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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Human rights and the privatization of water and sanitation services

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the human rights to safe drinking water and sanitation, Léo Heller, in accordance with Human Rights Council resolution [42/5](#).

* [A/75/150](#).



Report of the Special Rapporteur on the human rights to safe drinking water and sanitation, Léo Heller

Summary

A common narrative in the human rights community is that human rights are neutral towards the type of water and sanitation provision and provider. The present report challenges this narrative. In the report, the Special Rapporteur on the human rights to safe drinking water and sanitation, Léo Heller, starts from the premise that specific risks to the enjoyment of the human rights to water and sanitation in situations of privatization exist, and that the exploration of the legal, theoretical and empirical dimensions of these risks is necessary and relevant. The Special Rapporteur discusses those risks based on a combination of three factors related to the private provision of water and sanitation: profit maximization, the natural monopoly of services and power imbalances. Using this analytical framework, he identifies different risks, including the lack of usage of the maximum of available resources, the deterioration of services, unaffordable access, the neglect of sustainability, the lack of accountability and inequality. He also provides recommendations to States and other actors to address and mitigate those risks.

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I. Introduction

1. The provision of water and sanitation services has been a responsibility primarily undertaken by governments and the public entities under their control. However, since the 1980s, privatization has started to expand, actively promoted by international financial institutions. Through various legal and contractual arrangements and a diversity of means, private actors have been afforded greater presence in the water and sanitation sector, and as a result, their operations have come to affect the outcome of service provision for part of the global population.

2. The human rights community has expressed a range of views about the privatization of water and sanitation services. At one extreme of the spectrum, anti-privatization movements have been vocal in arguing that public provision is the most adequate model for the realization of the human right to water and, more recently, to sanitation.¹ At the other extreme, a common formulation is that of “neutrality” or “agnosticism” of the human rights framework concerning the type of provider. This position asserts that what matters are the outcomes of service provision, which are independent of the model of provision,² and that the human rights framework does not require States to adopt any particular model (A/HRC/15/31, para. 15). However, this narrative has opened the door for the acritical idea that public or private provision are equivalent in terms of human rights compliance.

3. The drafting of general comment No. 15 (2002) on the right to water of the Committee on Economic, Social and Cultural Rights reflected the polarized debate on the privatization of water and sanitation services. In its initial versions, the text called for the deferral of privatization until sufficient regulatory systems were in place.³ Eventually, a more nuanced language was adopted. While referring to both public and private providers, the Committee noted in paragraph 11 of the general comment that “water should be treated as a social and cultural good, and not primarily as an economic good”. In paragraph 24, the Committee also emphasized the State’s obligation to protect “equal, affordable, and physical access” from abuse in situations where water services are operated or controlled by third parties through an effective regulatory system that must include independent monitoring, public participation and penalties for non-compliance. Despite these guidelines, the meaning and implications of treating water as a social and cultural good rather than an economic good, a key principle of this foundational comment, still require clearer interpretation and development.

4. In the present report, the Special Rapporteur on the human rights to safe drinking water and sanitation, Léo Heller, starts from the premise that the processes underlying water and sanitation service provision are not neutral and shape the social, political and economic environment in which human rights are realized. Furthermore, he considers that, since debates and concerns with regard to the association between privatization and abuses of the human rights to water and sanitation have a long track record in the sector, it is incumbent upon the Special Rapporteur to explore the issue from its legal, theoretical and empirical dimensions. The implementation of the 2030

¹ Maude Barlow, *Whose Water Is It, Anyway?: Taking Water Protection into Public Hands* (Toronto, ECW Press, 2019); and Sharmila Murthy, “The human right(s) to water and sanitation: history, meaning and the controversy over privatization”, *Berkeley Journal of International Law*, vol. 31, No. 1 (2013).

² An example of this position appears in a submission by the Organization for Economic Cooperation and Development (OECD) Water Governance Initiative: “The critical question underlying the achievement of the human right to water and sanitation is not whether service delivery should be publicly or privately managed, but what is most effective in the context.”.

³ Malcolm Langford, “Privatization and the right to water”, in *The Human Right to Water: Theory, Practice and Prospects*, Malcolm Langford and Anna F. S. Russell, eds. (Cambridge, United Kingdom, Cambridge University Press, 2017).

Agenda for Sustainable Development has created a pressing need to address this issue, as it has triggered renewed pressure for increased private sector involvement, mobilizing different forms of finance that would complement public funds.⁴

5. Although the term “privatization” has been applied to different situations of private participation in the water and sanitation sector, in the present report it is used in a broad sense, encompassing different forms by which public authorities delegate service provision to private actors, and does not restrict the term to asset sales. The use of the term with this meaning is consistent with other reports issued by special procedure mandate holders.⁵ The analysis herein covers different modalities of for-profit organizations that provide services, including multinational and national enterprises and public companies with a significant proportion of shares owned by private investors. The modalities do not include informal and community-based providers, non-governmental organizations and State-owned companies. Furthermore, the report focuses on private actors that directly provide services or are involved in significant activities in service provision and not those engaged in subsidiary activities across the water and sanitation cycle, such as supplying materials and equipment, developing engineering designs or building infrastructure.

6. The scope of the present report, although addressing only some forms of private participation, still encompasses a complex and challenging landscape and includes various types of actors and ways in which they may be involved in service provision. Regarding the types of privatization, the most extreme is “full divestiture”, in which all relevant assets of a public entity are fully transferred to a private company, and the private actor assumes the responsibility for capital investment, operation and maintenance, in exchange for charging for services. There are a range of other models, often referred to as public-private partnerships. A common modality of such partnerships is the concession of the whole or parts of the water cycle for 20 to 30 years, with governments retaining ownership of assets. In joint ventures, either a private and a public entity jointly hold the ownership of a company, or a significant proportion of the shares in an existing public utility is sold in the stock market. Other types include affermage contracts, in which services are transferred for a specific period to a private provider in exchange for a lease fee, and “build-operate-transfer” contracts, in which the company builds an infrastructure, operates it for a certain period and then transfers it back to public authority.

7. In the present report, the Special Rapporteur does not carry out an exhaustive comparative analysis between private and public provisions, nor does he presuppose that one of them is more or less capable of realizing the human rights to water and sanitation than the other. The main aim of the Special Rapporteur is to explore risks that are specific to or might be exacerbated by privatization and to identify necessary safeguards to protect the human rights to water and sanitation from those risks. While acknowledging that human rights risks also exist with regard to the public provision of water and sanitation services, which is largely predominant worldwide, previous reports addressed concerns and ways to improve this type of provision in terms of accountability,⁶ regulation,⁷ affordability,⁸ participation,⁹ planning,¹⁰ financing¹¹ and

⁴ Office of the United Nations High Commissioner for Human Rights and the Heinrich Böll Foundation, *The Other Infrastructure Gap: Sustainability – Human Rights and Environmental Perspectives* (2018), p. 115.

⁵ See, for example, [A/69/402](#) and [A/73/396](#).

⁶ See [A/73/162](#).

⁷ See [A/HRC/36/45](#).

⁸ See [A/HRC/30/39](#).

⁹ See [A/69/213](#).

¹⁰ See [A/HRC/18/33](#).

¹¹ See [A/66/255](#).

the rights of people who may face vulnerable conditions.¹² Furthermore, it is relevant that a report be focused specifically on private provision, since the privatization of water and sanitation services requires a process of decision-making by States regarding whether or not to embark on this modality of provision, and the Special Rapporteur, through the report, aims to provide useful guidance for this process.

8. For the development of the report, the Special Rapporteur convened three public consultations: on 13 September 2019 in Geneva; on 21 October 2019 in New York; and a separate consultation with private service providers on 17 October 2019 in New York. Furthermore, questionnaires to States and civil society organizations elicited 109 submissions. Several online consultations were also organized, allowing for the remote participation of stakeholders.¹³ The Special Rapporteur received an enormous amount of valuable input that certainly contributed to improving the content of the report and provided evidence to inform his arguments. Unfortunately, due to length limitations, only part of the contributions could be explicitly reflected herein.

9. The Special Rapporteur begins by providing background to the discussion, including on how global trends in contemporary economies came to influence the privatization of water and sanitation services (sect. II). Then, he presents a conceptual rationale for informing the subsequent sections (sect. III). Thereafter, drawing from experiences from around the globe, he frames the discussion regarding potential risks of privatization from a human rights perspective (sect. IV). Subsequently, the Special Rapporteur outlines responses and safeguards, including recommendations, for ensuring the proper fulfilment and protection of, and respect for, the human rights to water and sanitation when private provision is being considered or is in place (sect. V).

II. Background

10. The realization of the human rights to water and sanitation in situations where private participation is prominent in service provision cannot be properly understood as an isolated phenomenon, disconnected from the political economy that has driven the global and national politics since the twentieth century. In this context, the privatization of public services, although often introduced as a technical solution, is actually “an integral part of an economic and social philosophy of governance”.¹⁴ The delegation of public services has been justified through arguments, such as the superior performance of the private sector and the failure of the public sector to provide adequate services due to a combination of inefficiency, corruption and weak accountability. The privatization of public services, however, has not happened without notable social and political opposition, cemented in evidence that it brings more inequality and poverty,¹⁵ thereby jeopardizing the realization of human rights.¹⁶

11. The promotion of privatization is associated with pressures for a reduction in the role of the State, so that the private sector can thrive and deliver welfare benefits. Conversely, and ironically, periodic crises challenging the social stability of economies have called the State back to provide services and protect those in the most vulnerable situations. The coronavirus disease (COVID-19) pandemic in 2020 has been an emblematic situation, making clear the need for States to intervene in the water sector by suspending payments of water bills, temporarily prohibiting

¹² See A/HRC/21/42, A/HRC/33/49, A/HRC/39/55 and A/HRC/42/47.

¹³ Available at www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/PrivateSectorParticipation.aspx.

¹⁴ A/73/396, summary.

¹⁵ Joseph Stiglitz, *Globalization and Its Discontents Revisited: Anti-Globalization in the Era of Trump* (New York, W.W. Norton and Co., 2017).

¹⁶ A/73/396, para. 36.

disconnections and reconnecting people to services in order to ensure sufficient water for handwashing.¹⁷

12. International financial institutions such as the International Monetary Fund (IMF) and multilateral banks have had a pivotal role in privatization processes through the imposition of conditionalities on States seeking loans, debt relief and sector-specific aid. In the water and sanitation sector, to mention a few cases, the European Central Bank, IMF and the European Commission induced the Governments of Portugal¹⁸ and Greece to accelerate a privatization programme as a condition for bailout funding. In developing States, privatization as a conditionality for sector reforms grounded in neoliberal approaches has been a widespread practice of international financial institutions since the 1980s.

13. During the 1990s, local governments in several countries conducted privatization processes of water and sanitation provision with the expectation that the private sector would bring in more investments, improve technology, enhance efficiency and provide access to the poor. Nevertheless, expectations for privatization were too high, and reality seemed somehow different in the early 2000s: not only did private sector participation not expand as anticipated, but several concessions were prematurely terminated or not renewed.¹⁹ Sources suggest that the proportion of people served by private companies was between 10 and 13 per cent in 2016.²⁰ However, privatization remains on the political agenda in many countries. In Brazil, for instance, a recent bill passed by Parliament revised the 2007 Water and Sanitation Act, strongly inducing municipalities to transfer services to the private sector.²¹ Furthermore, international business interests in the water sector have moved from Latin America and Africa towards Asia and Eastern Europe. China alone accounts for over half of all private provision projects in the past 30 years and for some 25 per cent of total investment.²² On the other hand, formats such as build-operate-transfer contracts, more focused and less risky for businesses, are on the rise (829 projects from 2001 to 2018).²³

14. In many States, the pendulum of service provision swung back into public hands. Between 2000 and 2019, at least 311 cases of de-privatization²⁴ occurred worldwide, despite the opposition and the often successful litigation by multinational corporations in international arbitrations, arguing disruption of contracts.²⁵ A prominent remunicipalization case occurred in Paris, where city authorities chose not to renew contracts with Veolia and Suez owing to concerns about rising tariffs and a lack of transparency and accountability. However, it was reported that the companies had hampered the implementation of this decision in different ways.²⁶

¹⁷ A call to implement those measures was issued by many mandate holders: see www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25746&LangID=E.

¹⁸ A/HRC/36/45/Add.1, paras. 5 and 6.

¹⁹ According to the submission by AquaFed, between 2000 and 2019, 75 per cent of contracts were not renewed, 11 per cent were terminated early and 14 per cent were extended.

²⁰ AquaFed, *Private Operators Delivering Performance for Water-Users and Public Authorities: Examples from Across the World* (Paris, 2015), p. 6; and Ben Taylor, "Private sector involvement in water – global lessons", *The Springfield Centre* (2016).

²¹ Bill No. 4162/2019, art. 7, changing Law No. 11445/2007, art. 10.

²² Kate Bayliss, "Moving the goalposts: reconfiguring the role of the private sector in the provision of water", in *PPPs: A Critical Guide*, J. Gideon and E. Unterhalter, eds. (London, Routledge, 2020) (forthcoming).

²³ Submission by AquaFed.

²⁴ Satoko Kishimoto, Lavinia Steinfert and Olivier Petitjean, eds., *The Future is Public – Towards Democratic Ownership of Public Services* (Amsterdam, Transnational Institute, 2019).

²⁵ Lavinia Steinfert, "The 835 reasons not to sign trade and investment agreements", in *Reclaiming Public Services – How Cities and Citizens Are Turning Back Privatisation*, Satoko Kishimoto and Oliver Petitjean, eds. (Amsterdam, Transnational Institute, 2017).

²⁶ Anne Le Strat, *Una victoria contra las multinacionales: la batalla por el agua de París* (Barcelona, Icaria, 2019).

15. Another modality of privatization has emerged in recent decades, with investment funds buying shares or full ownership of water and sanitation companies. For financial actors, such a modality is an attractive investment strategy, as it could “secure long term returns, diversify risk, and generate new investment opportunities while maintaining a relatively flexible and balanced investment mix”.²⁷ From the human rights perspective, the financialization of the water and sanitation sector creates a disconnect between the interests of company owners and the goal of realizing the human rights to water and sanitation.

III. Human rights risks of privatization: a rationale

16. The provision of water and sanitation services by private operators is conducive to a particular set of human rights risks, grounded in a combination of three factors: profit maximization, the natural monopoly that characterizes water and sanitation provision, and power imbalances. These factors combine to create a conceptual framework that allows for the assessment of privatization vis-à-vis human rights risks. Establishing causation between privatization processes and human rights impacts is often methodologically challenging, since building counterfactual scenarios (i.e., hypothetical alternative scenarios where privatization is not in place) is rarely possible. The use of the three-factor framework in the present report allows those methodological difficulties to be overcome.

17. First, the purpose of profit realization, typical of the private sector, is often expressed as profit maximization, in which providers attempt to extract the maximum net gains from service provision, by either reducing costs, raising revenues, or both. Costs can indeed be reduced through efficiency gains and service expansion might mean increased revenues without necessarily raising prices or excluding people living in poverty. Nevertheless, empirical evidence does not always validate the idea that the prices of private provision benefit from higher efficiency,²⁸ and revenue maximization can lead to affordability concerns from the perspective of rights-holders. To increase revenues, private providers might exercise pressure over public authorities to review tariffs, to increase or create connection charges or to authorize new sources of gains, often through unsolicited services.²⁹

18. Second, as the scope for competition in the water and sanitation sector is limited because of the high upfront costs, the fact that it is a natural monopoly, in which a single provider operates, implies that regulatory bodies are more exposed to the risk of capture by providers.³⁰ When dealing with private providers, especially international companies, other issues related to international arbitration can negatively influence the capacity of regulatory bodies to effectively protect the interests of the rights holders.³¹

19. Third, imbalances of power between private providers and public authorities are commonplace and can result in human rights concerns. This factor may also exacerbate the impacts of the two other factors mentioned above. Concessions are often signed by

²⁷ See Erik Swyngedouw, “Troubled waters: the political economy of essential public services”, in *Water and Sanitation Services: Public Policy and Management*, José Estaban Castro and Léo Heller, eds. (London, Zed Books, 2009).

²⁸ Isaac W. Wait and William Adam Petrie, “Comparison of water pricing for publicly and privately owned water utilities in the United States”, *Water International*, vol. 42, No. 8 (December 2017).

²⁹ José Luis Guasch and Stéphane Straub, “Corruption and concession renegotiations: evidence from the water and transport sectors in Latin America”, *Utilities Policy*, vol. 17, No. 2 (June 2009).

³⁰ [A/HRC/36/45](#), para. 26.

³¹ See, for example, arbitration of the case of Buenos Aires by the International Centre for Settlement of Investment Disputes in Luke Eric Peterson, “Bilateral investment treaties and investment arbitration”, in *The Human Right to Water: Theory, Practice and Prospects*.

local authorities that lack the technical expertise and accurate information to draft contract clauses that establish sound obligations from providers in the long term. Furthermore, it is very common that underresourced and understaffed public bodies assume the role of supervising and monitoring the private provider.³² Those authorities might also lack the political and financial strength to negotiate favourable conditions with transnational corporations, or to succeed in complex and prolonged litigation when conflicts arise. Clauses of international investment treaties and investor-State dispute settlements are often disconnected from international human rights law and give foreign companies several instruments to protect their investments, thus leaving States in a weak position and the rights of affected communities unprotected.³³

20. Another facet of power asymmetry is the position occupied by private actors in decision forums, including at the international level, which provides access to relevant decision-makers and opportunities to lobby them.³⁴ According to an anonymous commentator in a consultation for this report: “at the UN, we are witnessing what is called ‘corporate capture’. The UN has allowed corporations to have a huge say in discussions and decisions”. Particularly in the water and sanitation sector, the strong presence of corporate representatives in international bodies is manifest in the way they show more capacity to defend their interests and views than other civil society representatives.³⁵ For instance, the participation of Suez, one of the largest transnational water companies, in discussions that preceded the drafting of general comment No. 15 was considered “disconcerting” by a scholar uncomfortable with a possible influence in content that could benefit the company as a result of “the economic consolidation accruing from water industry restructuring”.³⁶ The “revolving door” phenomenon in the water and sanitation sector is also well known, with the same people serving alternately as executives of large corporations and high-level policymakers.³⁷

21. All of these factors related to power asymmetry simultaneously empower private actors, might result in a conflict of interest and open the door for the excessive influence of corporate lobbying in the regulation of what should be a social and cultural good rather than an economic good.

IV. Human rights risks of privatization

22. The conceptual framework introduced in the previous section is grounds to state that privatization in the water and sanitation sector leads to a unique set of risks for the realization of human rights. The particular ways in which those risks potentially affect rights holders requires in-depth analysis in order to assess whether they might be in breach of States’ obligations to refrain from undertaking retrogressive measures and to prevent third parties from negatively affecting the human rights to water and sanitation. As clearly defined by human rights law, when unjustified retrogression in the

³² Eric Gutierrez, Belinda U. Calaguas, Joanne Blanche Green and Virginia Roaf, *New Rules, New Roles: Does PSP Benefit the Poor? – synthesis report* (London, Water Aid and Tearfund, 2003).

³³ Letter by Special Rapporteurs to the United Nations Commission on International Trade Law. Available at www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf.

³⁴ David A. McDonald, “Remunicipalization: The future of water services?”, *Geoforum*, vol. 91 (2018).

³⁵ Cristy Clark, “Of what use is a deradicalized human right to water?”, *Human Rights Law Review*, vol. 17, No. 2 (2017).

³⁶ Stephen Tully, “A human right to access water? A critique of general comment No. 15”, *Netherlands Quarterly of Human Rights*, vol. 23, No. 1 (2005).

³⁷ See Anne Le Strat, *Una victoria contra las multinacionales*, in reference to a case in France.

realization of human rights occurs, it constitutes a human rights violation.³⁸ The present section addresses the most relevant of these risks and their causes and consequences.

A. Usage of the maximum of the available resources

23. Under article 2 of the International Covenant on Economic, Social and Cultural Rights, States parties have the obligation to progressively realize Covenant rights using the maximum of their available resources.³⁹ Considering that shortcomings in the access to public services mostly affect people living with vulnerabilities, this obligation must be seen in connection with the principle of equality and non-discrimination, requiring States to identify and mobilize all available resources and target those who are worst off. Non-compliance with this obligation can be driven both by not fulfilling the principle of resources allocation, for instance through an insufficient budget, and by the lack of the use of those resources. Failures in the usage of the maximum of the available resources, in a context of privatization, can be an outcome of, among other things, four factors: the transfer of profits out of the water sector without corresponding efficiency and access gains; companies' limited investments of their own resources, particularly in areas where people live in vulnerable situations; corrupt practices; and the granting of a concession in which a lease payment is not used in the water and sanitation sector.

24. Often, surplus revenues from service provision are almost entirely distributed among owners or shareholders of private companies as profits and dividends. This practice has a negative impact on investments in maintenance and the extension of services for the unserved or underserved populations, which can lead to a continued need for public investment.⁴⁰ Because of this, a view that human rights law should not be "neutral" towards privatization has been promoted: "If private companies make huge profits ..., the respective governments have not taken the necessary steps, to the maximum of their available resources, as required by article 2 (1) [of the Covenant], to make this public good available to their people."⁴¹

25. The second factor refers to the extent to which private providers bring external financial resources to services and fill investment gaps. Despite the investment of external funds being one of the main rationales used to justify privatization,⁴² reality shows a different picture. During the 1990s, global investments in water and sanitation corresponded to 5.4 per cent of the total invested in private infrastructure;⁴³ however, investments did not flow into the regions where they were most needed but rather into medium-income, more stable countries.⁴⁴ Moreover, private operators often rely on public funds, often in the form of loans with low interest rates, to extend access or improve infrastructure. Instead of bringing in new money, companies compete with public operators over scarce public funding.⁴⁵ When States allocate taxpayers' funds to fill gaps resulting from the non-application of expected private investments, while economic surpluses are transferred to companies, public resources are used to benefit private enterprises, meaning that they are not used to the maximum

³⁸ [A/HRC/27/55](#), paras. 46 and 48.

³⁹ [A/HRC/45/10](#).

⁴⁰ [A/HRC/24/44](#), para. 44.

⁴¹ Manfred Nowak, *Human Rights or Global Capitalism: The Limits of Privatization* (Philadelphia, University of Pennsylvania Press, 2017).

⁴² Submission by the Brazilian Association of Private Concessionaires of Public Water and Sewage Services.

⁴³ Philippe Marin, *Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries*, Trends and Policy Options, No. 8 (Washington, D.C., World Bank, 2009).

⁴⁴ Eric Gutierrez and others, *New Rules, New Roles*.

⁴⁵ José Esteban Castro, "Neoliberal water and sanitation policies as a failed development strategy: lessons from developing countries", *Progress in Development Studies*, vol. 8, No. 1 (2008).

availability to meet human rights obligations. This affects not only the human rights to water and sanitation but also other economic and social rights.

26. Third, corruption hinders the State's ability to use the maximum of its available resources.⁴⁶ When private actors are involved in corruption practices, it creates another chain of entities and a further layer of possible acts of corruption, including bribing public officials or even receiving bribes.⁴⁷ Indeed, cases of corruption involving private providers have been documented in several places, such as in Atlanta, United States of America, in Sofia and in Tarragona, Spain.⁴⁸ In Grenoble, France, for instance, a court found that the private company only won the public tender because it bribed public authorities that, in return, agreed to provide the company with greater income than that received by the public operator.⁴⁹

27. Finally, there is also the risk of resources being drained out of the water and sanitation sector and used in other sectors, through lease payments whose destination might not be easily traceable. In Rialto, United States, for instance, around 20 per cent of the total upfront investment by the recently privatized provider was for lease payments to the municipality, which were used in other projects.⁵⁰ Even if the expenses are relevant for the realization of other economic, social and cultural rights, the situation can be considered as undermining a State's obligations under the International Covenant on Economic, Social and Cultural Rights, since the State is not using the maximum of the available resources to progressively realize the human rights to water and sanitation.

B. Affordability

28. When privatization is expected to improve the standard of services, prices charged to users are supposed to increase to meet higher costs. In addition, part of the trend of soaring prices following privatization can be attributed to an environment of low values charged for the services that previously prevailed.⁵¹ However, the human rights framework raises important questions on this issue. First is whether the new prices are compatible with both the costs incurred and the State's obligation to use the maximum of its available resources. A second question pertains to the extent to which the most disadvantaged populations are financially affected and their human rights are respected and protected. Third is the question of how, with regard to decision-making involved in the setting of tariffs, the independent role of the public administration, as a duty-bearer, is played vis-à-vis the level of influence of private actors.

29. Especially when operating under the premise of full cost recovery through tariffs, the type of provider (public or private) may not be neutral in terms of the impact on affordability, and service delivered by private operators, particularly those driven by the logic of profit maximization, raises concerns. In Guayaquil, Ecuador, water prices increased by 180 per cent after privatization;⁵² in Jakarta, prices increased by 135 per cent in the first 10 years of the concession contract;⁵³ and in Cochabamba, Plurinational State of Bolivia, shortly after privatization prices

⁴⁶ A/HRC/28/73, para 20 (c).

⁴⁷ Ibid., para. 8.

⁴⁸ Submissions by Food & Water Watch, by Eulalio and by Italian Forum.

⁴⁹ Cour de Cassation, chambre criminelle, France, arrêt du 08/04/1999, pourvoi No. 060 98-84539.

⁵⁰ Submission by Food & Water Watch.

⁵¹ Emanuele Lobina, "Problems with private water concessions: a review of experiences and analysis of dynamics", *International Journal of Water Resources Development*, vol. 21, No. 1 (2005).

⁵² "Observatorio ciudadano planea demandar a Interagua ante Corte Interamericana", *El Universo* (Guayaquil, Ecuador), 15 April 2008.

⁵³ Abdul Badeges, "The ownership of water services company in Indonesia: an Islamic economics perspective", dissertation, University of Malaya, 2013. Available at www.academia.edu/4098585/The_Ownership_of_Water_Services_Company_in_Indonesia_An_Islamic_Economics_Perspective.

increased on average by 43 per cent.⁵⁴ In addition, some findings indicating that, in countries where private service provision prevails, such as France, there is no price difference regardless of the management scheme,⁵⁵ must be cautiously interpreted.⁵⁶

30. Price increases can stem from different mechanisms. Contract clauses or regulations can ascribe to private operators obligations to invest in service extension and infrastructure upgrading, the costs of which result in increased tariffs.⁵⁷ However, that might also happen when contracts allocate investment obligations to public authorities, but companies' revenues are not proportionately reduced. One concern is that accountancy regulations may fail to map actual profit levels. For example, underestimated profits in Bordeaux, France, were only detected after an audit of the municipal operator and its parent company was carried out.⁵⁸ The use of more costly technologies, resulting in the elevation of tariffs to compensate for the cost increase, was also reported.⁵⁹ Furthermore, there are reports of higher prices charged by private providers as a result of the purchase of materials and services from subsidiaries of the same business group.⁶⁰ These examples show tension between the profit-seeking nature of companies and its impact on tariffs, and the limited ability of public authorities to ensure that prices are not disproportionately elevated, which in the end can affect affordability with regard to access to services.

31. Users living in poverty can be strongly affected by an increase in tariffs, in particular when there is no financial support in place, such as social tariffs or social protection floors. For instance, evidence exists that in Latin America, full cost recovery may imply affordability problems for one in five households in the region; in countries such as the Plurinational State of Bolivia, Honduras, Nicaragua and Paraguay, this policy can affect nearly half the population.⁶¹ Affordability was identified as a major issue in 70 per cent of households in sub-Saharan Africa in a study in 2005.⁶² Higher water tariffs can lead people to look for alternative water sources that are unsafe. In KwaZulu-Natal, South Africa, access to water through prepaid metering, implemented by the private provider, was associated with an outbreak of cholera in 2000, when 120,000 persons were infected and 300 died.⁶³ In Jakarta, as an alternative to the inadequate quality of the water provided, people living in poverty resorted to (polluted) low-level groundwater, while the well-off used water of safer quality from deep-level wells, which caused subsidence and had an impact on environmental sustainability.⁶⁴

32. Although defining tariffs is a task generally undertaken by public authorities, private providers have an intrinsic interest in increasing revenues through tariffs and

⁵⁴ John P. Mulreany, Sule Calikoglu, Sonia Ruiz and Jason W. Sapsin "Water privatization and public health in Latin America". *Revista Panam Salud Publica*, vol. 19, No. 1 (2006).

⁵⁵ Submission by Aquafed.

⁵⁶ Emanuele Lobina, "Commentary on the European Commission's 'Study on water services in selected member States'", Public Services International Research Unit reports, 2018. Available at http://gala.gre.ac.uk/19211/7/19211%20LOBINA%20European_Commission%E2%80%99s_Study_on_Water_Services_2018.pdf.

⁵⁷ ECE/CECI/2019/5, p. 5.

⁵⁸ Anne Le Strat, *Una victoria contra las multinacionales*.

⁵⁹ Submission by Coalition Eau.

⁶⁰ Anne Le Strat, *Una victoria contra las multinacionales*.

⁶¹ Vivien Foster and Tito Yepes, "Is cost recovery a feasible objective for water and electricity? the Latin American experience", Policy Research Working Paper, No. 3943 (Washington, D.C., World Bank, 2006).

⁶² Ibid.

⁶³ Dale T. McKinley. "The struggle against water privatisation in South Africa", in *Reclaiming Public Water: Achievements, Struggles and Visions from Around the World*, 2nd ed., Belén Balanyá, Brid Brennan and others, eds. (Amsterdam, Transnational Institute and Corporate Europe Observatory, 2005). Available at www.tni.org/files/publication-downloads/second_edition.pdf.

⁶⁴ Emanuele Lobina and others, "Water justice will not be televised: moral advocacy and the struggle for transformative remunicipalisation in Jakarta", *Water Alternatives*, vol. 12, No. 2 (2019).

fees charged to users, and often exert a significant influence in related decision-making processes. In many cases, companies have technical expertise and resources to assess tariff reviews that dwarf those of public authorities in charge of this analysis, in particular at the local level. Information asymmetry and regulatory capture increase the risks of unaffordable prices for the poor, especially when there are no subsidy schemes.⁶⁵ Moreover, a significant proportion of tariffs corresponds to capital remuneration. Since regulators only rarely interfere with investment decisions, they have no alternative other than to agree to increases in tariffs and the economic sustainability of contracts in these situations. Once services returned to public hands, some municipalities, such as Paris, experienced a reduction in tariff levels.⁶⁶

33. Private companies tend to implement a policy of disconnecting users who are unable to pay their bills, as in France and the United Kingdom of Great Britain and Northern Ireland. In England and Wales, in the first five years following privatization, the number of household disconnections tripled, which resulted in the 1999 Water Act, banning the disconnection of users for non-payment and the use of pre-payment meters in response to public health hazards associated with cut-offs.⁶⁷ In Jakarta, the two companies who were awarded water and sanitation contracts were accused of “denying water access services to residents unable to pay their bills” leading users to “buy expensive drinking water from street vendors and bathe in polluted public wells”.⁶⁸ Similarly, the Mexican provider Aguas de Saltillo dramatically increased the number of disconnections and introduced a reconnection fee.⁶⁹ In Mbombela, South Africa, the company cut off water services after issuing warnings about non-payment, compromising the access of thousands of users. This also happened in impoverished areas of the Dolphin Coast, South Africa, where disconnections were implemented after higher water bills became unpayable.⁷⁰ On the other hand, the Special Rapporteur, during his official country visits, witnessed that, even when regulations authorize disconnections, public providers are often less strict, not applying them automatically and allowing supply to continue to users in poverty.⁷¹ This same standard has been reported in United States providers.⁷² It is more likely that public providers are more receptive to seeing users as rights-holders, and do not disconnect them as easily as in situations when provision is profit-oriented.

C. No improvement or deterioration of services

34. The move from public provision towards private provision is usually touted as a way to achieve better quality and safer and more available services, as private entities are regarded as more efficient and as having greater expertise. However, evidence suggests that privatization is not a panacea for the improvement and expansion of services. Tensions between the economic interests of companies and the social outcomes of the services often favour the former. Furthermore, when the

⁶⁵ A/HRC/36/45, para. 26.

⁶⁶ See Anne Le Strat, *Una victoria contra las multinacionales*, and submission by Aquafed.

⁶⁷ Emanuele Lobina, “UK – strong and weak lock-in of water governance outcomes in England”, in *Facing the Challenges of Water Governance*, Simon Porcher and Stéphane Saussier, eds. (New York, Palgrave Macmillan, 2019).

⁶⁸ Andreas Harsono, “Indonesia’s Supreme Court upholds water rights”, Human Rights Watch, October 2017. Available at www.hrw.org/news/2017/10/12/indonesias-supreme-court-upholds-water-rights.

⁶⁹ Submission by Asociación de Usuarios del Agua de Saltillo.

⁷⁰ David Hall and Emanuele Lobina, “Pipe dreams: the failure of the private sector to invest in water services in developing countries”, Public Services International Research Unit reports, 2006.

⁷¹ As reported to the Special Rapporteur during visits to Portugal and Mexico.

⁷² George Homsy and Mildred Warner, “Does public ownership of utilities matter for local government water policies?”, *Utilities Policy*, vol. 64 (April 2020).

privatization process is inadequately implemented, and investments do not arrive as committed, the public sector ends up taking the burden of addressing the shortcomings,⁷³ as States remain duty bearers vis-à-vis the rights-holders, when services are delegated to third parties.

35. Companies may consider water and sanitation services in developing States to be unattractive businesses. Reasons for this include “increased country risk, increased financial risk, increased contractual risk, unreasonable contractual constraints and unreasonable regulator power and involvement”, and strict requirements, including “unrealistic service levels” and “highly stringent water quality standards”, have also been raised.⁷⁴ Unwillingness by governments to enforce the disconnection of services has also been cited as a problem for investors in some contexts.⁷⁵ This mindset is conducive to strategies that prioritize the minimization of business risks against investments to improve and expand services, which in turn affects human rights. As a result, States might feel pressured to create an attractive environment for business, which can include lowering service standards and focusing on well-off populations, limiting States’ capacity to oversee and regulate, or leading to an increase in prices that is higher than what is affordable. This posture is driven by a combination of coercion, for instance through lending conditionalities, and emulation, such as calls for compliance with strategies of management, such as the new public management approach.⁷⁶

36. Concerns related to the availability and accessibility of water and sanitation can increase after privatization processes. In the Plurinational State of Bolivia, studies showed that privatization did not lead to higher levels of access to water.⁷⁷ In Zambia, deterioration in access rates following the privatization of services was observed: “the process of commercialization not only failed to reverse the negative trend in access rates, but...access rates have declined by an average of more than 20 per cent” from 2001 to 2005. More households needed to rely on public taps, boreholes and wells rather than on piped water.⁷⁸ On the other hand, the private sector reported service improvements after privatization, including gains in service continuity, in countries such as Ecuador, Senegal and the Philippines.⁷⁹

37. Although some sources mention water quality improvements in England and Wales after privatization,⁸⁰ due in part to the need to comply with the directives of the European Union, evidence shows deterioration of drinking water quality in other contexts. In Tucumán Province, Argentina, after privatization, users reported undrinkable water over many weeks.⁸¹ In Buenos Aires, the national Government

⁷³ Radhika Balakrishnan, Diane Elson, James Heintz and Nicholas Lusiani, *Maximum Available Resources & Human Rights: Analytical Report* (New Brunswick, New Jersey, Center for Women’s Global Leadership, Rutgers, 2011).

⁷⁴ Erik Swyngedouw, “Troubled waters”.

⁷⁵ World Bank, “Project appraisal document, Third National Urban Water Sector Reform Project”, 26 March 2014. Available at <http://documents1.worldbank.org/curated/en/736591468098978156/pdf/PAD3960P123513010Box385166B00OUO090.pdf>.

⁷⁶ Klaas Schwartz, “The New Public Management: the future for reforms in the African water supply and sanitation sector?”, *Utilities Policy*, vol. 16, No. 1 (March 2008).

⁷⁷ John P. Mulreany and others, “Water privatization and public health in Latin America”.

⁷⁸ Hulya Dagdeviren, “Waiting for miracles: the commercialization of urban water services in Zambia”, *Development and Change*, vol. 39, No. 1 (January 2008).

⁷⁹ See submission by Aquafed, and Chris Heymans, Rolfe Eberhard, David Ehrhardt and Shannon Riley, *Providing Water to Poor People in African Cities Effectively: Lessons from Utility Reforms* (Washington, D.C., World Bank, 2016).

⁸⁰ Philippe Marin, *Public-Private Partnerships for Urban Water Utilities*.

⁸¹ International Institute for Sustainable Development, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Republic of Argentina*, ICSID Case No. ARB/97/3 (18 October 2018). Available at www.iisd.org/itn/2018/10/18/vivendi-v-argentina/.

decided to rescind the concession contract in part due to poor water quality.⁸² Quality concerns are not exclusive of privatization in developing countries. In Atlanta, United States, users vehemently complained about water quality, and the city reported an increase in the number of boil water alerts.⁸³ In addition, in Pittsburgh, United States, a Veolia subsidiary held a contract that incentivized cost-cutting by tying it to the corporation's compensation, resulting in the replacement of a chemical used for corrosion control and to prevent lead contamination with a cheaper product in 2014, while laboratory staff was significantly reduced. This was followed by high levels of lead in the water system, which serves tens of thousands of households.⁸⁴

D. Sustainability

38. Private sector participation has an impact on the sustainability of water and sanitation services when the drive for increased profitability reduces investments, compromising aspects of the normative content of the human rights to water and sanitation in the long term.⁸⁵ Contract renegotiations after privatization in Latin America “tended to delay or bring down investment levels, as firms do not get immediate rewards through tariff adjustments on investments”.⁸⁶ Particularly in developing countries, the short-term demands for private capital are not compatible with sustainable investment in infrastructure, since it takes many years to recover costs and ensure profits.⁸⁷ As part of the companies' financial strategies, providers rely on public finance as their primary source of resources, slowing down their own investments. In Senegal, for example, the private provider, during a 10-year contract, committed less than a tenth of the amount invested by the public sector and donors.⁸⁸

39. Challenges to sustainability are notable in time-bound contracts that have no guarantee of renewal, as private providers may have limited incentive to ensure adequate services after the concession period. Defining investment needs for infrastructure renewal during the contract period and ensuring compliance with them may be complex for public authorities. In England and Wales, where there are no time-bound contracts, the regulator intervenes directly,⁸⁹ but regulators in many countries do not perform such a task.⁹⁰ In Zambia, after a concession ended in 2005, it was noted that much of the existing water infrastructure, which had been built in

⁸² Bernard de Gouvello, Emilio J. Lentini and Federica Brenner, “Changing paradigms in water and sanitation services in Argentina: towards a sustainable model?” *Water International*, vol. 31, No. 2 (2012).

⁸³ Frank L. K. Ohemeng and John K. Grant, “Has the bubble finally burst? an examination of the failure of privatization of water services delivery in Atlanta (USA) and Hamilton (Canada)”, *Journal of Comparative Policy Analysis: Research and Practice*, vol. 13, No. 3 (2011).

⁸⁴ Julia Lurie, “How one company contaminated Pittsburgh's drinking water”, *Wired*, 28 October 2018. Available at www.wired.com/2016/10/pittsburghs-drinking-water-got-contaminated-lead.

⁸⁵ Janice A. Beecher, “Privatization, monopoly, and structured competition in the water industry is there a role for regulation”, *Journal of Contemporary Water Research and Education*, vol. 117, No. 1 (2000).

⁸⁶ Antonio Estache, José-Luis Guasch and Lourdes Trujillo, “Price caps, efficiency payoffs, and infrastructure contract renegotiation in Latin America”, Policy Research Working Paper, No. 3129 (Washington, D.C., World Bank, 2003).

⁸⁷ Kate Bayliss, “Privatization and poverty: the distributional impact of utility privatization”, *Annals of Public and Cooperative Economics*, vol. 73, No. 4 (December 2002).

⁸⁸ Clarissa Brocklehurst and Jan G. Janssens, “Innovative contracts, sound relationships: urban water sector reform in Senegal”, Water Supply and Sanitation Sector Board Discussion Paper, No. 1, (Washington, D.C., World Bank, 2004).

⁸⁹ Michael Rouse, *Institutional Governance and Regulation of Water Services: The Essential Elements* (London, IWA Publishing, 2007).

⁹⁰ Oscar Pintos, President of the Association of Regulatory Bodies of the Americas, in an interview for the present report.

the 1970s, had not been renewed or rehabilitated since. The lack of private investment had severe implications for service sustainability.⁹¹

40. Increasingly frequent water scarcity and other events related to climate change have required strategic planning and investments that anticipate those situations. During the 2014 water crisis that ravaged the metropolitan region of São Paulo, Brazil, the company in charge had been aware since at least 2009 that by 2015 new water sources would be necessary to guarantee service continuity. However, the company failed to preventively invest in infrastructure for water security, affecting millions of users.⁹² Nevertheless, dividends paid to shareholders during that period were always higher than the minimum threshold defined by law (25 per cent of yearly surplus), reaching a peak of 43.9 per cent in 2011.⁹³

E. Access to information, participation and accountability

41. Lack of transparency in processes of privatization often starts even before the formal decision-making process. There are cases of service delegations issued behind closed doors and secret negotiations between companies and public authorities. In Nigeria, authorities in Lagos have shown signs of opting for privatization, but “although civil society organizations have called on the Government on multiple occasions to ensure transparency and a participatory process, in particular enabling the participation of women”, requests were ignored, and discussions went on without public scrutiny.⁹⁴ However, information disclosure alone is not always enough for participatory decisions. Contract arrangements and public procurements are very complex processes. For the non-expert, the information in technical terms about targets, costs and tariff adjustment methodologies does not suffice for informed participation. For instance, in Kathmandu, documents related to the privatization process were issued in English and not even translated into Nepali.⁹⁵ In the United States, state-level governments have restricted public access to information about privatization bids prior to the signing of a contract, and water corporations actively seek to change state laws to cut participants out of the decision-making process.⁹⁶

42. The monitoring of provider performance is sometimes jeopardized in services operated by private companies due to information asymmetry. In South Africa, civil society organizations complained that they did not know if the consortium Water and Sanitation South Africa was monitoring water quality, and also argued that critical clauses of the concession contract were not disclosed.⁹⁷

43. Limited financial and commercial transparency can also be problematic. In Sofia, civil society organizations collected signatures to evaluate a private contract with Sofiyska Voda, a subsidiary of Veolia, owing to its lack of transparency, exorbitant salaries and financial losses.⁹⁸ In Spain, when the 2008 economic crisis struck, allegedly

⁹¹ Hulya Dagdeviren, “Waiting for miracles”.

⁹² Laura Alves Martirani and Isabela Kojin Peres, “Crise hídrica em São Paulo: cobertura jornalística, percepção pública e o direito à informação”, *Ambiente & Sociedade*, vol. 19, No. 1 (March 2016).

⁹³ Mario G. Schapiro and Sarah M. M. Marinho, “Conflito de interesses nas empresas estatais: uma análise dos casos Eletrobrás e Sabesp”, *Revista Direito & Práxis*, vol. 9, No. 3 (2018).

⁹⁴ See AL NGA 1/2020. Available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25024>.

⁹⁵ Eric Gutierrez and others, *New Rules, New Roles*.

⁹⁶ See submission by Food & Water Watch.

⁹⁷ Greg Ruiters and Patrick Bond, “Contradictions in municipal transformation from apartheid to democracy: the battle over local water privatization in South Africa”, Background Research Series, Municipal Services Project (2010).

⁹⁸ Satoko Kishimoto and Olivier Petitjean, eds., *Reclaiming Public Services – How Cities and Citizens Are Turning Back Privatisation* (Amsterdam, Transnational Institute, 2017).

some 500,000 people were disconnected, but in reality that figure was considered to be underestimated, because the private provider resisted disclosing information.⁹⁹

44. Lack of transparency and accountability also results in challenges for de-privatization initiatives. In Terrassa, Spain, the provider was granted a concession for 75 years, and the municipality decided to take the services back before contract termination. After remunicipalization, local authorities realized that all data stored in computers had been deleted, making it difficult to find and use reliable information to adequately manage technical operation and financial management.¹⁰⁰

F. Leaving no one behind

45. Private sector involvement can hamper the availability and accessibility of services for groups or locations that offer lower chances of an economic profit. Frequently, the private sector, backed by the contracting government, adopts a “redline” approach, excluding informal settlements or rural areas from its coverage area.¹⁰¹ In such cases, typically the obligation to deliver services to these populations remains in public hands, which usually do not have the resources to comply with this obligation, particularly because the technical capacity of public authorities is dismantled after delegation takes place.¹⁰² In France, for example, some municipalities could not compel private companies to make necessary investments in rural areas and thus had to form municipal entities as a way to expand the water networks.¹⁰³ In countries in sub-Saharan Africa, the wave of water and sanitation service privatization in the 1990s, and its focus on full cost recovery, has “intensified inequalities in the provision of such services, at the expense of low-income households”.¹⁰⁴

46. Other rights of people living in vulnerability may also be affected when accessibility is compromised, for instance, owing to tariff increases or disconnections. In Madagascar, a survey revealed that the slight changes in water prices that occurred after privatization could induce people in poverty to turn to alternative and unsafe sources, leading to increased health risks.¹⁰⁵ In Mbombela, South Africa, disconnections by the private company occurred even during a cholera epidemic.¹⁰⁶ During the COVID-19 pandemic, associations of water service providers in Spain and Brazil, largely driven by private companies, expressed concerns about the economic sustainability of companies and their right to maintain disconnection practices for those

⁹⁹ Submission resulting from national consultation in Spain.

¹⁰⁰ Ibid.

¹⁰¹ Tony Ballance and Sophie Trémolet, “Private sector participation in urban water supply in sub-Saharan Africa”, study for KfW Bankengruppe, 2005.

¹⁰² Oscar Pintos, President of the Association of Regulatory Bodies of the Americas, in an interview for the present report.

¹⁰³ David Hall and Emanuele Lobina, “The past, present and future of finance for investment in water systems”, Public Sector International Research Unit, paper presented at IRC conference entitled “Pumps, pipes and promises”, The Hague, Netherlands, November 2010.

¹⁰⁴ European Parliament resolution of 8 September 2015 on the follow-up to the European Citizens’ Initiative Right2Water (2014/2239(INI)), para. N. Available at www.europarl.europa.eu/doceo/document/TA-8-2015-0294_EN.html.

¹⁰⁵ Bart Minten and others, “Water pricing, the new water law, and the poor: an estimation of demand for improved water services in Madagascar”, report S12 (USAID Ilo program – Cornell University, 2002).

¹⁰⁶ Julia Brown, “Water service subsidies and the poor: a case study of Greater Nelspruit Utility Company, Mbombela Municipality, South Africa”, Centre on Regulation and Competition Working Paper No. 112 (Manchester, United Kingdom, University of Manchester, 2005).

who do not pay their bills.¹⁰⁷ Conversely, the necessary protection of people in vulnerable situations through the provision of water for all, regardless of one's economic capacity, was widely adopted by public operators and advocated by civil society organizations.¹⁰⁸

V. Addressing risks and establishing safeguards

47. Under international human rights law, the obligations to respect, protect and fulfil apply to States at all levels throughout all stages of the privatization process. When a company operates abroad, these obligations apply to both home-States and host-States.¹⁰⁹ The obligation to respect requires States to identify potential conflicts between human rights obligations and commercial treaties or contracts with private entities, and to refrain from joining treaties and from signing contracts where these conflicts are identified. In this context, commercial law, international investment law and international arbitrations must comply with human rights law, not prevail over it. The obligation to protect requires States to consider sanctions and penalties, and enables civil suits by victims and the revocation of licences and public procurement contracts, among other actions, when business activities result in abuses of the human rights to water and sanitation.¹¹⁰ The obligation to fulfil requires States to direct the efforts of business entities towards the progressive realization of the human rights to water and sanitation and to prevent companies from violating the human rights to water and sanitation in other countries.¹¹¹ These obligations require States to adopt several measures before, during and after privatization processes.

48. Delegating water and sanitation services to private actors means that States will rely on a third party to meet their legal obligations to realize the human rights to water and sanitation. While not prohibiting private companies from playing a role in service provision, the human rights framework calls on States to establish preventive measures to avoid impacts to their ability to realize their human rights obligations. Recognizing that service provision is a crucial activity for the realization of the rights to water and sanitation, the Special Rapporteur considers that the decision on whether to privatize services must be part of a general strategy to realize those rights, prioritizing access to the unserved and making sure that services are affordable to all. States must therefore fully assess the risks identified in section IV and establish adequate safeguards to ensure that they are properly addressed. In section V, the Special Rapporteur provides recommendations to States, companies and international organizations that are implicated in privatization processes, based on established obligations and responsibilities.

¹⁰⁷ Asociación Española de Empresas Gestoras de los Servicios de Agua, “Medidas adoptadas por el Real Decreto-ley 11/2020 en materia de garantía de suministro de agua”; and Associação Brasileira das Concessionárias Privadas de Serviços Públicos de Água e Esgoto (ABCON) and Associação Brasileira das Empresas Estaduais de Saneamento (AESBE), “O fornecimento de água não pode parar – posicionamento do setor de saneamento sobre medidas de controle da expansão do COVID-19 e decorrentes medidas de proteção social”.

¹⁰⁸ Aqua Publica Europea, “Joint statement: European public water operators commit to the continuity of water services in response to COVID-19 emergency”, 19 March 2020, available at www.aquapublica.eu/article/news/joint-statement-european-public-water-operators-commit-continuity-water-services; and Observatório Nacional dos Direitos à Água e ao Saneamento (ONDAS), “Sustentabilidade financeira dos serviços públicos de água e esgoto é importante, mas a prioridade deve ser salvar vidas”, 26 March 2020, available at <https://ondasbrasil.org/sustentabilidade-financeira-dos-servicos-publicos-de-agua-e-esgoto-e-importante-mas-a-prioridade-deve-ser-salvar-vidas/>.

¹⁰⁹ A/73/162, para. 6.

¹¹⁰ Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para. 15.

¹¹¹ *Ibid.*, general comment No. 24, para. 24, and general comment No. 15, para. 33.

A. States

1. Prior to the adoption of privatization

49. When considering the adoption of a private model of provision, States should promote transparent mechanisms and clear accountability to support decision-making and openly discuss alternatives with civil society and the potentially affected communities. All too often, privatization processes are conducted in an opaque manner, restricting the ability of the rights holders to, properly and in due time, intervene in decision-making. The necessary safeguards during the stage of decision-making include transparent and well-designed procurement processes that prevent companies from lobbying public authorities to establish biased conditions, or engaging in strategic underbidding.¹¹² Duty-bearers must allow public scrutiny of all official documents in the course of the process and take the views of rights holders into account.

2. Drafting contracts

50. If a State decides to privatize, contract drafting is a crucial stage in which to mitigate the risks of service deterioration, discrimination and affordability. By no means should contract clauses limit the State's capacity to oversee, monitor and sanction private providers for any human rights abuses. Contracts must be carefully drafted in such a way that the human rights to water and sanitation trump commercial imperatives in cases of conflict, fostering the State's international obligations.

51. Although privatization enthusiasts believe that contracts can counter market failure and ensure that the public interest will be respected, in reality a series of advanced precautions need to be reflected in them. A scholar, drawing from experience in Jakarta, stated that the effectiveness of a privatization process is only possible if "the contract can be auctioned among competing firms, when uncertainty is convertible to risk, when the contracted service can be accurately specified, and when the first party can terminate the contract without suffering major repercussions".¹¹³ However, these conditions are rarely present, in particular in developing countries.

52. Contracts must clearly establish roles and responsibilities, and targets, giving special priority to unserved and underserved groups and to the consequences of non-compliance.¹¹⁴ They should define targets related to quality, accessibility, acceptability, affordability and safety. Indicators and benchmarks for monitoring human rights standards should be formulated and conceptualized in such a way that they can be disaggregated by prohibited grounds of discrimination.¹¹⁵ Clear rules for tariff-setting, including in particular measures to ensure financial protection for the most disadvantaged by using effective means to identify those in need and establish affordable tariffs, are sensitive issues in this context. In addition, the inclusion in contract clauses of a prohibition on retrogressive measures, such as disconnecting users who are unable to pay their bills, is a human rights imperative. Furthermore, States must adapt commercial law to the human rights framework, ensuring that in cases of conflict the latter prevails.

53. Vital issues to be taken into account with regard to contracts and other norms are the conditions for the withdrawal of the private provider and the return of service

¹¹² A/HRC/15/31, para. 36.

¹¹³ Okke Braadbaart, "Privatizing water – the Jakarta concession and the limits of contract", in *A World of Water: Rain, Rivers and Seas in Southeast Asian Histories*, Peter Boomgaard, ed. (Leiden, Netherlands, Brill, 2007). Available at www.jstor.org/stable/10.1163/j.ctt1w76vd0.15?seq=1#metadata_info_tab_contents.

¹¹⁴ OECD, *Private Sector Participation in Water Infrastructure: OECD Checklist for Public Action*. Available at www.oecd.org/env/resources/42350657.pdf.

¹¹⁵ Committee on Economic, Social and Cultural Rights, general comment No. 15, para. 53.

provision to public hands in cases of human rights abuses, failure to comply with performance targets or systematic misconduct regarding accountability and transparency. When contract termination implies a financial burden for the State, it may compromise the State's obligation to use the maximum available resources to realize human rights. The impact of such clauses could be especially negative when a decision by a particular government constrains the decisions of subsequent governments, which may be willing to take services back in order to fulfil their human rights obligations, but may not be able to afford compensations derived from contracts.

3. Operational stage

54. During the private provider's operational stage, the central Government should promote the capacity and institutional development of those in charge of overseeing service provision. Regulatory bodies should be granted not only the legal conditions and resources needed to properly monitor and enforce contract obligations but also those needed to work in a sound institutional environment and under a robust legal framework in accordance with human rights law. Regulators must be open to public scrutiny, and be accountable to and driven by the human rights framework.¹¹⁶

55. Accountability and access to effective remedies are also essential, as service providers and States are accountable for deteriorating services, unmet performance standards, unjustified tariff increases, inadequate social policies or other breaches.¹¹⁷ Judicial, quasi-judicial and administrative mechanisms for accountability should be in place and accessible to those affected by possible abuses.

4. Renegotiation or termination stage

56. Although undesirable, situations of contract renegotiations may emerge when relevant aspects of service provision are not foreseen from the outset and are not included in contracts. Nevertheless, renegotiations cannot entail retrogressive measures, which are considered human rights violations. Renegotiations should instead be used to adapt contracts to human rights requirements.

57. Contract termination is also critical. If the concession period comes to an end, the provider, under human rights law, is expected to cooperate with governments and ensure a sound transition, with transparency and full access to information.

58. **In line with these elements, the Special Rapporteur recommends that States:**

(a) When adopting legislation that allows privatization, explicitly state that water and sanitation are human rights, establish that private providers must uphold the same level of obligations as public providers and define that a human rights assessment must precede the decision as to whether to privatize services;

(b) Conduct a human rights assessment that includes available alternatives before opting for the privatization of services, and in doing so choose the type of provision most suitable and adapted to local conditions in order to promote the realization of human rights to water and sanitation for all;

(c) Establish effective and transparent accountability and enforcement mechanisms and remedies in order to ensure that alleged human rights abuses by private providers are duly investigated and sanctioned;

(d) Promote active, free and meaningful participation by civil society and affected communities throughout the process of the decision on the type of provider, making sure that opinions of the communities are duly considered;

¹¹⁶ A/HRC/36/45, para. 39.

¹¹⁷ A/HRC/15/31, para. 56.

(e) Identify potential conflicts between commercial and investment law and human rights legislation and address them so that the State is in compliance with its minimum core obligations and the obligation to use the maximum of its available resources under the International Covenant on Economic, Social and Cultural Rights;

(f) Define contract obligations according to the normative content of the human rights to water and sanitation, prioritizing the unserved and the underserved and establishing clear roles and responsibilities and defining targets related to quality, accessibility, acceptability, affordability, safety and the prohibition of retrogressive measures, such as disconnecting users who are unable to pay their bills;

(g) Include, in contract clauses, conditions and procedures allowing States to engage in a sound, transparent and cost-effective de-privatization process when the provider infringes the contract, especially in cases of human rights abuses or non-compliance with contract terms based on the human rights to water and sanitation;

(h) Establish autonomous entities to monitor and enforce contractual obligations and provide those entities with sufficient human and financial resources to carry out their mandate and conduct meaningful participation with civil society as an integral part of their work;

(i) Implement legislation that requires companies operating abroad to comply with human rights standards;

(j) Refrain from establishing, as a condition for bilateral cooperation, that host countries engage in the privatization of water and sanitation services.

B. Private actors

59. The most notable international instrument that aligns private participation with the human rights standards is the Guiding Principles on Business and Human Rights of the United Nations. It notes that “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises”, through the provision of “effective policies, legislation, regulations and adjudication”. It also states that Governments should “exercise adequate oversight ... when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights”. While, as “soft law”, compliance with these principles and frameworks is voluntary, their existence remains useful for the creation of norms and, from a legal pluralist perspective, as law for those who subscribe to them. When it comes to the relationship between delegating States and companies, the Guiding Principles provide a basis for what should be expected from businesses and the types of compliance mechanisms that should be in place.

60. Within the current framework of international law, controversies on the human rights obligations of businesses have arisen.¹¹⁸ In 2018, the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, created by the Human Rights Council, issued a “zero draft” of a new treaty on a “legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other

¹¹⁸ Andrés Felipe López Latorre, “In defence of direct obligations for businesses under international human rights law”, *Business and Human Rights Journal*, vol. 5, No. 1 (January 2020). Available at www.cambridge.org/core/services/aop-cambridge-core/content/view/EEB34BECDE016C2E6BC1F18BFE2F10A5/S2057019819000270a.pdf/in_defence_of_direct_obligations_for_businesses_under_international_human_rights_law.pdf.

business enterprises”.¹¹⁹ The document sets out several obligations that are to be placed upon States to introduce legislation and regulation ensuring that private businesses properly respect human rights, which is extremely relevant for the privatization of water and sanitation services. Although not yet operative, this document provides an additional framework for defining the obligations of private service providers at the national level.

61. Although private actors are not directly bound by international human rights law, national laws, contracts and regulations define a set of obligations that are binding for companies, and can incorporate international human rights obligations. Based on a legal and institutional framework that incorporates the human rights to water and sanitation, contract clauses should impose human rights obligations on companies through the domestic legal system. Moreover, companies have the responsibility to refrain from acting in disregard of the human rights framework by banning measures such as disconnections and acting in accordance with the realization of those rights. They must therefore proactively identify and address human rights concerns in procurement processes and contracts, avoiding complicity with situations that might negatively affect the enjoyment of those rights. They must also respond to users’ complaints in a timely manner and provide information related to alleged human rights abuses, even when contract clauses do not require them to do so. While major multinational companies have supported the recognition of the rights to water and sanitation,¹²⁰ a gap still needs to be filled regarding an active role by the companies in promoting and complying with the realization of human rights by reconciling their commercial interests with States’ human rights obligations.

62. Therefore, the Special Rapporteur recommends that private actors operating water and sanitation services:

(a) Incorporate human rights obligations, regardless of whether those obligations are stipulated in domestic legislation, that comply with the standards of international human rights law;

(b) Proactively identify and address human rights concerns, avoiding complicity in situations that might negatively impact the enjoyment of those rights;

(c) Communicate to the public the ways in which the company ensures that its business interests are reconciled with the realization of the human rights to water and sanitation;

(d) Refrain from acting with disregard to the normative content of the human rights to water and sanitation, such as disconnecting users who are unable to pay their bills, or selectively providing services and investing in infrastructure for sectors of society that are more able to pay tariffs;

(e) Disclose financial and operational information to the public in an accessible manner, so that governments and civil society can comprehensively oversee service performance.

C. International financial institutions

63. Several international organizations have had an essential role in promoting the privatization of water and sanitation services as part of their development policies or as conditionalities for grants, loans and technical assistance to developing countries,

¹¹⁹ See www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

¹²⁰ Submission by Aquafed.

as was the case of IMF and the World Bank in the 1990s and early 2000s.¹²¹ The Special Rapporteur is concerned that such pressures still occur and also is of the view that incentives for States to privatize services should be definitely banned. International financial institutions have specific human rights obligations¹²² that should be applied in situations where their operations involve the private provision of water and sanitation services.

64. The Special Rapporteur recommends that international financial institutions:

(a) **Actively engage in incorporating the framework of the human rights to water and sanitation, fostering its dissemination among partner States when they are deciding the type of provider;**

(b) **Ban conditionalities that require States to engage in the privatization of water and sanitation services when providing grants, loans and technical assistance;**

(c) **Adopt a human rights framework when deciding whether to support public or private operations in specific countries, and when deciding to promote institutional and organizational reforms.**

¹²¹ Submission by the United Nations Development Programme.

¹²² [A/71/302](#), para. 13.