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Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, 2010

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Human Rights Council**Fifteenth session**

Agenda item 3

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development****Report of the independent expert on the issue of human
rights obligations related to access to safe drinking water and
sanitation, Catarina de Albuquerque***Summary*

The independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, submits the present report to the Human Rights Council in accordance with Council resolution 7/22. In the report, the independent expert focuses on the human rights obligations and responsibilities which apply in cases of non-State service provision of water and sanitation. She begins with an overview of the role that non-State service providers play in delivering water and sanitation throughout the world. She continues by outlining the human rights obligations of States and the responsibilities of non-State service providers and highlights three main areas where challenges can be faced in this regard: decision-making, operation of services, and accountability and enforcement.

In the present report, the independent expert emphasizes that the human rights framework does not express a preference over models of service provision, but insists that in all instances, the human rights to water and sanitation be guaranteed. The final section of the report contains conclusions and recommendations.

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I. Introduction

1. The present report is submitted by the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation in accordance with Human Rights Council resolution 7/22, which tasks her with further clarifying “the content of human rights obligations, including non-discrimination obligations, in relation to access to safe drinking water and sanitation”. She focused the second year of her mandate on clarifying the human rights obligations and responsibilities in the context of the participation of non-State service providers in water and sanitation service delivery. This includes both formal and informal private sector participation, but also extends to a multitude of other non-State actors.

2. The independent expert decided to do so for two main reasons. First, in the 2007 report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, the High Commissioner noted that, *inter alia*, “further elaboration is needed regarding the human rights response and requirements concerning the private provision of water and sanitation services” (A/HRC/6/3, para. 53). Moreover, since she took up her mandate, the independent expert has noted that there is, on the part of various stakeholders, a constant interest and curiosity in a human rights analysis of private sector participation. While the debate surrounding private sector participation has often been polarizing, the independent expert observes that concrete situations are rarely “black or white”, but instead are characterized by varying shades of grey. In carrying out this research, she noted that serious misconceptions exist about both the factual situation and the role and implications of human rights. These misconceptions relate, for instance, to the actual extent of private sector participation and the multitude of non-State actors who are involved in water and sanitation service provision. Therefore, she broadened the subject matter of her analysis, acknowledging that the formal private sector represents only a small fraction of actors involved in service provision. In the present report the independent expert aims to clarify these issues and to apply and specify the human rights obligations of States and the responsibilities of non-State actors in the context of non-State actor involvement in service provision.

3. To approach this task, the independent expert engaged in wide consultative processes. At one expert consultation, jointly organized with the Friedrich Ebert Foundation and held in Geneva in January 2010, participants discussed the human rights obligations of States in the context of the involvement of non-State service providers. A second consultation, held in Lisbon in April 2010, focused on the responsibilities of service providers in terms of human rights. Both consultations brought together experts from different backgrounds, such as civil society, State-owned and private companies, water and sanitation regulators, academia and international organizations, and presented an opportunity to benefit from the diverse experience of people who work in the sector. The independent expert also convened a public consultation in Geneva on 27 January 2010, in which several representatives of States Members of the United Nations, civil society, the private sector and academia participated. Lastly, she received 65 written contributions: 24 submissions from States, 4 from regulators, 2 from municipalities, 13 from civil society, 1 from a national human rights institution, 12 representing private sector interests and 9 from individuals. The in-depth discussions and various perspectives have provided valuable assistance and guidance to the independent expert in preparing the present report and she is very grateful to all those who contributed.

II. Background on provision by non-State actors

4. It is possible to identify three different forms of service provision:

(a) **Direct management.** The State can provide services itself, often through its municipalities. In that case, no actor other than the State is involved and the State is directly responsible and accountable for the provision of services;

(b) **Delegated service provision.** Instead of providing services itself, the State may choose to formally delegate service provision to non-State actors. While more attention is often paid to the involvement of large, transnational companies, service provision may also be delegated to smaller companies, non-governmental organizations (NGOs) or community-based organizations. Services are also often operated through State-owned companies, that is, companies that are totally or in the majority owned by the State, but that are legally distinct entities from the State itself. From the perspective of human rights, the crucial aspect is that the State has delegated the task of providing water and sanitation services to a third actor;

(c) **Informal provision.** Finally, in many cases, the State neither provides services itself, nor does it formally delegate service provision. Under these circumstances, informal provision often takes place, involving a variety of actors and structures that have evolved over time, responding to a need in areas not covered by formal provision, ranging from small-scale entrepreneurs to NGOs and community-based organizations. In this case, the State has not made an intentional decision to involve third actors. Rather, informal provision is de facto participation of non-State actors.

5. While the independent expert is aware of the significant differences in size, capacity and structure of these actors, she considers it necessary to cover the entire spectrum of non-State service providers. In the present report, she will not address direct State provision, because the legal analysis is different when non-State actors are involved, as will be explained below. Hence, the present report addresses both formal and informal service provision and covers private companies and entrepreneurs, NGOs and community-based organizations involved in service provision, as well as State-owned companies. She will use the terms “non-State service providers” or “actors” to refer to these. Where her considerations are limited to the private sector or parts of it, she will use the terms “(formal/informal) private sector”, “private sector participation” or “private actors”, while avoiding the term privatization for the reasons outlined below.

A. Delegated service provision

6. While the private sector has a long history of involvement in water and sanitation service provision, the starting point for the most recent wave of private sector participation can be situated in the 1980s in several developed countries, followed by many developing and transition countries during the 1990s.¹ Private sector participation in developing countries should be understood in the context of donor approaches and international policies.² International financial institutions, in particular, have promoted neo-liberal

¹ Naren Prasad, “Overview: social policies and private sector participation in water supply”, in *Social Policies and Private Sector Participation in Water Supply*, Naren Prasad, ed. (Houndsmill, Palgrave Macmillan, 2008), pp. 3 and 12.

² Private sector participation also has to be seen in the context of international trade and investment law that may potentially conflict with human rights law by limiting the regulatory space of a State. It would, however, be beyond the scope of the present report to address these complex issues. See generally the report of the High Commissioner for Human Rights on human rights, trade and investment (E/CN.4/Sub.2/2003/9); and more

reforms advocating for States to reduce public spending and avoid significant investments.³ Some of the reforms leading to greater involvement of the private sector have been imposed through loan or aid conditionalities, debt reprogramming or loan forgiveness.⁴

7. Some highly visible instances of private sector participation have triggered a vigorous debate, criticism and high scrutiny over the formal private sector, focusing more on water than sanitation. On the one side, some argue that water is a public good and a unique resource essential for life and health and thus should remain in the public domain. Critics often point to instances where private sector participation is perceived to have failed, arguing that performance has been poor, agreed coverage targets have not been met, the quality of services has decreased, prices have increased substantially and that processes have not been transparent. Conversely, others argue that the private sector can contribute to the necessary investments in the sector, and thus extend coverage to currently unserved or underserved areas, as well as increase service quality and efficiency, contribute with technologies and skills and provide services at lower prices.

8. The intensity of the debate between advocates and critics, which is sometimes ideological and emotional, may have partially obscured the actual extent of private sector participation. While such participation is very common in some countries,⁵ on a global scale, other forms of service provision predominate. It has been estimated that, as of 2003, only 5 per cent of world's population was being served by the formal private sector.⁶ Moreover, the debate sometimes conveys the impression that the private sector is largely dominated by transnational corporations. This does not reflect present reality. Some transnational corporations have started to withdraw from developing countries,⁷ they are increasingly developing local partnerships,⁸ and, in a number of countries, local private actors are also very active.⁹ Moreover, delegated service provision is not limited to the operation of networks; service provision can also be delegated to suppliers of non-networked services including standpipe operators, water kiosks, and operators of shared sanitation facilities.

9. Private sector participation is commonly used to refer to a broad spectrum of contractual arrangements between governments and the private sector that involve private companies in varying degrees in the provision of water and sanitation services. They differ according to the ownership of assets, the responsibility for capital investments, the allocation of risks, the responsibility for operations and maintenance, and the typical

generally on the fragmentation of international law the report of the Study Group of the International Law Commission on "Fragmentation of international law: difficulties arising from the diversification and expansion of international law" (A/CN.4/L.682).

³ See the report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, (A/HRC/11/10), paras. 26-42.

⁴ Karen Bakker, "Overview paper: recent trends in PSP, financing, and regulation in the water sector", The Water Dialogues, April 2009, available from www.waterdialogues.org/thematic.htm, p. 2.

⁵ For instance, in France and Malaysia it is estimated that 80 per cent and 64 per cent of the population, respectively, are served by the private sector. See Prasad, "Overview: social policies", pp. 22 and 26.

⁶ Herath Gunatilake and Mary Jane F. Carangal-San Jose, "Privatization revisited: lessons from private sector participation in water supply and sanitation in developing countries", Economics and Research Department (ERD) Working Paper No. 115 (Asian Development Bank, 2008), pp. 15-16.

⁷ Philippe Marin, *Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries* (Washington, D.C., World Bank, 2009), p. 34.

⁸ Organization for Economic Cooperation and Development (OECD), *Private Sector Participation in Water Infrastructure* (Paris, 2009), p. 17.

⁹ Marin, *Public-Private Partnerships*, p. 29.

contract duration.¹⁰ For instance, while the model of concessions confers the management, risk and responsibility for investment on the private sector, private sector participation can also be limited to contracting out some aspects of management or service provision. In many cases, the system cannot be designated as exclusively public or private but instead takes on a hybrid nature, also in the form of joint ventures. The oft-used term “privatization” obscures the fact that full-scale privatization, that is, divestiture including the transfer of assets, is a rare exception rather than the norm.¹¹ To avoid imprecision and confusion, the independent expert will not use the term, but will rather mention private sector participation when referring specifically to the private sector.

10. State-owned companies also play an increasingly significant role in service provision, both in their home States as well as abroad.¹² Such companies are fully or predominantly owned by the State, are often incorporated under private law and often operate on a commercial basis. While they are owned by the State, they are distinct legal entities from the State as such. Therefore, they are considered here as non-State actors to which service provision is delegated (often through a legislative act or a contract), and many of the same issues as in the context of private sector participation arise.

B. Informal provision

11. Compared to the formal private sector, many more people are served by informal small-scale providers. It has been estimated that up to 25 per cent of the urban population in Latin America and almost 50 per cent of the urban population in Africa rely on small-scale providers to some extent.¹³ Apart from unprotected sources, such as rivers, poor households rely on a variety of private water vendors such as water truck, standpipe and kiosk operators and small-scale water delivery services, which often – although not always – operate on an informal basis. When other sources are unsafe, people also often depend on bottled water in particular for drinking purposes. Even more so than in the water sector, small-scale local entrepreneurs are of enormous significance in the provision of sanitation services. Sanitation for low-income households is often provided on site and multiple actors are involved, with activities ranging from constructing, maintaining and emptying latrines and septic tanks to managing public facilities and selling related products such as cleaners and soap.

12. Finally, NGOs and community-based organizations are also taking on an increasingly important role in service provision, stepping in where the State is not involved in such activities. While their motivation may be different, as they often operate on a not-for-profit basis, many of the same issues arise in that context, for instance how to apply consistent standards for the quality of services and how to ensure that organizations are accountable to the people they serve.

13. To a large extent, the debate has focused on the relative advantages and disadvantages of formal public or private provision, too often losing sight of this de facto commercialized service provision. While such services differ greatly depending on the

¹⁰ On the different models of private sector participation, see OECD, *Private Sector Participation*, pp. 17-18.

¹¹ A few areas of the United Kingdom of Great Britain and Northern Ireland as well as some cities in Chile are the only places where this model has been chosen. See Gunatilake and Carangal-San Jose, “Privatization revisited”, p. 8.

¹² Marin, *Public-Private Partnerships*, pp. 10-11.

¹³ Mukami Kariuki and Jordan Schwartz, “Small-scale private service providers of water supply and electricity: a review of incidence, structure, pricing and operating characteristics”, Policy Research Working Paper, No. 3727 (Washington, D.C., World Bank, 2005), p. 6.

circumstances, it is not uncommon for people to have no choice but to rely on services (often low quality) which are exorbitantly priced.¹⁴ Due to the high number of intermediaries involved in providing the service, high transport costs and a lack of regulation, water bought from informal private vendors is frequently 10 to 20 times as expensive as water provided by a utility.¹⁵ When looking beyond networked water supply and sewerage, adding in informal small-scale providers, a completely different picture of the characteristics of the private sector emerges. Overall, there is a need for a more nuanced debate, which recognizes the various forms of private sector participation, the wide range of non-State actors involved, the role of State-owned companies, as well as differences between networked provision of water and sanitation vs. on-site solutions.

III. Standards of assessment: the human rights to water and sanitation

A. Links between the provision of water and sanitation by non-State actors and human rights

14. In the political debate over the best mode of service delivery, human rights are often invoked in arguments against private sector participation. The right to water (less so the right to sanitation) and opposition to private sector participation are frequently linked to each other. Decisions taken at the national level to recognize the right to water, while simultaneously ruling out private sector participation of water services, contributed to this perception.¹⁶

15. Yet, the two issues are separate. Human rights are neutral as to economic models in general,¹⁷ and models of service provision more specifically. The report of the High Commissioner points out that “the approach of United Nations treaty bodies and special procedures has been to stress that the human rights framework does not dictate a particular form of service delivery and leaves it to States to determine the best ways to implement their human rights obligations” (A/HRC/6/3, para. 52). The various forms of delegating service provision are viable options that each State can consider.

16. Certainly, however, this does not imply that human rights are irrelevant. The delegation of water and sanitation service delivery does not exempt the State from its human rights obligations. Traditionally, human rights are concerned with the relationship between the State and the individual. They impose obligations on States and endow individuals with rights. When a third party comes in, it has to be accommodated within that bilateral relationship, as the State retains its obligations to realize human rights, while the type of actions necessary to meet these obligations changes. While the State is directly accountable for the provision of services in the case of direct management, the lines of accountability become more complex when a third actor becomes involved. When opting for this form of service delivery, the State must adopt specific measures which take account of the involvement of non-State actors to ensure that the rights to sanitation and water are not compromised. In its general comment No. 15 (2002) on the right to water, the Committee on Economic, Social and Cultural Rights points out that “States parties must

¹⁴ United Nations Development Programme, *Human Development Report 2006 - Beyond Scarcity: Power, Poverty and the Global Water Crisis* (New York, Palgrave Macmillan, 2006), p. 83.

¹⁵ *Ibid.*, pp. 83-84.

¹⁶ See for instance art. 47 of the Constitution of Uruguay.

¹⁷ Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties obligations, para. 8.

prevent [third parties] from compromising equal, affordable, and physical access to sufficient, safe and acceptable water” (para. 24), which equally applies to sanitation.¹⁸ As outlined below, involving non-State actors requires, inter alia, clearly defining the scope of functions delegated to them, overseeing their activities through setting regulatory standards and monitoring compliance.

17. The work of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises is especially relevant to the subject of this report as it is concerned with States’ obligations and business responsibilities. In his 2008 report to the Human Rights Council, the Special Representative set out a three-part policy framework entitled “Protect, Respect and Remedy” (A/HRC/8/5). It consists of the States’ obligation to protect against human rights abuses by third parties, the responsibility of companies to respect human rights, and the need for access to effective remedies and grievance mechanisms to address alleged human rights violations. The Human Rights Council welcomed the framework by consensus in its resolution 8/7. The Special Representative is now in the process of further operationalizing the framework. To some extent, the work of the independent expert builds on the framework and is aimed at contributing to its operationalization by applying it specifically to the provision of water and sanitation services.

B. State obligations

18. The State cannot exempt itself from its human rights obligations by involving non-State actors in service provision. Irrespective of responsibilities of the latter, the State remains the primary duty-bearer for the realization of human rights.

19. Generally speaking, the human rights obligations of States can be classified as obligations to respect, to protect and to fulfil. Obligations to respect require States to refrain from interfering with existing access. Obligations to protect take into account the role of third parties, requiring States to prevent such third parties from interfering with the enjoyment of human rights by others. Finally, obligations to fulfil call on States to adopt the necessary measures to enable and assist individuals to enjoy their human rights and to ensure direct provision as a last resort, when individuals are, for reasons beyond their control, unable to provide for themselves. States have to achieve the full realization of the rights to water and sanitation progressively. They are required to devote the maximum available resources and move towards it as expeditiously and effectively as possible, but do not have to achieve the full realization immediately.

20. States must realize their human rights obligations in a non-discriminatory manner. They are obliged to eliminate both de jure and de facto discrimination on grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status, or any other civil, political, social or other status including the social and economic situation.¹⁹ They are obliged to pay priority attention to groups and individuals particularly vulnerable to exclusion and discrimination. Depending on the circumstances, they may need to adopt positive measures to redress existing discrimination.

21. When non-State actors are involved in service provision, there is a shift to a stronger focus on the obligation of the State to protect. At the same time, the obligation to fulfil

¹⁸ Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation (A/HRC/12/24), para. 64.

¹⁹ See Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights.

retains its significance with the aim of creating an enabling environment. States have a duty to regulate and monitor providers that they involve in service delivery. Moreover, they may need to adopt supplementary measures depending on the circumstances, for instance to ensure the affordability of services. A comprehensive approach is needed: non-State service providers can be involved, but the State has the obligation to develop an overall (short, medium and long-term) strategy on how to fully realize the rights to water and sanitation. When the State does not directly provide services, its role nevertheless remains obligatory and critical.

C. Responsibilities of non-State service providers: rationale, basis and scope

22. Parallel to the obligation of the State to protect, it is undisputed that service providers must comply with the laws and regulations of the State in terms of a general legal obligation. Yet, while the activities of non-State actors can have an enormous impact on the realization of human rights, they are not addressed directly within the traditional human rights legal framework concerned with the relationship between States and individuals. This issue of direct human rights responsibilities of non-State providers will now be considered.

23. The basic expectation that Society has of business enterprises is that they will respect human rights (A/HRC/8/5, para. 9), and businesses themselves acknowledge this responsibility.²⁰ This is affirmed through global voluntary commitments such as the United Nations Global Compact²¹ and various multi-stakeholder initiatives in different sectors. These commitments are reinforced through soft law instruments²² such as the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development²³ and the Tripartite Declaration of Principles Concerning Multinational Enterprises of the International Labour Organization (para. 8). These do not create legally binding obligations, but “[derive their] normative force through recognition of social expectations by States and other key actors” (A/HRC/4/35, para. 45). The “Protect, Respect and Remedy” framework has confirmed these commitments, and the Human Rights Council, in its resolution 8/7, has specifically emphasized that business enterprises have a responsibility to respect human rights. While such an endorsement does not establish direct human rights obligations in a strictly legal sense, it shows a strong political commitment and highlights that this is what States expect from business enterprises in relation to human rights.

24. To some extent, the debate has focused on highly visible transnational corporations against the background of globalization and gaps in accountability. Yet, it seems just as relevant in the context of medium-sized national companies and small-scale service providers that often operate unregulated. Their activities can have a significant impact on the realization or non-realization of human rights. And while their activities may not have the same repercussions at the global level and they do not get as much attention, they serve

²⁰ AquaFed, the International Federation of Private Water Operators, explicitly supports the human rights to water and sanitation.

²¹ Global Compact, Principles 1 and 2. The CEO Water Mandate of the Global Compact, as an initiative of specific relevance to the water sector focusing on industrial water use, does not yet explicitly refer to human rights, although discussions about human rights have been included in its meetings.

²² For a comprehensive mapping of international standards and practices, see the 2007 report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/4/35).

²³ OECD, “The OECD Guidelines for Multinational Enterprises: text, commentary and clarifications” (31 October 2001), p. 11.

more people than the formal private sector. Furthermore, their impact is of a more direct nature as they are not anonymous companies, but often neighbours, friends or family members.

25. The activities of State-owned companies can influence the enjoyment of human rights to an even larger extent.²⁴ At a very minimum, State-owned companies have the same responsibilities as other businesses. Depending on the degree of control the State exercises over such companies, the State may be held responsible for their actions. When State-owned companies act as arms of Government or implementing agents of Government policy, the State must ensure policy coherence and guarantee that the activities of those companies contribute to the realization of human rights.

26. To be able to respect human rights, non-State actors need to know the actual and potential impact of their activities on the realization of human rights. According to the framework of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, such actors are required to exercise due diligence “to become aware of, prevent and address adverse human rights impacts”.²⁵ Due diligence is understood as “a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a [...] business activity, with the aim of avoiding and mitigating those risks”.²⁶ That responsibility is not a mere passive one, but requires active steps to put into place the necessary policies, mechanisms to identify actual and potential harm to human rights, and grievance mechanisms.²⁷

27. In exercising due diligence, non-State service providers have to take into account a variety of factors. They must consider the country and local context where their activities are carried out – such as the institutional capacities of the Government – aiming to identify the specific human rights challenges. A second set of factors turns to the actual and potential impact of their activities. Finally, a third set relates to whether they might contribute to human rights abuses through their relationships with other actors (A/HRC/8/5, para. 57). Thus, the responsibility to respect not only requires service providers to ensure that their own action does not result in human rights abuses, but also includes the avoidance of complicity, which means that they must avoid being indirectly involved in human rights abuses committed by other actors, including the State (para. 73). The concept of due diligence requires contextualization and is sufficiently flexible to determine what is required from non-State providers operating in different contexts. The necessary actions required in the exercise of due diligence will depend on the scale, nature and sectoral and operational specificities of the actor in question.

28. Compared to other business activities, the provision of water and sanitation services is characterized by special features: the services relate directly to the fulfilment of human rights. While non-State actors are well positioned to positively contribute to the realization of the rights to sanitation and water through service provision, the activities of service providers, whether through their direct actions or through failure to live up to the mandate delegated to them, can also potentially result in abuses of the rights to water and sanitation. In this regard, their activities are intrinsically linked to the realization of human rights, and therefore they need to observe particular requirements in exercising due diligence.

²⁴ See the 2010 report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/14/27), paras. 26-27.

²⁵ See the 2009 report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, (A/HRC/11/13), para. 59.

²⁶ *Ibid.*, para. 71.

²⁷ *Ibid.*, para. 59.

IV. Main challenges from a human rights perspective

29. From a human rights perspective, it is imperative to determine whether service delivery contributes to or undermines the realization of human rights. Therefore, the provision of services must be assessed against the standard of the human rights to sanitation and water. While all aspects of these rights, that is, availability, safety, acceptability, accessibility, affordability, participation, non-discrimination and accountability,²⁸ have to be met, some will become more relevant than others in the following discussion.

30. The challenges in the water and sanitation sector are huge. Many of these challenges are faced by all service providers, State and non-State, and thus this analysis may be relevant in a broader context. However, the present section retains a specific focus on situations where non-State service providers are involved, clarifying the obligations of States and the responsibilities of non-State actors in this context, since the human rights analysis changes when non-State actors become involved. By identifying the challenges in the context of water and sanitation service provision, it is hoped that concrete and practical guidance may be offered to States and service providers alike. Against the standard of the human rights to water and sanitation, a number of such challenges can be identified, including:

- Guaranteeing transparent and democratic decision-making
- Addressing power asymmetries in the bidding and negotiation process
- Reaching the poorest and most marginalized
- Ensuring affordable services
- Avoiding disconnections in cases of inability to pay
- Ensuring the quality of services
- Ensuring regulatory capacity and enforcement
- Ensuring monitoring and follow-up capacity
- Establishing effective complaint mechanisms
- Addressing corruption

31. These challenges can be encountered at various stages of engagement with non-State service providers. Human rights have to be protected before and throughout the process, requiring a constant assessment, both by States and service providers, of whether the measures taken contribute to the realization of human rights. In the present section, both State obligations and the responsibilities of non-State actors will be addressed in relation to the challenges encountered. Starting with the decision to delegate service provision, the independent expert highlights questions regarding participatory and transparent processes, instruments for delegation and human rights impact assessments. She specifically addresses provision of services to previously unserved and underserved areas. In the operation of services, it is observed that regulation is essential, but often not sufficient to meet the standards of the human rights to water and sanitation and must be complemented by social policies. That section also raises issues regarding institutional capacity and the regulation of informal small-scale providers. Finally, the last section turns to questions of accountability and enforcement.

²⁸ Committee on Economic, Social and Cultural Rights, general comment No. 15, para. 12; A/HRC/12/24, paras. 69-80.

A. Decision-making

32. The human rights framework sets certain standards with regard to, inter alia, transparency and participation. These requirements apply starting with the process of decision-making on the nature and modalities of service provision, the bidding process and entering into contracts in the case of private sector participation, and a continuous assessment of the actual and potential impact on human rights.

33. In the case of informal service provision, there has not been an intentional decision to involve non-State service providers, but rather these structures have evolved over time responding to a need in areas not connected to the utility network. In this regard, the issues for States to consider is whether and how to integrate this type of provision into the formal system and how to exercise oversight over a sector largely operating on its own terms, questions that will mainly be addressed in section B below.

1. Democratic, participatory and transparent processes

34. The decision whether to delegate service provision must take place in the context of a sound overall strategy that lays out how the State aims to achieve universal access to sanitation and water. Both the strategy and the decision on delegation have to be adopted in a democratic, participatory and transparent process. In the view of the independent expert, the participation of all concerned must be active, free and meaningful.²⁹ To enable genuine participation, this requires disclosure of adequate and sufficient information and actual access to information, referring in particular to the instruments that delegate service provision. In the case of State-owned companies, management will usually be delegated via legislation, decrees or contracts, while the authorities will often enter into contracts with private providers. The creation of a wider enabling environment for meaningful participation must be ensured, as well as specific opportunities for participation and reinforcement of the capacities of individuals and civil society to enable them to participate, monitor, evaluate and report on possible human rights abuses.

35. Democratic decision-making implies that Governments must not be pushed into the decision to delegate service provision by donor conditionalities. Such conditionalities may limit independent decision-making in developing countries and thus undermine democracy and the capacity of local authorities to address and solve local problems. States must not limit their regulatory and policy space and must safeguard the ability to protect human rights (A/HRC/14/27, paras. 20-25). The decision for, or against, delegating service provision to non-State actors should always be taken in the light of the local circumstances. In that regard, the Committee on Economic, Social and Cultural Rights considers that the “international financial institutions [...] should take into account the right to water in their lending policies, credit agreements, structural adjustment programmes and other development projects [...], so that the enjoyment of the right to water is promoted”,³⁰ which, in the opinion of the independent expert, also applies to the right to sanitation.

36. When deciding to delegate service provision, and once that fundamental decision has been taken, the subsequent process of tendering, bidding and contract negotiation also must be transparent. The terms of reference and the final contract should be made available for public scrutiny and commenting. Commercial confidentiality must not jeopardize the transparency requirements provided for under the human rights framework. Both the tender and the bids must be based on accurate information, taking into account all existing relevant facts. This precludes strategic underbidding. Some have asserted that companies have

²⁹ See the Declaration on the Right to Development (General Assembly resolution 41/128, annex, art. 2, para. 3).

³⁰ General comment No. 15, para. 60.

purposely quoted bids less than the actual amount required to implement the contract, with the intention of renegotiating the contract for a higher price once the bid has been won.³¹ Renegotiations are not generally a problem from a human rights perspective: changes in circumstances and data availability may require that the contract be adapted or amended and renegotiations may also be necessary to adapt contracts to human rights requirements. However, when renegotiations are the result of strategic underbidding and companies secure more favourable terms in the ensuing bilateral negotiations, such as increases in tariffs as well as delays and decreases in investment obligations,³² this is contrary to the exercise of due diligence.

37. The negotiation of contracts is extremely complex, including the need to clearly define responsibilities, allocate risks, set delivery and coverage targets and establish penalties for non-compliance. Negotiation skills are therefore essential. In particular, local governments are usually far less experienced than transnational corporations in negotiating contracts and addressing the issues at stake.³³ Any imbalance aggravates the task of ensuring that the contract includes the necessary human rights safeguards. Therefore, strengthening the negotiation capacity of (local) governments and reducing power asymmetries is essential.

38. Any instrument delegating service provision, including contracts, must meet human rights standards. While ensuring this is the primary obligation of the State, non-State service providers are expected to exercise due diligence in this regard. To become aware of, and address, any potential impact on the realization of human rights, service providers have a responsibility to analyse the proposed instrument from a human rights perspective, in order to detect any human rights-related risks and aim to avoid them. As outlined above, exercising due diligence explicitly extends to the relationship with others, including when service providers enter into a contract with the State. While they cannot unilaterally change the terms, they are expected to avoid complicity in human rights abuses, namely by not entering into a contract which seems likely to result in human rights violations. Non-State service providers should proactively engage with the State to identify and address human rights concerns, and in this manner support the efforts of the State to realize human rights.

2. Providing services to previously unserved and underserved areas

39. Particular challenges occur with regard to the provision of services to previously unserved and underserved areas. In these cases, the operator is faced with not only the recurrent costs of operation and maintenance, but also the need for substantial investments. The private sector has often been criticized for selectively serving attractive areas within regions, countries, cities and neighbourhoods, where a high rate of return can be expected. However, the geographic coverage of services provided by non-State actors is the result of a political decision and a contract proposed by the public authorities – non-State service providers will not extend services to unserved or underserved areas unless explicitly mandated to do so in their contracts.

40. It is therefore the Government that has the power and obligation to resist the temptation of investing in and prioritizing only neighbourhoods where interventions are less expensive and complex. The State has the ultimate obligation to realize the rights to sanitation and water for all, including the poorest in society. It must not discriminate against people living in certain areas, but rather must pay specific attention to the most marginalized. To that end, it must develop a comprehensive and coherent approach that

³¹ J. Luis Guasch, *Granting and Renegotiating Infrastructure Concessions: Doing It Right* (Washington, D.C., World Bank, 2004), p. 37.

³² *Ibid.*, p. 18.

³³ Marin, *Public-Private Partnerships* (see footnote 7 above), p. 131.

may or may not involve non-State actors in the provision of services to currently unserved and underserved areas. When involving private actors, the Government must carefully consider where it contracts for private sector participation, what coverage is to be achieved in the designated areas and what service levels have to be met, and negotiate the contract accordingly. Like any other instrument delegating service provision, the contract should include clear goals, such the targets to be reached, investment levels and pricing arrangements. The State also has to consider what additional measures are necessary in terms of subsidies and other instruments, which will be further discussed below.

41. The lack of security of tenure, in particular in informal settlements, is one of the critical underlying issues in this context. Utility networks often do not extend to informal settlements, while currently more than one billion people live in unauthorized urban and peri-urban areas.³⁴ Service providers often do not extend services to these areas due to the lack of legal tenure. At the same time, people themselves do not have a strong incentive for investing in ensuring access to water and sanitation in their homes when they face the constant threat of forced eviction. Appropriate measures by the State to facilitate provision will depend on the local context and might include steps to formalize the legal status of settlements, guarantees that people will not be forcibly evicted, the provision of financial assurances, and, in some circumstances, resettlement to an alternative area as long as human rights standards are respected.³⁵ Where the issue of the lack of security of tenure has not yet been resolved, States should at least take measures to ensure that the informal service provision that often prevails in such areas meets minimum human rights standards, as further outlined below, or that innovative solutions to providing formal services are implemented.

42. In cases where services are provided to previously unserved or underserved areas, the role of the water and sanitation service providers in contributing to the progressive realization of human rights becomes particularly obvious. Given that intrinsic link to the fulfilment of human rights, exercising due diligence to become aware of and address potential negative impacts is particularly important. That responsibility extends to detecting (de facto) discrimination, for instance where the scope of delegation excludes certain areas such as slums. What can reasonably be expected from non-State service providers depends on the context and the scale of operation. For instance, when becoming aware that certain targeted areas within or next to its area of operation are excluded from its contract, service providers should inquire about the broader Government strategy to determine whether these areas are provided with services by other operators. They should raise concerns about limited coverage with the State and engage proactively in order to avoid and address policies that would amount to discrimination.

3. Human rights impact assessment

43. A human rights impact assessment can serve as a tool for ensuring compliance with human rights. It can be described as a “systematic process to investigate and measure the impact of policies, programmes, projects, and interventions on human rights”.³⁶ The decision to delegate service provision should be preceded by an ex ante assessment that carefully considers the potential impact on the realization of human rights, including the rights to water and sanitation.

³⁴ United Nations Development Programme, *Human Development Report 2006* (see footnote 14 above), p. 86.

³⁵ Centre on Housing Rights and Evictions, *Manual on the Right to Water and Sanitation* (Geneva, 2008), p. 126.

³⁶ Saskia Bakker and others, “Human rights impact assessment in practice: the case of the Health Rights of Women Assessment Instrument (HeRWAI)”, *Journal of Human Rights Practice*, vol. 1, No. 3 (November 2009), pp. 436–458, p. 436.

44. States are encouraged to build human rights impact assessments into the process of deciding on the means of service provision and monitoring such provision, as well as to adopt legislation that imposes on service providers the obligation to carry out a human rights impact assessment. Service providers have a responsibility to undertake these assessments as part of exercising due diligence to become aware of the actual and potential impact of their action on the human rights to water and sanitation. On that basis, the State and service providers can work together to integrate human rights into water and sanitation policies, thereby ensuring compliance with human rights law, preventing human rights violations and maximizing positive effects.

45. Depending on the scale and expected impact of the decision and the size and capacity of the actor carrying out the assessment, the human rights impact assessment does not necessarily have to be very formal in nature. To facilitate the process, it could also be integrated with social or environmental impact assessments. While there is no agreed template for conducting a human rights impact assessment,³⁷ some principal elements can be identified that should be taken into account.³⁸

(a) Any assessment should be explicitly based on human rights, including the rights to water and sanitation;

(b) The human rights impact on the most excluded and marginalized should specifically be addressed;

(c) The process of carrying out the assessment itself should be in line with human rights principles, including active, free and meaningful participation, non-discrimination, gender equality, transparency and accountability;

(d) The process should strive to contribute to strengthening the capacities of relevant stakeholders;

(e) The assessment should seek to involve national, regional and international human rights mechanisms as their respective mandates and capacities allow.

B. Operation of services

46. When non-State actors are involved in service provision, the obligation remains with the State to ensure that the involvement does not result in violations of the rights to sanitation and water; adequate regulation is thus required. Regulation is often understood to refer “to the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with these rules”³⁹ that are aimed at the protection of consumers, investors and the environment. Accordingly, regulatory activities pertain to environmental regulation, consumer protection (including in case of disconnections), the regulation of water quality, economic regulation, and general monitoring of the sector.⁴⁰ In order to be effective, regulation requires, inter alia, “independent monitoring, genuine public participation and imposition of penalties for

³⁷ For a description of possible phases and steps that can be followed in such an assessment, see Gauthier de Beco, “Human rights impact assessments”, *Netherlands Quarterly of Human Rights*, vol. 27, No. 2 (2009), 139–166; International Business Leaders Forum and International Finance Corporation, *Guide to Human Rights Impact Assessment and Management*, Road-testing draft (Washington, D.C., 2007).

³⁸ See in this regard Simon Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (Intersentia, Antwerp, 2009), pp. 30–38.

³⁹ Baldwin and others, cited in Prasad, *Social Policies* (see footnote 1 above), p. 5.

⁴⁰ OECD, *Private Sector Participation* (see footnote 8 above), p. 25.

non-compliance.”⁴¹ In this section, the independent expert will introduce the relevant human rights standards, consider the responsibilities of non-State actors in the operation of services, highlight the need for institutional and regulatory capacity, pay particular attention to the regulation of informal small-scale providers, and stress the significance of complementary social policies.

1. Setting standards

47. One of the key roles of regulation is to set and monitor performance standards. The regulatory framework has to set specific standards for providers to comply with in line with the human rights to water and sanitation and the obligation to progressively realize these rights in particular with regard to:

(a) **Sufficient quantity.** Water must be available in a quantity sufficient to satisfy all personal and domestic needs;

(b) **Water quality.** It must not pose a threat to human health. The World Health Organization Guidelines for Drinking-water Quality serve as an important reference in this regard;

(c) **Regularity of supply.** Water supply must be sufficiently reliable to allow for the collection of amounts sufficient to realize all personal and domestic needs over the day;

(d) **Safety of sanitation facilities.** Human, animal and insect contact with human excreta must be effectively prevented. Regular maintenance, cleaning and – depending on the technology – emptying is necessary to that extent. Sludge and sewerage must be properly disposed of to avoid negative impacts on water quality and human health;

(e) **Acceptability.** Sanitation facilities, in particular, must be culturally acceptable. This will, for instance, often require privacy as well as separate male and female facilities when these are shared;

(f) **Accessibility of services.** Services must be available within or in the immediate vicinity of each household as well as schools, workplaces, health-care settings and public places. Access must be ensured in a sustainable manner;

(g) **Affordability of services.** Regulation also has to set standards regarding pricing. Water and sanitation services do not have to be provided for free and tariffs are necessary to ensure the sustainability of service provision. To meet human rights standards, the essential criterion is that tariffs and connection costs are designed in a way, including through social policies, that makes them affordable to all people, including those living in extreme poverty.

48. Linked to the question of affordability of services is the issue of disconnections. When water disconnections take place despite people’s inability to pay, individuals must still have at least access to minimum essential levels of water.⁴²

2. Complying with human rights standards in the operation of services

49. While it is the obligation of the State to put into place the necessary regulations, providers also have responsibilities in the operation of services. As outlined above, they must exercise due diligence to become aware of, prevent and address adverse impacts on human rights. To meet this responsibility, service providers should take certain measures, such as ensuring that the water they provide is of safe quality, ensuring the regularity of

⁴¹ Committee on Economic, Social and Cultural Rights, general comment No. 15, para. 24.

⁴² See for example section 61(1A) of the Water Industry Act of the United Kingdom of Great Britain and Northern Ireland, which prohibits disconnections of water supply due to non-payment of charges.

supply, not discriminating in their operations, adopting fair procedures in cases of disconnections due to non-payment and refraining from disconnections when people are unable to pay and the disconnection would leave them without access to minimum essential levels of water.

50. However, the overall policy framework governing these issues is within the purview of the State. Often, these decisions apply to a broader context than the area of operation of the provider in question. And most importantly, service providers lack the legitimacy to take such decisions. Yet, service providers should consider the human rights implications of different policy decisions, in particular, they should be aware of adverse implications of their activities. They can be expected to engage with the State authorities to ensure they are not indirectly contributing to human rights abuses. For instance, while non-State service providers do not determine tariff structures unilaterally, they can be involved and make suggestions on how to ensure that services are affordable, also to the poorest. Moreover, they can and should offer flexible payment schemes adapted to the needs of people living in poverty, such as phased connection charges, payment in instalments and grace periods.

3. Institutional and regulatory capacity

51. Effective regulation depends on the capacity to carry out regulatory functions. Regulation must be independent and shielded from political interference and capture by specific groups or politicians. A transparent and comprehensive regulatory framework helps to reduce the potential for abuse. Regulatory and institutional models may differ: some countries have independent regulatory agencies at the national level, while others largely regulate private sector participation by contract. There is no one-size-fits-all solution, but regulation has to be approached in a flexible manner and be adapted to local circumstances, needs and challenges such as the degree of decentralization. The essential point is that institutions must be in a position to carry out regulatory functions independently.

52. Even the best contracts and regulatory frameworks will not serve any purpose if they are not monitored and enforced. Monitoring compliance with the established standards is therefore essential. Benchmarking – against the best performing company, a model company, across different regions, or comparable cities – might be a suitable instrument to assess whether standards are met.⁴³ It is critical that Governments have the commitment and the capacity for enforcement. The regulator must be endowed with the power to enforce existing regulations and the contractual agreements. Mechanisms for contract enforcement must include adequate incentives, serious penalties for non-compliance, such as fines, and the possibility of revocation of the contract.

4. Particular challenges of informal small-scale providers

53. Compared to the regulation of utilities, far less attention has been paid to the regulation of informal small-scale providers. Operating unregulated, they often provide poor quality services at exorbitant prices. Yet, many people would be far worse off without their services. Any attempt to regulate the activities of such providers first requires an overview of the sector and the political will to acknowledge their activities. Human rights law does not prescribe the choice of policy and approach to small-scale providers, which is rather left to the State. It can decide to aim for regulation, or to use incentives for the provision of quality services at affordable prices, or to phase out small-scale providers in the long term and replace them by formal provision. The best policy option will depend on the circumstances and cannot be determined in the abstract. Any measures taken must comply with human rights obligations. There has to be a clear strategy with the end goal of providing universal access to services in line with human rights standards. At the same

⁴³ OECD, *Private Sector Participation* (see footnote 8 above), p. 51.

time, States must ensure that the measures taken - for instance strict licensing requirements - do not worsen the situation and leave people without access to services. In particular when granting exclusivity to formal providers extending into areas that have previously been served by small-scale providers, States have to ensure that the network actually constitutes an affordable alternative for poor people and that they are not lacking service provision until the formal provider is ready to fill the gap.

54. Given the decentralized and often on-site nature of small-scale services provision, distinct regulatory instruments are needed. For instance, many on-site sanitation solutions require the emptying of septic tanks. To ensure that sludge is actually brought to treatment plants and not dumped into the environment, payment for the service could be made only upon arrival at the plants. It is unlikely that a central agency can adequately oversee the activities by small-scale providers, but rather a different institutional set-up may be required, for instance involving local governments.

5. Significance of social policies

55. There is an inherent tension between commercial viability and direct full cost recovery on the one hand and providing affordable services to the poor on the other hand. When utilities are not adequately and sustainably resourced, they cannot ensure operation and maintenance, let alone invest in the network. Yet, direct full cost recovery would render services unaffordable for many people. Regulatory oversight alone may not be sufficient to achieve the rights to sanitation and water for all, and special safeguards and supplementary social policies to ensure inclusiveness, such as safety nets and subsidies, may be necessary.⁴⁴ These may take various forms, whether providing support to people's income or adjusting tariffs to render services affordable. Moreover, while people will often be able to pay recurring charges for services, a high one-off payment for the initial connection is often beyond their capacity. Connection subsidies and public spending will often be necessary to expand the network to low-income areas. Whatever measures are taken, they must not disproportionately benefit the upper and middle classes already connected to the network, but, crucially, have to be targeted to reach the unserved and underserved most in need. Affordability studies carried out by the regulatory body or other States authorities can be an important tool for taking decisions on how to target measures.

C. Accountability and enforcement

56. The capacity to regulate effectively does not only depend on the institution itself, but is embedded in the broader context. Regulation will be undermined in a situation where corruption is rampant or when there is no functioning independent judiciary to enforce the regulatory framework and decisions taken by the regulator. Accountability and access to effective remedies are essential for closing the circle, as service providers and the State can be held accountable for deteriorating services, unmet performance standards, unjustified tariff increases, inadequate social policies or other breaches.

57. To ensure accountability, roles and responsibilities have to be clearly designated and made transparent. Also, the coordination between different entities involved – public and private – has to be ensured. Water and sanitation users must be able to identify who is responsible in order to hold the relevant actor to account. Corruption presents an additional challenge to building responsive and accountable institutions. Fighting it requires, above all, strong political will. Transparency, in particular, will help to reduce the risk of

⁴⁴ For a detailed overview of possible sanitation subsidies, see Water Supply and Sanitation Collaborative Council, *Public Funding for Sanitation: The Many Faces of Sanitation Subsidies* (Geneva, 2009).

corruption, for instance, by ensuring that bidding is competitive and contracts are made public. Where a State-owned company is formed to deliver water and sanitation services, the legislative process for the establishment of the company should be the product of a participatory and transparent process. In all cases, clearly defined performance targets and disclosure of information help to reduce the risk of corruption.

58. Accountability can be achieved through judicial, quasi-judicial, administrative, political and social mechanisms at the national and international levels. Mechanisms can be based at the level of the service provider or of the State. As stated by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, irrespective of the obligation of the State to establish accountability mechanisms and ensure access to these, service providers have a responsibility to put into place means that allow individuals to bring alleged human rights abuses to their attention (A/HRC/8/5, para. 82). Such mechanisms should be easily accessible to consumers, but also to people within the area of operation who are not considered clients, for instance due to the non-payment of bills. This is part of exercising human rights due diligence, since accountability mechanisms enable the service provider to become aware of its (alleged) human rights impacts. Establishing grievance mechanisms can be seen as a necessary feedback loop complementing the general monitoring of human rights compliance. When abuses have been identified, non-State actors bear a responsibility to remedy those. Evidently, the set-up of these mechanisms will vary depending on the size of the business and other factors. For instance, while a large company might have an entire department dealing with complaints, small providers might be in touch directly with those who rely on their services. According to the Special Representative of the Secretary-General, to be effective and credible, a non-judicial grievance mechanism should be legitimate, accessible, predictable, equitable, compatible with rights and transparent (para. 92).

59. In any case, non-State service providers must not obstruct access to State-based accountability mechanisms, including court proceedings. Such mechanisms are essential, since an appropriate solution might not be found between the individual who has allegedly been harmed and the service provider. Grievance mechanisms provided by service providers are an important first step, but they may not settle the issue conclusively. In contentious cases, settlement via an independent institution such as the judiciary is required.

60. Therefore, it must be possible to address complaints to State institutions. Such mechanisms must be available to all people, not only for “clients” who pay for services provision. For instance, concerned individuals must have the opportunity to bring up potential discrimination in the targeting of subsidies. States have to provide “accessible, affordable, timely and effective”⁴⁵ remedies. Victims of violations are entitled to adequate reparation, including restitution, compensation, satisfaction and/or guarantees of non-repetition. While administrative remedies will be adequate in many cases, a right of judicial appeal as a last resort is often appropriate and sometimes indispensable.⁴⁶

V. Conclusions and recommendations

61. The independent expert considers that a more nuanced approach is needed in the debate on the participation of non-State actors in water and services provision,

⁴⁵ Committee on Economic, Social and Cultural Rights, general comment No. 9 (1998) on the domestic application of the Covenant, para. 9.

⁴⁶ Ibid.

namely, one that overcomes the simplistic public vs. private debate and acknowledges the existence of a wide variety of actors and arrangements for the delivery of water and sanitation services. These are rarely exclusively public or private, and they also involve both the formal and informal sectors.

62. In the present report, the independent expert has focused on the role of non-State service providers. Recognizing that service provision is an essential component of the realization of the rights to water and sanitation, she intends to continue working on this issue. For instance, she considers that instruments for the delegation of service provision such as contracts and mandates of State-owned companies would benefit from a human rights analysis. In that context, she notes with interest the work the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises is undertaking in the area of responsible contracting.

63. The human rights framework does not call for any particular form of service provision. It is well established that, from a human rights perspective, States can opt to involve non-State actors in sanitation and water services provision. But the State cannot exempt itself from its human rights obligations and hence remains the primary duty-bearer. Therefore, also when involving other actors in services provision, the role of the State is crucial. The obligations of States and the responsibilities of non-State actors are complementary. The latter can and should support the State in the realization of human rights. In line with these conclusions, the independent expert offers the following recommendations:

(a) States must develop a national plan, including legislation and other appropriate measures, to progressively achieve the full realization of the rights to water and sanitation, including in currently unserved and underserved areas, independent of the modalities of the service provision chosen. These measures should be based on the explicit recognition of the rights to water and sanitation;

(b) States must not discriminate (de jure or de facto) against any groups or individuals in the provision of services, but rather adopt targeted measures to reach the most marginalized;

(c) Regardless of its modalities, the decision of the State to delegate or not delegate service provision must be taken in a democratic and participatory process. All those concerned must be enabled to participate throughout the process and to monitor, evaluate and report on possible human rights abuses. Participation has to be active, free and meaningful and allow for a genuine opportunity to influence decision-making;

(d) International financial institutions and donors should support national and local decision-making processes aimed at finding contextualized solutions in compliance with human rights law;

(e) The process of decision-making and implementation, any instruments that delegate service provision including contracts, and instruments that outline roles and responsibilities must be transparent, which requires the disclosure of adequate and sufficient information and actual access to information;

(f) All instruments for delegation, including contracts, must be in line with human rights standards, contribute to the realization of the rights to water and sanitation and guide the activities of non-State service providers;

(g) Non-State service providers should exercise due diligence to ensure they comply with human rights standards throughout the process, from the bidding over entering into agreements with the State to the operation of services. They are

encouraged to proactively engage with the State to detect potential human rights abuses and find solutions to address these;

(h) States should carry out human rights impact assessments before and throughout the process, building these into the process of deciding on the means of service provision as well as a monitoring provision to determine the actual and potential impact on the realization of human rights, including the rights to water and sanitation. They are encouraged to adopt legislation that imposes obligations on service providers to also carry out human rights impact assessments. Service providers should undertake such assessments as part of exercising due diligence to become aware of the actual and potential impact of their activities on the realization of the human rights to water and sanitation;

(i) States must adopt strong regulatory frameworks for all service providers in line with human rights standards;

(j) States should ensure regulatory capacity and that regulatory functions are carried out independently. States must enable institutions to monitor and enforce regulations. International development cooperation and assistance should aim to enhance the regulatory capacity of States as needed;

(k) Regulatory authorities, where they exist, should exercise their functions in line with human rights standards. They should develop instruments to ensure that services are available, safe, acceptable, accessible and affordable;

(l) States must put into place supplementary social policies to ensure inclusiveness, such as safety nets and subsidies. These measures must be well targeted to actually reach those who need it most;

(m) To ensure accountability, States and other actors involved should clearly designate roles and responsibilities;

(n) States must put into place accountability mechanisms at the national level. They should also adhere to mechanisms at the regional and international levels and should, in particular, ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights;

(o) States should ensure that economic, social and cultural rights, including the rights to sanitation and water, are justiciable before national courts and other accountability mechanisms. They must ensure access to justice in practical terms, including physical and economic access on an equitable basis;

(p) Non-State actors must not obstruct access to State-based mechanisms and should also provide grievance mechanisms.
