeholders can operationalize the PRR Framework by way of taking practical steps to address the impacts of corporations on the human rights of individuals.

123 The PRR Guidelines lay down that in the event where a corporation has leverage to prevent or mitigate the adverse impact, it should exercise it. Moreover, if a corporation lacks leverage there may be ways to increase it, for example, offering capacity-building or other incentives to the related corporation, or collaborating with other actors. In the instance where a corporation lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage, the corporation in question should consider ending the relationship, taking into consideration credible assessments of potential adverse human rights impacts of doing so. Further challenges is raised when considering ending a relationship that is “crucial” to the corporation. This is due to the fact that such a relationship could be considered as crucial if it “provides a product or service that is fundamental to the corporations operations, and for which no reasonable alternative source exists”. In addition, the severity of the adverse human rights impact must also be considered “the more severe the abuse, the more quickly the corporation will need to see change before it takes a decision on whether it should end the relationship”. Besides, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences (reputational, financial or legal) that attach to the continuing relationship. See United Nations 2011 http://bit.ly/18WbEUy 19.
From the discussion thus far, it is clear that protecting human rights solely through obligations on governments seems rather uncontroversial if states represent the only threat to such rights; the only actors that can be held liable to respect, protect, promote and fulfil human rights, particularly environmental human rights; or if states could be fully relied upon to restrain conduct within their borders effectively. The concept of governance has stimulated increasing interest in the manner in which private sector actors contribute to governance as many human right violations, especially environment related violations, can mostly be traced back to corporations not taking responsibility for the impacts of their operations. Amongst the many ideological changes that have taken place in the corporate world, the rise of CSR is one of the most noteworthy. Both the PRR Framework and PRR Guidelines reflect that where any existing regulatory regime falls short, the implications of standards and practices founded in CSR should be elaborated on and integrated “within a single, logically coherent and comprehensive template” in order to address the growing concern of corporate related human rights violations. Therefore, it can be said that a more inclusive governance paradigm, as derived from these guidelines, could provide a foundation for placing positive, albeit it not legally enforceable, obligations upon corporations to ensure respect for and to advance the realisation of environmental related human rights norms.

2.5.2 *International environmental framework relating to corporate responsibility*

The increased importance of promoting CSR within corporate governance is also evident in the context of global water governance. The environment is regarded as an “underlying determinant” of the right to access to sufficient water, and other related environment and socio-economic rights, such as the right to sufficient food and health. This view is effectively captured in the opening paragraph of the *United

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131 Fuo 2013 *Obiter* 89.
Nations Conference on Environment & Development (Agenda 21) to the effect that the:

... integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future.

Chapter 3 of Agenda 21 requires states to establish and implement measures, in partnership with international and national actors, which will directly or indirectly provide people living in poverty with access to water. Agenda 21 further recognises private sector actors as full participants in the implementation and evaluation of activities related to Agenda 21, by encouraging such actors to “recognise environmental management as amongst the highest corporate priorities and as a key determinant to sustainable development”. In addition to complying with all legal requirements aimed at protecting the environment (for example public participation, environmental audits and impact assessments), corporations are urged to implement initiatives and measures that ensure their activities have nominal impacts on the quality of water resources, human health and the environment. Therefore, private actors are urged to not only minimise the impacts that their activities may have on the environment, but also to contribute to realising environmental and social services, including those related to water. Despite remaining unilateral and voluntary in nature, the diversity of CSR initiatives that have steadily emerged in recent years underlines how important it is for corporations to assume greater human rights based socio-ecological responsibilities.

2.5.3 Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001)

The need to place greater socio-ecological responsibilities and/or obligations on private sector actors and the need to establish a legal avenue through which corporations can

135 United Nations 1992 http://bit.ly/1EjqrTs 3 and 30. Furthermore, the Committee on Economic, Social, and Cultural Rights had recognised the need for states to take more responsibility for the actions of their corporations, particularly in the case of water rights. The Committee noted that states should take steps to “prevent their own citizens and companies from violating the right to water of individuals and communities in other countries”. See Smith 2010 Columbia Journal of Law and Social Problems 186.
be held accountable for their negative effect on the environment, is clearly illustrated in the *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001)* case. In this case, SERAC and the Centre for Economic and Social Rights (CESR) jointly brought a communication on behalf of the Nigerian Ogoni tribe against the Nigerian government for various environmental degradation and health problems caused by the oil exploration activities by the Nigerian National Petroleum Company (NNPC), a government controlled consortium with Shell. The toxic waste found in the Ogoni environment and local waterways resulted in both serious short- and long-term health impacts, such as skin infections, gastrointestinal and respiratory ailments, increased risk of cancers, and neurological and reproductive problems. The communication alleged that the failure of the Nigerian Government to fulfil the minimum duties required, for example its failure to protect the Ogoni population from the harm caused by the exploration activities by the NNPC, had violated the Ogoni people’s right to health and the right to clean environment.

In its analysis, the Commission held that in terms of Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the Nigerian government was required to take reasonable steps for the development of all aspects of environmental and industrial hygiene, for example by way of non-interventionist state conduct. The Nigerian government could have abstained from carrying out,

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138 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001).*
139 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) 1; Ebobrah Towards effective realisation 1 and 23; and Viljoen 2013 Law Democracy & Development 303.*
140 *See Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) 2 and 9; and Viljoen 2013 Law Democracy & Development 303.*
141 The right to health is recognized under Article 16 of the African Charter, which reads that:

(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.
(2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

142 The right to a clean environment is recognized under Article 24 of the African Charter, which provides that “All peoples shall have the right to a general satisfactory environment favourable to their development”.
supporting or tolerating any practice, policy or legal measures violating the integrity of people.144

The SERAC-case serves as a good illustration of where a regional court directed Nigerian government to observe human rights obligations, including those caused as a result of the government’s support of the oil company.145


145 Regardless of the obvious health and environmental crisis in Ogoniland, the Nigerian government failed to require the oil consortium (or its own agencies) to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production. In addition, the government went as far as refusing environmental organisations and scientists from entering Ogoniland to undertake such impact studies, despite the concerns raised by the Ogoni people regarding the oil development. See Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) 5 and 58; and Gladh Being Indirect 5 for a full discussion in this regard.
3 Environmental rights and governance in South Africa

In South Africa, the context and meaning of corporate responsibility has been significantly influenced by the legacy of apartheid, with corporations having been implicated in this history. During this period, the public and private spheres functioned to a large extent separately and with limited intervention by the South African government in corporate affairs.¹ This is particularly evident in respect of corporate responsibility which was primarily dominated by ad hoc philanthropic-type contributions that were reflected to be in the interests of the corporation.² With the introduction of democracy in 1994, South Africa approved a new constitutional framework that is much more conducive to creating binding obligations upon private sector actors such as corporations.³ This innovation, South Africa has largely been dominated by a voluntaristic framework concerning corporate responsibility since 1994.⁴ To fully understand the extent to which CSR operates within the context of South Africa and how such actors can be held liable to account for constitutional environmental-related rights (with particular reference to sections 24 and 27 of the Constitution), it is important to briefly outline its background and nature in South African law.

¹ Despite much debate about the extent and manner of corporate involvement in the apartheid regime, it is clear, for instance, that apartheid represented an opportunity to make profits that allowed for the development of corporate wealth based on the oppression of black South Africans. Refer to Ramllall 2012 Social Responsibility Journal 271; Lund-Thomsen 2005 International Affairs 624; NBI 2008 http://bit.ly/1qFtoS 6; and Bilchitz 2008 The South African Law Journal 772.

² Such philanthropic-type contributions provided, inter alia, good advertising, enhanced public image, the creation of general goodwill, and tax rebates which in turn contributed to the interests of a corporation. An example of such a philanthropic-type of initiatives can be found in the code of conduct that became known as the Sullivan Principles. The Sullivan Principles consisted of a list of principles for responsible corporate conduct targeted at US companies active in apartheid. See Ramllall 2012 Social Responsibility Journal 273; Lund-Thomsen 2005 International Affairs 624; and NBI 2008 http://bit.ly/1qFtoS 6 in this regard.

³ See s 8(2) of the Constitution of the Republic of South Africa, 1996; and Bilchitz 2008 The South African Law Journal 772. For a full exposition of s 8(2) of the Constitution of the Republic of South Africa, 1996 see Chapter 4.2 of this discussion in this regard.

⁴ It should be noted that although the introduction of the Constitution provides a possible leeway in holding private sector actors liable to account for fundamental rights, specifically constitutional environmental-related rights, it is still primarily the duty of state to protect individuals or groups from violations of their human rights by private sector actors. Refer to Bilchitz 2008 The South African Law Journal 772; NBI 2008 http://bit.ly/1qFtoS 6; Chirwa 2004 Melbourne Journal of International Law 13 in this regard. This notion of corporate responsibilities represents a departure from the emphasis on the state as duty holder and seeks to justify that new direction. See Rather 2001 The Yale Law Journal 468.
3.1 The current approach: a voluntary notion of responsibility

The current approach entails corporations integrating social and environmental concerns within their business operations and in the interactions with their respective stakeholders on a voluntary basis. This framework of voluntarism has been accompanied by advances concerning corporate governance and, in particular, the King Report on Corporate Governance for South Africa 2002 (King II Report) and King Report on Corporate Governance for South Africa 2009 (King III Report) that made certain far-reaching recommendations in this regard.

3.1.1 King Report on Corporate Governance for South Africa 1994

The notion of good corporate citizenship as a central feature to good governance first rose to prominence in the Report on Corporate Governance for South Africa 1994 (King I Report). Aimed at promoting the highest standard of corporate governance, the King I Report incorporated a Code of Corporate Practices and Conduct, which comprised of generally accepted corporate governance norms and procedures. This Code emphasised the relationship between shareholders and directors by placing greater accountability on companies’ financial affairs, which included amongst others the environment. Although regarded as ground breaking and at the forefront of

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5 With the political transition after 1994, in concert with globalisation, immense pressure resulting from new economic challenges placed higher expectations and assumptions on the corporate sector to adopt initiatives of ‘corporate responsibility’. Such initiatives are largely voluntaristic in nature which refer to a loose set of institutional arrangements, including (i) unilateral initiatives (company sponsored); (ii) public (government sponsored) voluntary programmes; and (iii) negotiated agreements (bilateral to multilateral initiatives). However, despite numerous corporations integrating such initiatives within its operations, for example donating large sums of money for the development of important social projects, this voluntary approach is essentially one whereby corporations give ‘charity’ to causes that move them, either because of the positive reputational benefits that flow from such donations, or out of a genuine altruistic concern for the welfare of society on the part of its shareholders and directors. Refer to Bilchitz 2008 The South African Law Journal 772; and Acutt Perspectives on Corporate Responsibility 4 and 6 for a full discussion in this regard.


7 Kloppers 2013 PELJ 176.

8 The King I Report provided a good system of corporate governance that aimed to achieve a proper balance between accountability, the freedom to manage and the interest of different stakeholders. In addition, application of the King I Report was restricted to entities such as companies with securities listed on the JSE, governmental departments, semi-private companies, banks and insurance companies. See Calkoen Corporate Governance Review 275, and Le Roux The applicability of the Third King Report 10 in this regard.

9 Le Roux The applicability of the Third King Report 10.
international corporate governance, the King I Report provided very little guidance in respect of corporate environmental governance.\textsuperscript{10}

3.1.2 King Report on Corporate Governance for South Africa 2002

The King II Report broadened the notion of corporate governance in that it placed emphasis on the need for corporations to recognise that they do not act independently of the societies in which they operate.\textsuperscript{11} Secondly, the King II Report advocated a move towards the notion of non-financial reporting and the idea of a so-called “triple bottom-line” which encompasses the traditional notion of the role of corporations beyond the single-minded pursuit of profit to embrace social and environmental considerations.\textsuperscript{12} Through this notion, corporations have a duty to adopt sound policies that extend to the non-financial aspects of its operations to minimise their negative impact on society and the environment.\textsuperscript{13}

The broader responsibility of companies (and its directors) was noted in Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company 2006 5 SA 333 (W), where the directors were fined for violating their environmental obligations.\textsuperscript{14} With

\begin{itemize}
\item \textsuperscript{10} Le Roux The applicability of the Third King Report 11.
\item \textsuperscript{11} The King II Report acknowledges that although the primary duty of directors is to the corporation, the interest of its stakeholders, such as “the community in which the company operates, its customers, its employees and its suppliers”, need to be taken into account when developing corporate strategies. See Institute of Directors Southern Africa 2002 http://bit.ly/1sRHmL7 7 and 10-11; Bilchitz 2008 The South African Law Journal 772; and Miles and Jones 2009 Deakin Law Review 58. In Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company 2006 5 SA 333 (W), the court, with reference to the King II Report, noted that social responsibility is regarded as one of the characteristics of good governance. In its judgement, the court held that the respondents in the matter, a mining company, acted irresponsibly by not addressing the issue of the water pollution caused by its mining operations. See Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company 2006 5 SA 333 (W); and Kloppers 2013 PELJ 166-167.
\item \textsuperscript{12} Miles and Jones 2009 Deakin Law Review 58; and Bilchitz 2008 The South African Law Journal 772.
\item \textsuperscript{13} Miles and Jones 2009 Deakin Law Review 57-58; Kloppers 2013 PELJ 179, and Bilchitz 2008 The South African Law Journal 772.
\item \textsuperscript{14} In Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company 2006 5 SA 333 (W), the Minister of Water Affairs and Forestry issued directives against Stilfontein Gold Mining Co Ltd (a JSE listed company) to provide information and make interim contributions for the pumping and treating of water in relation to the water pollution caused by its mining operations. The company failed to comply with these directives and subsequently, the Minister had obtained a court order compelling the company to adhere to the directives after which all the company’s directors had resigned simultaneously. In its judgment, with specific reference to the King Report III, the court held:

“The conduct of the second to the firth respondents flies in the face of everything recommended in the code of corporate practices and conduct recommended by the King Committee. In my view, the second to fifth respondents acted irresponsibly in merely abandoning the first respondent, a listed company of which they were the directors.”

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specific reference to the King II Report, the court noted that one of the characteristics of good governance is social responsibility. The court further noted in its judgment that the majority of the South African corporate community have uniformly endorsed the King Report II, and as the respondent was a listed company, the directors were obliged to implement the principles contained in the King Reports and had to adhere to the Listing Requirements of the JSE Securities Exchange. In its conclusion, the court held that the respondents had acted irresponsibly (and in bad faith) by not addressing the issue of preventing water pollution caused by its mining operations in a responsible manner.

Therefore, despite recognising the notion of corporate governance, as set out in the King Report II, the courts have yet to determine corporate responsibilities relating to human rights, particularly environmental-related rights.

3.1.3 King Report on Corporate Governance for South Africa 2009

The formulation of the King III Report became necessary with the introduction of the Companies Act 71 of 2008 and changing trends in governance resulting from globalisation. As with the previous King Reports, the King III Report endeavoured to be at the forefront of governance both internationally and domestically by focusing on the importance of reporting annually on how corporations have both positively and negatively affected the economic, social and environmental performance of the communities in which they operated during the year under review. In addition,
emphasis has been placed on the requirement to report on how the corporation intends to enhance those positive aspects and eradicate or ameliorate any possible negative impacts on the economic, social and environmental performance of the communities in which it will operate.\textsuperscript{20}

From the wording of the King III Report, it can be said that a sense of “corporate citizenship” is captured.\textsuperscript{21} Although not a new concept, the King III Report gives the notion of corporate citizenship more credence and concrete expression than ever before, while continually highlighting the ethical relationship between the corporation, environment and society in which it operates.\textsuperscript{22} Although not a legally enforceable instrument per se, the King II Report underlines that corporations should no longer be permitted to merely pursue commercial interests only, but should also take into consideration the environmental and social issues surrounding them.\textsuperscript{23}

3.1.4 Draft King IV Report on Corporate Governance for South Africa 2016

The Institute of Directors in Southern Africa and the King Committee has invited public commentary on the recently published \textit{King IV Report on Corporate Governance for South Africa 2016} (King IV Report).\textsuperscript{24} The King IV Report aims to promote good corporate governance,\textsuperscript{25} extend the recognition of good corporate governance,\textsuperscript{26} underline good corporate governance as a holistic and inter-related set of measures,\textsuperscript{27} and emphasise that good corporate governance should address both the structure and

\begin{itemize}
\item and Institute of Directors Southern Africa 2009 \url{http://bit.ly/1thFzg1} 5 and 12-13 for a full analysis on the “apply or explain” approach in this regard.
\item Institute of Directors Southern Africa 2009 \url{http://bit.ly/1thFzg1} 5; and Ramlal 2012 Social Responsibility Journal 282.
\item The notion of corporate citizenship is a consequence when a corporation, being a legal person, operates in a sustainable manner. Refer to Ramlal 2012 Social Responsibility Journal 282.
\item Ramlal 2012 Social Responsibility Journal 282.
\item It is important to note that the King III Report, in contrast to King I and King II Reports, applies to all entities regardless of the manner and form of incorporation or establishment. See PWC 2009 \url{http://bit.ly/1qjZuBq} 3; and Miles and Jones 2009 Deakin Law Review 59.
\item Institute of Directors Southern Africa 2016 \url{http://bit.ly/1WMLTx9}.
\item Good corporate governance is regarded as an integral part in the running of a business, which in turn results in benefits such as: (i) an ethical culture, (ii) enhancing corporate performance and value-creation, (iii) enabling the corporate body to exercise adequate and effective control, and (iv) building and protecting corporate trust in its reputation and legitimacy. See Institute of Directors Southern Africa 2016 \url{http://bit.ly/1WMLTx9} 2.
\item Institute of Directors Southern Africa 2016 \url{http://bit.ly/1WMLTx9} 2.
\item According to the King IV Report, these measures of corporate governance should be understood and implemented in an integrated manner. See Institute of Directors Southern Africa 2016 \url{http://bit.ly/1WMLTx9} 2.
\end{itemize}
process of corporations as well as their ethical consciousness and behaviour. Furthermore, the King IV Report has replaced the 75 principles contained in the King III Report with 17 principles. For instance, the “apply or explain” requirement in the King III Report has been replaced by an “apply and explain” requirement, the test for the independence of directors has been widened, and the inclusion of specific corporate governance guidance supplements.

More particularly, the King IV Report recognises how corporations should achieve positive lasting outcomes for the corporation itself, society and the environment by way of the manner resources are used and how corporations balance their needs with those of society. To this end, the King IV Report recognises a responsible corporate citizen as a corporation that responds to changing societal demands by informing stakeholders of the impact its activities has on the natural environment.

In sum, both the King II report and King III Report represent a welcome development in thinking around CSR in the South African context. However, from a human rights perspective, the approaches adopted in both the reports contain a number of gaps. First, there is very limited focus on human rights and no attempt to delineate the human rights obligations of corporations. The King II Report simply indicates that an array of aspects are involved in good citizenship, and that one of these takes account of “recognising the implications of human rights in the corporation’s operation, having a policy, and acting on it”. Second, attention is paid to aspirations and principles of good corporate citizenship rather than more concrete enforceable obligations. It provides guidance that is to be followed on a voluntary basis and such guidance only becomes

32 This notion of corporations having obligations towards society is supported by the Companies Act. See Institute of Directors Southern Africa 2016 http://bit.ly/1WMLTx9 6.
33 The guidelines on corporate governance, as contained in both the King II and King III Reports, are thought to be amongst the most progressive in the world as it integrates CSR and corporate governance within a social and environmental context. See Bilchitz 2008 The South African Law Journal 773; and Ramlal 2012 Social Responsibility Journal 283.
mandatory when required by bodies, such as the Johannesburg Stock Exchange.\footnote{Bilchitz 2008 \textit{The South African Law Journal} 773.} Third, in terms of enforcement, both reports focus on “corporate governance” and subsequently the framework in which it operates is one of self-regulation. They do refer to the advantage of independent verification as involving “greater transparency and confidence in a company’s integrity”, but until now there has ultimately been no obligation to have a company’s non-financial reports verified.\footnote{Ramlal 2012 \textit{Social Responsibility Journal} 283; Bilchitz 2008 \textit{The South African Law Journal} 773; and Institute of Directors Southern Africa 2002 \url{http://bit.ly/1sRHmL7}.} Non-financial reporting can in fact conceal a number of violations that corporations may not reflect in its reports.\footnote{Bilchitz 2008 \textit{The South African Law Journal} 773.} Finally, both reports do not provide any remedies for violations of human rights or environmental violations where they are reported.\footnote{Bilchitz 2008 \textit{The South African Law Journal} 773.} In respect of the King IV Report, despite recognising the notion of “corporate citizenship” – which includes, amongst others, sustainable development, human rights, impact on communities in which the corporation conducts its activities and distributes its outputs, protection of the natural environment and responsible use of natural resources – corporations are merely required to “apply and explain” the principles enshrined in the King IV Report, rather than being held to account for their violations.\footnote{Institute of Directors Southern Africa 2016 \url{http://bit.ly/1WMLTx9}.}

3.2 \textit{Notion of responsibility – a constitutional approach?}

Despite the fundamental transformation brought about by the Constitution in the South African legal system, it appears that little consideration has been given to the impact of the Constitution upon corporate activities on human rights despite explicit recognition of the reach of the Bill of Rights into the private sphere.\footnote{The application of the Bill of Rights to horizontal relationships in respect of the 1996 Constitution differs significantly from the position obtained in the 1994 (interim) Constitution. The interim Constitution provided that the Bill of Rights only had “indirect horizontal application”, however, this position had been challenged in both \textit{Du Plessis v De Klerk} 1996 (3) SA 850 and \textit{Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 1996 (4) SA 744 (CC)}. In the \textit{Du Plessis}-case, the Constitutional Court held that the Bill of Rights could apply indirectly to proceedings between private individuals. What this entails is that certain values contained in the Bill of Right must be respected whenever ordinary law is interpreted, developed or applied (particularly in respect of the common law). Shortly after the \textit{Du Plessis}-case, the Constitutional Court found in the \textit{Ex parte Chairperson}-case that s 8 could also have “direct horizontal application” whereby the provisions contained in the Bill of Rights trumps ordinary law and conduct. See \textit{Du Plessis v De Klerk} 1996 (3) SA 850; \textit{Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 1996 (4) SA 744 (CC)}; Chirwa 2003 \textit{ESR Review} 2; Bilchitz 2008 \textit{The South African Law Journal} 773-774; Kotzé 2004 \textit{PELJ} 4; Nolan 2014 \textit{Int J Constitutional Law} 77; Currie and De Waal The New...}
reviewing scholarship on company law and constitutional law that have continued largely as separate disciplines with a very narrow area of overlap. Beyond the King Reports that provide broad policy-type guidelines, to what extent does the Constitution set out more concrete and enforceable human rights obligations for corporations that would also enable their more deliberate participation as non-state actors in environmental governance in South Africa?

3.2.1 Horizontal application of constitutional rights

Section 8 of the Bill of Rights confirms that vertically, “the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state”. But the Constitution also goes beyond a purely vertical relationship to affirm a degree of “direct horizontal application” between individuals and other individuals including natural or juristic persons. When endeavouring to apply a provision of the Bill of Rights to a natural or juristic person, section 8(2) provides that:

A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

Section 8(2) can be said to deal with direct horizontal application, as it sets out the conditions in which the conduct of private actors may be confronted for infringing human rights or may be bound by the rights in the Bill of Rights. The determination as to whether constitutional environmental-related rights are applicable to non-state actors in terms of section 8(2) is dependent on the nature of these rights and the nature of the duty imposed by these rights. Depending on the nature of the rights and duty imposed by such rights, there are three possible circumstances that may arise in relation to the application of constitutional environmental-related rights. A right may (i) be of no

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44 S 8(1) of the *Constitution of the Republic of South Africa*, 1996.
45 S 8(2) of the *Constitution of the Republic of South Africa*, 1996.
48 S 8(2) of the *Constitution of the Republic of South Africa*, 1996.
application to private persons; (ii) be fully applicable to private persons; or (iii) only be applicable to a certain extent.\textsuperscript{50}

According to Currie and De Waal, when determining the horizontal application of the Bill of Rights, as a general rule such application should not “be determined a priori and in the abstract”.\textsuperscript{51} The potential horizontal application of a constitutional provision is therefore context specific and will be dependent on the nature of the private conduct and the circumstances in each particular case.\textsuperscript{52} In other words, the extent to which a constitutional provision will be applicable is determined in respect of the context within which and the purpose of such a provision is sought to be relied upon in the private sphere.\textsuperscript{53} For example, the right of every arrested, detained and accused persons (as contained in section 35 of the Constitution) would only apply vertically since the purpose of this right is explicitly directed at the state to protect individuals from irregularities during arrests and detentions.\textsuperscript{54} On the other hand, the right to human dignity (as contained in section 10 of the Constitution) would apply horizontally and vertically since its purpose is to protect human dignity irrespective of whether it is the state or a private person affecting such dignity.\textsuperscript{55} In respect of the nature of the duty imposed by the right, Currie and De Waal argue that the state is motivated by the broader common concerns of society and its well-being, while natural or juristic persons are mostly motivated by narrow self-interest.\textsuperscript{56} As natural or juristic persons are motivated by narrower self-interests, the potential horizontal application of a constitutional provision to private conduct should not undermine private authority to the same extent that it places restrictions on the sovereignty of the state.\textsuperscript{57}


\textsuperscript{51} Currie and De Waal \textit{The Bill of Rights Handbook} 49.

\textsuperscript{52} Kotzé and Fuo 2016 \textit{Journal of Energy and Natural Resources Law}; and Currie and De Waal \textit{The Bill of Rights Handbook} 49.

\textsuperscript{53} Currie and De Waal \textit{The Bill of Rights Handbook} 49.

\textsuperscript{54} This is on the basis that only the state can arrest and detain people. See Kotzé and Fuo 2016 \textit{Journal of Energy and Natural Resources Law} 303; and Currie and De Waal \textit{The Bill of Rights Handbook} 49 for a full discussion in this regard.

\textsuperscript{55} Kotzé and Fuo 2016 \textit{Journal of Energy and Natural Resources Law} 303.

\textsuperscript{56} Kotzé and Fuo 2016 \textit{Journal of Energy and Natural Resources Law} 305; and Currie and De Waal \textit{The Bill of Rights Handbook} 50.

\textsuperscript{57} Currie and De Waal argue that “since the conduct of private persons has to be funded from their pockets, the same duties may not be imposed on them as can be imposed on an organ of state which relies on public funds.” See Kotzé and Fuo 2016 \textit{Journal of Energy and Natural Resources Law} 304-305; and Currie and De Waal \textit{The Bill of Rights Handbook} 50.
In light of the above, when determining the extent to which constitutional environmental-related rights will be applicable to private actors, such as corporations, it is first important to determine the nature of and duties imposed by such rights.

3.2.2 Section 24 – environmental right

In terms of section 24 of the Constitution:\textsuperscript{58}

Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Section 24 sets out a natural division between the right to an environment that will not cause harm to health and well-being, and the duty of the state to take certain measures in order to realise and protect the rights set out in section 24(a).\textsuperscript{59} What this entails is that the state should adopt and effectively implement adequate legislation, policies and programmes.\textsuperscript{60} The duty to take certain measures goes further as it also places a negative obligation on the state to abstain from measures that may cause environmental degradation or that may generally impair the right guaranteed in subsection 24(a).\textsuperscript{61}

Both subsections 24(a) and (b) share a common introductory phrase, namely “Everyone has the right”, which reflects the language of the socio-economic rights contained in the Constitution.\textsuperscript{62} Thus, these two elements are intended to be read and interpreted in conjunction with one another and with the remainder of the Constitution.\textsuperscript{63} In essence, section 24 reflects two principle characteristics. Sub-section (a) reflects that of a fundamental human right, and sub-section (b) reflects that of a socio-economic right.\textsuperscript{64}

\textsuperscript{58} S 24 of the Constitution of the Republic of South Africa, 1996.
\textsuperscript{59} Christiansen 2013 Stanford Environmental Law Journal 243.
\textsuperscript{60} Kotzé and Fuo 2016 Journal of Energy and Natural Resources Law 302.
\textsuperscript{61} Feris and Tladi “Environmental rights” 257.
\textsuperscript{63} Christiansen 2013 Stanford Environmental Law Journal 243.
\textsuperscript{64} This position has been confirmed in HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism 2006 5 SA 512 (T) 518 (own emphasis added). Briefly explained, the HTF Developers-
Section 24, as a whole, relates to “material conditions for human welfare” as it encompasses an acknowledgment that environmental degradation has a profound effect on humans, their health and well-being and their continued existence, \(^{65}\) since continuous environmental degradation affects the health, livelihoods and lives of humans. \(^{66}\) As an established principle that human rights are interrelated, interdependent and indivisible, to best understand environmental rights, it should be read in relation to other rights, specifically those contained in section 27 of the Constitution. \(^{67}\)

### 3.2.3 Section 27 – socio-economic rights

In terms of section 27 of the Constitution: \(^{68}\)

1. Everyone has the right to have access to –
   
   (a) health care services, including reproductive health care;
   
   (b) *sufficient food and water*; and
   
   (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

2. The state must take reasonable legislative and other measures, within its available resources, to achieve the *progressive realisation of each of these rights*.

From the wording above, it is apparent that the obligation to “take reasonable legislative and other measures” in order to realise and protect the rights set out in section 27 rests...
primarily with the state, as in the case of section 24. Furthermore, it can be said that “socio-economic rights create entitlements to material conditions for human welfare, such as food, water, health care services and shelter”. All these rights form components of an adequate standard of living, but for purposes of this discussion, attention will only be paid to the right of access to sufficient water.

The right of access to food, an appropriate means of subsistence and standard of living, and the right to life are explicitly protected in the South African Constitution. From a human perspective, water is a prerequisite to these rights since survival, an adequate standard of living, good health and sufficient food all depend on a minimum amount of clean water to prevent dehydration, reduce risk of disease and provide for cooking, hygiene and sanitation. From an ecological perspective, the prerequisite is that ecosystems must remain in a state to sustainably provide water of an adequate quality and quantity in order to meet such rights. This ecological requirement is properly captured by the environmental right that provides for “an environmental that is not harmful to ... health or well-being” and the term “ecologically sustainable development”. The environmental right works in this way to ensure or sustain the ecological base to provide access to water. Water is an essential service and without safe and affordable access to sufficient water, all other rights are meaningless.

Section 7(2) of the Constitution provides that the state, as the primary addressee of socio-economic rights obligations, is obliged to respect, protect, promote and fulfil all

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70 Feris 2008 SAPL 202.
71 S 11 and 27 of the Constitution of the Republic of South Africa, 1996; Stewart and Horsten 2009 SAPL 488; and Gabru 2005 PELJ 11-12.
72 As humans cannot survive without water, many communities who lack access to adequate and clean water are subjected to insufficient or unsafe intake of water. Such water compromises their health and hygiene that could expose them to cholera, diarrhoea, parasitic infestations and HIV/AIDS-related infections. See Stewart and Horsten 2009 SAPL 488; and Gabru 2005 PELJ 11-12.
73 Gabru 2005 PELJ 11-12; and Stewart and Horsten 2009 SAPL 488.
74 S 24(a) of the Constitution of the Republic of South Africa, 1996.
75 S 24(b) of the Constitution of the Republic of South Africa, 1996. This right is to be realised through reasonable legislative and other measures that secure ecologically sustainable development whilst promoting justifiable economic and social development. See Stewart and Horsten 2009 SAPL 488.
76 Stewart and Horsten 2009 SAPL 488; and Gabru 2005 PELJ 11-12.
77 Gabru 2005 PELJ 11-12.
rights as set out in the Bill of Rights. As a result, the constitutional duty to realise the right of access to water therefore lies with the state, and not with private sector actors, such as corporations. However, states are increasing experiencing challenges in fulfilling its constitutional duty to provide access to water. Such challenges can be attributed to corruption, increasing industrial and domestic demand, inequality, poverty, the lack of adequate financial and human resources, disproportionate advancement of industrial interests insufficient water infrastructure, limited government capacity, and increasing water scarceness. These challenges can best be illustrated in the Federation for Sustainable Environment and Others v Minister of Water Affairs and Others (Carolina) series of cases. Briefly these cases addressed the issue regarding water which had been contaminated by acid mine drainage (AMD) which in turn impeded the ability of the municipality to provide (appropriately treated) water to the town Carolina and the nearby township Silobela in Mpumalanga Province. In its judgment, the court held that the contaminated water (as a result of the “acid mine water”) was not healthy for both human and animal consumption. To this end, the court further held that the state is enjoined to take progressive measures to ensure the eradication of “gross infringement of the constitutional right to have access to water” in communities. Despite granting an urgent order directing the municipality to provide adequate temporary water to Carolina and Silobela, the court failed to address the core issue of the problem – specifically the corporate and environmental liability of the surrounding mines responsible for the AMD.

The so-called “state action” paradigm may serve as a useful basis for distinguishing the level of liability and responsibility that private sector actors have in terms of environmental related human rights. What this paradigm entails is that private actors
carrying out the functions of the state should in terms of section 8(2) bear the latter’s responsibilities.\textsuperscript{87} Likewise, a corporation not linked to the state should be bound by the same standard as the state would.\textsuperscript{88} The operations of private water service providers may serve as an example.\textsuperscript{89} As many of these private actors that provide water have vast amounts of power, both in the form of political power and in overall capital, a monopoly is effectively maintained over water.\textsuperscript{90} This, in turn, can create a dangerous disparity between provider and consumers, possibly leaving consumer helpless to defend their interests.\textsuperscript{91} Within South Africa, this position can be illustrated by the Silulumanzi concession in Nelspruit, Mpumalanga.\textsuperscript{92} Silulumanzi provides water to 350,000 people in Nelspruit and its neighbouring townships.\textsuperscript{93} Although the Silulumanzi concession has seen improved services in Nelspruit by assisting many more South Africans to have access to water, the impact of this concession has not only been all positive.\textsuperscript{94} This is due to the Nelspruit municipality struggling to cope with financial obligations under the contracts, as a result of which it has been forced to resort to debt collection mechanisms such as pre-paid meters, water restrictors and rigorous debt recovery.\textsuperscript{95} These methods affect the enjoyment of the right of access to sufficient water. For example, over 100 000 people who were unable to afford to pay for water, fell victim to a ten month cholera outbreak after the water utility, Silulumanzi, disconnected the tap and people were forced to find water in polluted ponds and streams in February 2002.\textsuperscript{96} Accordingly, as Silulumanzi carries out the function of the

\textsuperscript{87} Chirwa 2003 ESR Review 6. \\
\textsuperscript{88} Chirwa 2003 ESR Review 6. \\
\textsuperscript{89} The notion of privatisation derives from economic and political models that “define the relationship between the public actors and the citizens in respect of delivery of public services”. Though privatisation has been associated primarily with the full divestiture of state assets, it includes various forms of delegation of public duties to the private sector, such as private-public partnerships. See Mbazira “Privatisation and the Right of access to sufficient water in South Africa” 58. \\
\textsuperscript{90} Consumers are most likely not to be protected from the operations of such actors as they provide goods that people cannot live without and face little competition in the process. See Welch 2004 Sustainable Development Law & Policy 63; and Nhlapo et al 2011 http://bit.ly/1rMu3KM. \\
\textsuperscript{91} Welch 2004 Sustainable Development Law & Policy 63; and Nhlapo et al 2011 http://bit.ly/1rMu3KM. \\
\textsuperscript{92} In 1999, the local municipality of Nelspruit signed a 30-year concession with the Greater Nelspruit Utility Company, now Silulumanzi, to provide water to the Nelspruit area. See Govender 2012 http://bit.ly/1CGI2d8. \\
\textsuperscript{94} Govender 2012 http://bit.ly/1CGI2d8. \\
\textsuperscript{95} The principles behind privatisation, such as cost recovery and subsidy removal are inherently detrimental to the enjoyment of socio-economic rights. Refer to Mbazira “Privatisation and the Right of access to sufficient water in South Africa” 58; Govender 2012 http://bit.ly/1CGI2d8; and Nhlapo et al 2011 http://bit.ly/1rMu3KM. \\
\textsuperscript{96} Without undermining the relevance of public participation and transparency to human rights, the most important threat to poor people is absence of consumer protection as the water supplied by Silulumanzi is too expensive and too scarce for the poor communities in this area. The absence of consumer protection to these communities may decrease affordability and accessibility. See Mbazira
state by providing the people in Nelspruit and its neighbouring townships access to water, in terms of the “state action” paradigm and in light of section 8(2), Silulumanzi should bear the responsibilities and be held to many of the same standards as applied to the state.\textsuperscript{97}

Due to the high standard of protection required from the constitutional entrenchment for such environmental-related rights, concern has been raised that the obligation of such positive duties go far beyond the (material) capacity of the state.\textsuperscript{98} For example, the right to an environment that is not harmful to one’s health and well-being is not only dependent on the policies and actions of the state, but also on the decisions and policies of private sector actors as such actors often play a critical role in relation to the fulfilment, protection, promotion and violation of environmental-related rights.\textsuperscript{99} Thus, corporations exercising the functions of the state or those wielding particular oppressive power that are not directly linked to the state, could in theory be held liable for human rights violations under this paradigm.\textsuperscript{100}

From the discussion thus far it is clear that socio-economic rights, more specifically the right of access to sufficient water, have a close relationship with environmental rights.\textsuperscript{101} Due to the vital nature that these rights have to the requirements of life, it is imperative that section 24 and 27 rights find application to private sector actors to the degree that such actors may influence (either positively or negatively) such rights. In other words, the question arises as to whether corporate involvement makes provision for the negative duties to respect, protect and promote, as well as the positive duty to fulfil the right.\textsuperscript{102} 

\textsuperscript{97} Welch 2004 \textit{Sustainable Development Law & Policy} 63.
\textsuperscript{98} Feris 2008 \textit{SAJHR} 34.
\textsuperscript{99} Feris 2008 \textit{SAJHR} 34; and Feris and Tladi “Environmental rights” 258.
\textsuperscript{100} Chirwa 2003 \textit{ESR Review} 6.
\textsuperscript{101} Olenasha \textit{The Enforcement of Environmental Rights} 39-40 and 45.
\textsuperscript{102} Kotzé and Fuo 2016 \textit{Journal of Energy and Natural Resources Law} 304.
4 The responsibility to realise constitutional environmental-related rights by corporations in South Africa

Sections 8(2) and (4) of the Constitution require all natural and juristic persons, such as corporations, to comply with the human rights protected by the Bill of Rights.¹ As corporations exert particular power over the protection and realisation of constitutional environmental rights, efforts of addressing corporate power should start by understanding how South African environmental and corporate law addresses this issue.

This chapter aims to identify the various duties derived from both environmental and corporate law, whilst assessing whether transformation is required of the corporate structure and company law to give these duties effect within the South African context.

4.1 Duties derived from environmental law

Both sections 24(b) and 27(2) place an obligation on the state to give effect to these rights by means of positive implementation and enforcement by way of “reasonable legislative and other measures”,² and a negative obligation to abstain from measures that may generally impair these rights.³ More particularly, section 24(b) provides that every person has the right to have the environment protected “through reasonable legislative and other measures that prevent pollution and ecological degradation”. When considering section 24(b), it appears from the wording of this section that the implementation of reasonable and “other” measures do not explicitly fall upon the state alone and should therefore find applicability to some extent to private sector actors as well. Such application can be found within the context of water provision. For example, the Water Services Act 108 of 1997⁴ gives legislative effect to the right of access to water by providing, amongst others, a regulatory framework for water services institutions and water services intermediaries.⁵ Water services institutions and

¹ S 8(2) and (4) of the Constitution of the Republic of South Africa.
² S 27(2) of the Constitution of the Republic of South Africa.
³ Socio-economic and environmental rights act as “blueprints for the state’s manifold activities that proactively guide and shape legislative action, policy formulation and executive and administrative decision-making”. See Feris 2008 SAPL 202; Feris and Tladi “Environmental rights” 257; Kotzé and Du Plessis 2010 Journal of Court Innovation 167; and Ratner 2001 The Yale Law Journal 461.
⁵ S 1 of the Water Services Act 108 of 1997 provides that a “water services intermediary” includes any person who is obliged to provide water services to another in terms of a contract where the obligation
intermediaries, such as private corporations, provide a possible avenue to release some aspects of the state’s duty in relation to water to ensure that water supply services are provided in a manner which is efficient, equitable and sustainable.\(^6\)

Where a private actor is contracted by the state to expressly carry out the constitutional function of delivering water services on its behalf, Kotzé and Fuo contend that such an actor might bear the state’s socio-economic rights obligations as outlined in sections 24 and 27.\(^7\) Although such contracts entered between the state and private actors assist in the privatisation of water services, whereby such actors are more directly involved in respect of general water provision, it remains a highly contentious approach in South Africa as many of these private actors often encounter instances whereby human rights are violated (or occasionally violate human rights) during the course of their operations.\(^8\) This is aggravated by the competitiveness for corporate investment which, as a result, demands the scaling down of social, cultural and environmental policy.\(^9\) This is primarily caused by corporations that extract immense profits with relatively little reinvestment in local communities, despite such natural resources belong to them – for example in the case of private water service providers.\(^10\)

The outsourcing of water functions to the private actors, as illustrated in Chapter 3 above, do not always lead to the provision of water services in a manner that is efficient, equitable, cost-effective and sustainable.\(^11\) Because market forces cannot adequately regulate private water service providers, these private actors should be held to many of

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\(^9\) Aguirre 2004-2005 California Western International Law Journal 62; and Delmas and Young Governance of the Environment 119.

\(^10\) Despite various attempts made by the state to engage private sector actors in ensuring that their activities are in line with s 24, such as the King II and III Reports, such efforts have been frustrated because of their refusal to take responsibility for their corporate activities which contribute to environmental and health problems. Refer to Chapter 4 for a full discussion on the various attempts made by the state to ensure corporate environmental responsibility. In addition, see Aguirre 2004-2005 California Western International Law Journal 61; Figg 2005 International Affairs 606-608; and Van Eeden et al 2009 TD 52.

the same standards as applied to the state actors.\textsuperscript{12} Therefore, the state has the duty to ensure that legislation relating to water provision should specifically, where necessary, provide for and define the roles of corporations in contributing to the positive duty to fulfil the right of access to sufficient water.\textsuperscript{13}

\textbf{4.2 Duties derived from corporate law}

The \textit{Companies Act} 71 of 2008 aims, amongst others, to promote compliance with the Bill of Rights whilst reiterating the notion of a company as a social creature having responsibilities of a social, environmental and economic nature.\textsuperscript{14} Of particular note, section 7 of the \textit{Companies Act} states corporations should place human rights concerns at the centre of their policy making and that such concerns are entrenched in the holistic functioning of the company.\textsuperscript{15} Section 7 of the \textit{Companies Act} therefore aims to place a positive duty upon corporations to ensure that their actions not only identifies human rights concerns that are affected by their operations, but also that such concern are embedded in their corporate activities.

Furthermore, section 15(1) provides that a corporation’s Memorandum of Incorporation must be in line with the Companies Act, and any rule that is inconsistent with the Act is to be regarded as null and void to the extent of its inconsistency.\textsuperscript{16} In light hereof, it can be argued that corporations are obliged to consider corporate human rights violations in their day-to-day management of its affairs of the company. Accordingly, should this view be followed, it can then be further argued that in fulfilling their fiduciary duties,\textsuperscript{17} directors must consider human rights responsibilities as one of the “best interests” of their corporation.\textsuperscript{18} In order to crystallise the principle that human rights should be placed at the centre of corporate policy making as set out in section 7, it is vital that company law be amended so that companies are compelled to expressly recognise that they are bound to corporate human rights obligations and that they are “responsible for their realisation to the extent that they bear responsibility for them”.\textsuperscript{19}

\begin{thebibliography}{99}
\bibitem{Welch2004} Welch 2004 \textit{Sustainable Development Law & Policy} 63.
\bibitem{CompaniesAct2008} S 7(a) and (d) – (e) of the \textit{Companies Act} 71 of 2008.
\bibitem{CompaniesAct2008} S 7 of the \textit{Companies Act} 71 of 2008.
\bibitem{CompaniesAct2008} S 15(1) of the \textit{Companies Act} 71 of 2008.
\bibitem{CompaniesAct2008} S 76(3) of the \textit{Companies Act} 71 of 2008.
\bibitem{Bilchitz2008} Bilchitz 2008 \textit{The South African Law Journal} 781; and Kamga and Ajoku 2014 \textit{PELJ} 497.
\bibitem{Bilchitz2008} Bilchitz 2008 \textit{The South African Law Journal} 781; and Kamga and Ajoku 2014 \textit{PELJ} 497.
\end{thebibliography}
4.3 Horizontal application – Requiring transformation of the corporate structure and company law?

Traditionally, the main purpose of private actors, particularly of corporations, is viewed as the maximisation of profit.\textsuperscript{20} This limited understanding of corporate responsibility has been questioned by recent developments in both the international and national sphere.\textsuperscript{21} National initiatives (such as the “triple bottom-line” notion) and international initiatives (such as the notion of a corporation’s “sphere of influence”) are intended to recognise corporate responsibilities that go past simply making profit.\textsuperscript{22} However, as discussed above, these initiatives lack any binding force. In addition, when considering certain of the essential features of corporate responsibility, such as the “achievement of separate legal personality which allows the company to be the bearer of its own rights and liabilities”,\textsuperscript{23} it becomes evident that the very nature of the corporate form itself is contrary to recognising wider human rights responsibilities.\textsuperscript{24}

The same can be said with regard to private sector actors, whose actions are equally limited by the Constitution. Using the same language as that of section 8(1), section 8(2) confirms that private actors, including their actions, must conform to the Bill of Rights to the extent that it is applicable to them.\textsuperscript{25} Thus in terms of the Constitution, private sector actors cannot be conceptualised as having and exercising powers that directly conflict with their constitutional responsibilities – despite their powers often conflicting with the constitutional responsibilities, which is the founding source of all legal authority in South Africa.\textsuperscript{26}

Section 8 of the Constitution has significant consequences for private sector actors, such as corporations, as it provides a possible avenue in which such actors can be held

\textsuperscript{20} According to Friedman, as discussed in Bilchitz, corporations only have one and only one social responsibility to use its resources and engage in activities designed to increase its profits. However, such activity may persist for so long as corporations engage in open and free competition, without deception or fraud. Refer to Bilchitz 2008 The South African Law Journal 779 in this regard.

\textsuperscript{21} See Chapter 2.3 for a full discussion in this regard.

\textsuperscript{22} Bilchitz 2008 The South African Law Journal 780. Such initiatives include the King II Report and King III Report. See Chapter 3.1 for a full discussion in this regard.

\textsuperscript{23} Bilchitz 2008 The South African Law Journal 780.

\textsuperscript{24} From this, one can infer that the very purpose of a corporation is to carry the risk of its operations by excluding shareholders from bearing the full responsibility for its actions. For a further discussion, see Bilchitz 2008 The South African Law Journal 780.

\textsuperscript{25} S 8(1) and 8(2) of the Constitution of the Republic of South Africa, 1996.

\textsuperscript{26} Bilchitz 2008 The South African Law Journal 780.
liable to account, protect, promote and fulfil the rights contained in the Bill of Rights. However, the problem that arises is that currently the Companies Act fails to make any concrete reference to the Bill of Rights, despite its several amendments after 1994.27 As all law derives from the Constitution and structures cannot be created that are in conflict with the Constitution, the structures established by the Companies Act must therefore follow such constitutional requirements.28 The implication hereof is that the notion of creating a structure through company law which allows corporations to pursue profits at the expense of human rights is no longer legally tenable.29 It is therefore vital that company law be amended so that it is in line with the Constitution and its requirements.

As discussed above, corporate accountability approaches focus primarily on stricter regulation of corporate behaviour by governments.30 Thus far, three possible reasons present themselves to why stricter corporate accountability approaches appear to have the potential to make a useful contribution to holding private sector actors to respect, protect, promote and fulfil constitutional environmental-related rights within the South African context. First, the use of critical governance strategies, such as those proposed in the King Reports, PRR Framework and PRR Guidelines appear to influence corporate behaviour in a positive manner and to require stricter adherence to human rights standards. Second, the emergence of social and environmental actions against corporate-led globalization has increased environmental awareness, transforming the environmental corporate structure in South Africa.31 Finally, the applicability of section 24(b) of the Constitution lends support to the contention that the application of the right also relates to the administrative implementation of this right by way of reasonable legislative and other measures.32 For instance, the measures proposed on both an international and domestic level recognise that the facilitation of enforcing existing legislation that hold corporations accountable for their operations must be implemented.
by the state by way of legislative and/or any other reasonable measures.\textsuperscript{33} The obligation to respect, protect and fulfil constitutional rights, particularly environmental related rights, are inherent to the corporate structure of private actors more than ever. Therefore, the applicability of the Bill of Rights to private actors, put differently, goes beyond purely imposing obligations upon them as it changes the very nature of the public sector actors in South Africa.\textsuperscript{34}

\textsuperscript{33} Lund-Thomsen 2005 \textit{International Affairs} 628; and Bilchitz 2008 \textit{The South African Law Journal} 781.

\textsuperscript{34} Bilchitz 2008 \textit{The South African Law Journal} 781.
5 Conclusion

The debate on the application of constitutional environmental-related rights to private actors signals a formidable step forward to holding private actors to respect, protect, promote and fulfil human rights, as well as to account for human rights violations. The private sector clearly has a broader responsibility to the society in which it functions, especially when it is a corporate entity, from which it makes it profits. From this, it becomes necessary for those concerned with constitutional environmental-related rights to explore and examine the extent to which private sphere actors could be held liable to respect, protect, promote and fulfil such rights. This is also the main objective of this study. It seeks to answer the following research question: To what extent could private sector actors such as corporations be held to account to protect, promote, respect and fulfil constitutional environmental-related rights in South Africa?

To answer this question, Chapter 2 of this dissertation considered the increasing notion that private sector actors could become active partners in the protection, promotion, fulfilment and realisation of human rights, particularly in respect of various international initiatives aimed at addressing the need for governance of cross-scale issues resulting from globalisation within the environmental context. From the discussion it is clear that some aspects of international environmental and its related human rights obligations are no longer exclusively confined to states. To respect environmental and related rights is an idea that means more than refraining from violation; it likewise means protection and promotion. More notably, respecting human rights requires everyone’s participation, including private sector actors. The need for a legitimate international order that secures these rights have been recognised in various international human rights voluntary standards, such as the OECD Guidelines, UN Norms, PRR Framework and PRR Guidelines, recognise. More particularly, the PRR Framework and its Guidelines go further by indicating that corporations also have a responsibility to protect, respect and remedy human rights, especially where international and national human rights law do not reach or is not enforced. The PRR Framework argues that corporations should take up these responsibilities to avoid reputational and other dangers arising from the

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2 Miles and Jones 2009 Deakin Law Review 58.
3 Onate The Corporation in The XXI Century 59.
4 Onate The Corporation in The XXI Century 59.
increasing expectations surrounding their “social licence to operate” together with increased public scrutiny all of which are a result of globalization.

Moving towards the South African context, Chapter 3 assessed how environmental-related constitutional rights, as enshrined in sections 24 and 27, are provided for by the Constitution.\(^5\) There is a realisation that government cannot realise these rights alone, given the enormity of the obligation on government to address past and present environmental injustices; its international, regional and national obligations to secure sustainable development; and the environmental (notably climate change, water scarcity and acid mine drainage), social (human capital) and economic (a dwindling economy) governance challenges it faces.\(^6\) It has consequently become increasingly clear that state action alone is not sufficient to guarantee the enjoyment and protection of human rights generally, and there is a case to be made for the extension of environmental rights’ (particularly sections 24 and 27) application to private entities.

Chapter 4 of this dissertation considered how environmental-related constitutional rights function in terms of corporate responsibility and obligations of corporations. In an effort to become more responsible, many private sector actors have undertaken various efforts to reduce the adverse impacts of their corporate activities, whether on consumers, communities, employees, or the environment.\(^7\) The dominant approach to corporate responsibility for human rights has been to encourage voluntary adoption of standards governing corporate conduct.\(^8\) Although not all of the voluntary mechanisms profiled in the discussion above have been equally effective in protecting and promoting the fundamental human (and environmental) rights that corporations are obligated to uphold, they at least begin to address the weaknesses inherent in the unilateral, voluntary model of CSR. Therefore, the current voluntary CSR approach is both insufficient and incoherent, as the compliance of constitutional environmental rights should not be a voluntary matter but one of legal obligation.\(^9\) Therefore, such voluntary standards and policy directives must be tied together with legislation to devise systems of accountability and legal responsibility where private sector actors join states in the exercise of public functions such as the responsibility to respect, protect, fulfil and

\(^7\) Silverman and Orsatti 2009 Social Watch Report.  
\(^8\) Silverman and Orsatti 2009 Social Watch Report.  
\(^9\) Onate The Corporation in The XXI Century 59.
promote constitutional environmental-related rights, particularly where corporate
behaviour may infringe upon such rights.  

The challenge of such thinking is that corporations are not supposed to take over the
role of governments. The notion of “sphere of influence” provides a useful tool to draw
the boundaries between responsibilities of private sector actors and obligations of
states. Corporations should be held responsible for the environmental rights that are
within their sphere, and not replace such obligations of states. States still bear the
primary responsibility for the fulfilment, protection and promotion of constitutional
environmental rights – however, recent trends may see these responsibilities, such as
the duty to protect and promote the right to a clean environment that is not harmful to
one’s health and well-being, being extended to private sector actors. Therefore,
despite this approach not being legally binding upon private sector actors, it directly
challenges the prevailing conventional legal understanding that only states have direct
human rights responsibilities.

The inclusion of affirmative obligations on public sector actors is likely to be critical
innovations in South Africa’s constitutional enforcement of environmental rights as this
would encourage the realisation of these rights and as a result, deter the cycle of state
dependence on investments by unscrupulous corporations. The current economic and
environmental crisis has raised real questions about the benevolence of the corporation
and has highlighted the flaws inherent in the view that states are the only actors that
bear the responsibility for the fulfilment, protection and promotion of constitutional
environmental rights. This provides an opportune moment to establish a social
compact between corporations, society and the state, which in turn can generate a new
economic model based on human rights and sustainable development. In conclusion,
the idea that corporations be held to account to protect, promote, respect and fulfil
constitutional environmental-related rights, provides one with food for thought about

12 Erkocevic Human Rights for Business 48.
13 Erkocevic Human Rights for Business 48.
14 Erkocevic Human Rights for Business 48.
   Ethics Quarterly 5.
17 Silverman and Orsatti 2009 Social Watch Report
18 Silverman and Orsatti 2009 Social Watch Report
legal innovation to the corporate structure as a way to meet the needs of all stakeholders in an integral manner.
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