



HUMAN RIGHTS TO
WATER AND SANITATION

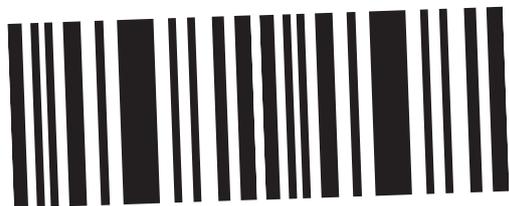
PRIVATIZATION
AND THE HUMAN RIGHTS TO WATER AND SANITATION

Report by the Special Rapporteur
on the human rights to
water and sanitation,
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WHAT IS PRIVATIZATION?

Although the term “privatization” has been applied to different situations of private participation in the water and sanitation sector, here 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.



- 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.
- Private actors that directly provide services or are involved in significant activities in service provision

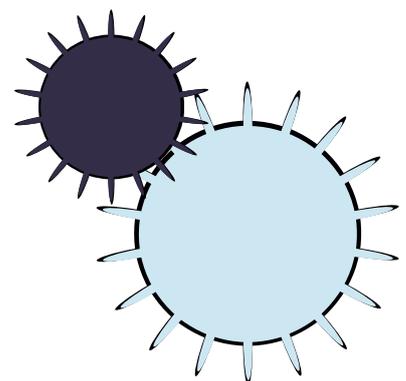


- Informal and community-based providers, non-governmental organizations and State-owned companies.
- Private actors engaged in subsidiary activities across the water and sanitation cycle, such as supplying materials and equipment, developing engineering designs or building infrastructure.

WHY PRIVATIZATION?

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.

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



HUMAN RIGHTS AND PRIVATIZATION

The human rights community has expressed a range of views about the privatization of water and sanitation services.

Anti-privatization movements have argued that public provision is the most adequate model for the realization of the human rights to water and sanitation.

A common formulation is that of “neutrality” or “agnosticism” of the human rights framework concerning the type of provider.

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. 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.



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.

PRIVATIZATION TRENDS

In the water and sanitation sector the European Central Bank, IMF and the European Commission induced the Governments of Portugal and Greece to accelerate a privatization programme as a condition for bailout funding.

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.

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.

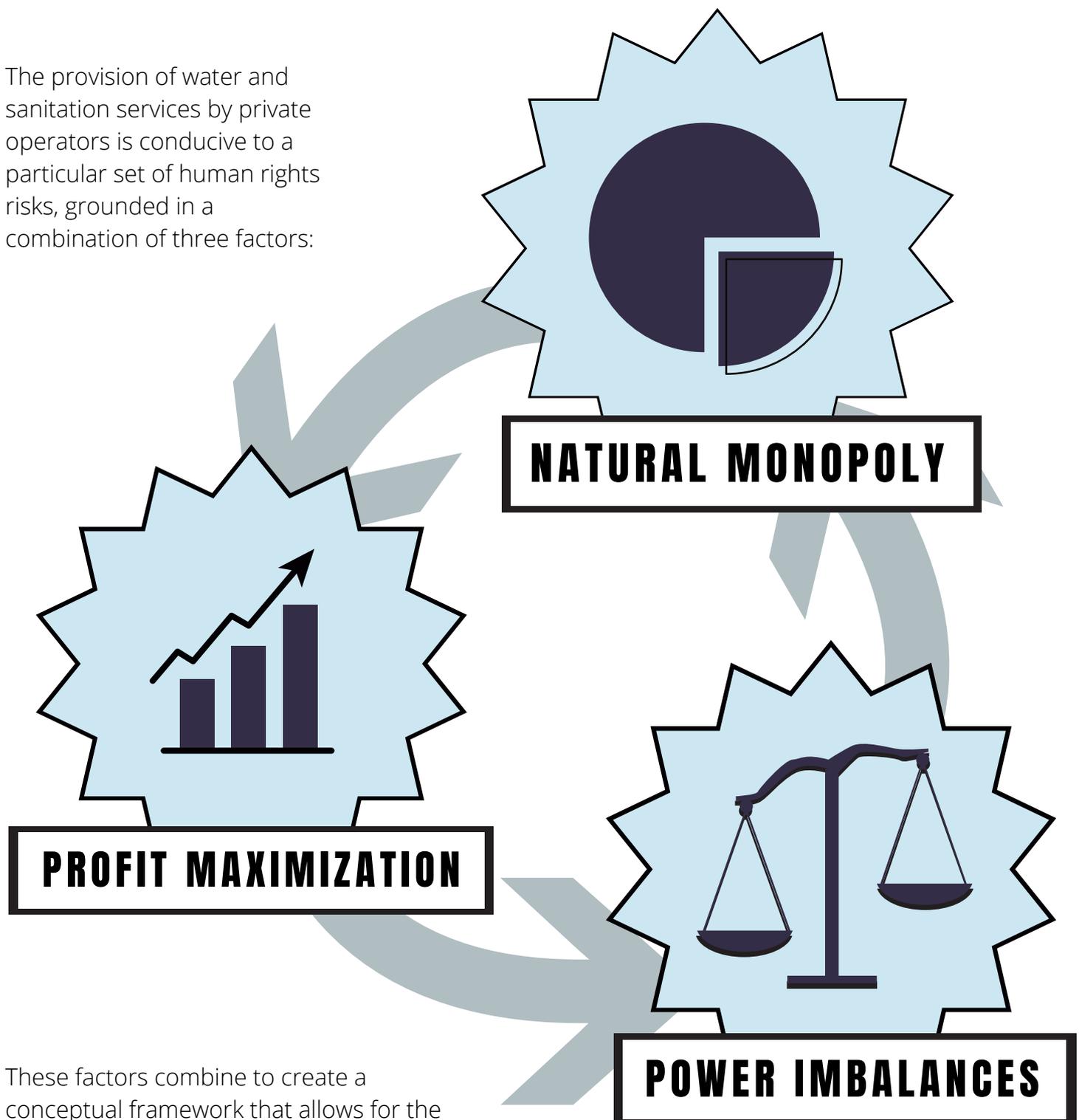
Expectations for privatization were too high, and reality seemed somehow different in the early 2000s: not only did private sector participation not expand as anticipated, but several concessions were prematurely terminated or not renewed. However, privatization remains on the political agenda in many countries.

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.

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”.

THE HUMAN RIGHTS RISKS OF PRIVATIZATION: A RATIONALE

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:



These factors combine to create a conceptual framework that allows for the assessment of privatization vis-à-vis human rights risks.

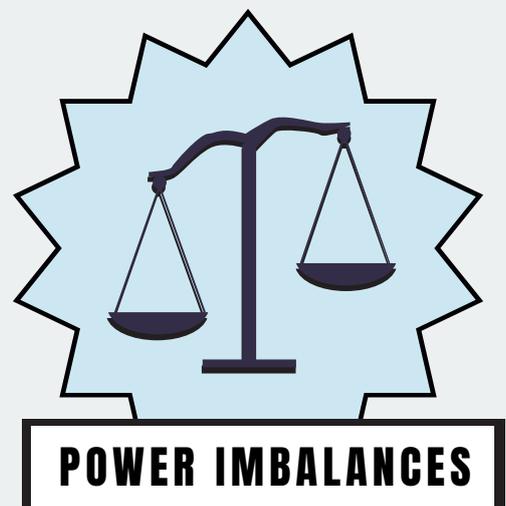
Establishing causation between privatization processes and human rights impacts is often methodologically challenging, since building counterfactual scenarios is rarely possible. The use of the three-factor framework in the present report allows those methodological difficulties to be overcome.

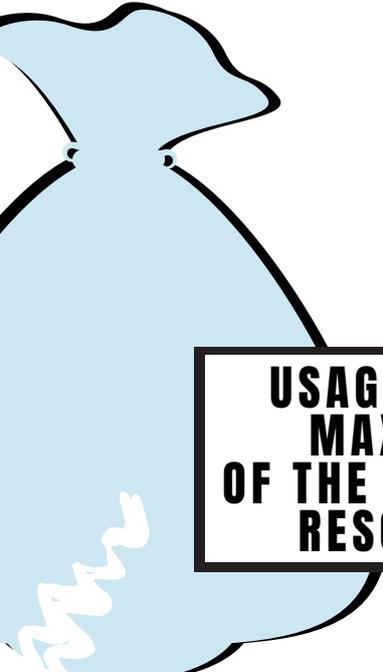
The purpose of profit realization, typical of the private sector, is often expressed as profit maximization, in which providers attempt to extract the maximum net gains from service provision, by either reducing costs, raising revenues, or both. Costs can indeed be reduced through efficiency gains and 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, and revenue maximization can lead to affordability concerns from the perspective of rights-holders.



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. 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.

Imbalances of power between private providers and public authorities are commonplace and can result in human rights concerns. Concessions are often signed by local authorities that lack the technical expertise and accurate information to draft contract clauses that establish sound obligations from providers in the long term. 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.





HUMAN RIGHTS RISKS OF PRIVATIZATION

USAGE OF THE MAXIMUM OF THE AVAILABLE RESOURCES

Considering that shortcomings in the access to public services mostly affect people living with vulnerabilities, the obligation to use the maximum available resources 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. 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:

1 THE TRANSFER OF PROFITS OUT OF THE WATER SECTOR WITHOUT CORRESPONDING EFFICIENCY AND ACCESS GAINS

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.

2 COMPANIES' LIMITED INVESTMENTS OF THEIR OWN RESOURCES, PARTICULARLY IN AREAS WHERE PEOPLE LIVE IN VULNERABLE SITUATIONS

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.

3 CORRUPT PRACTICES

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.

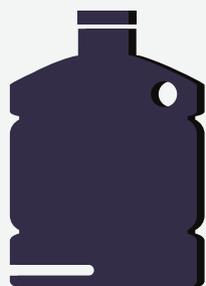
4 GRANTING OF A CONCESSION IN WHICH A LEASE PAYMENT IS NOT USED IN THE WATER AND SANITATION SECTOR

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.

AFFORDABILITY

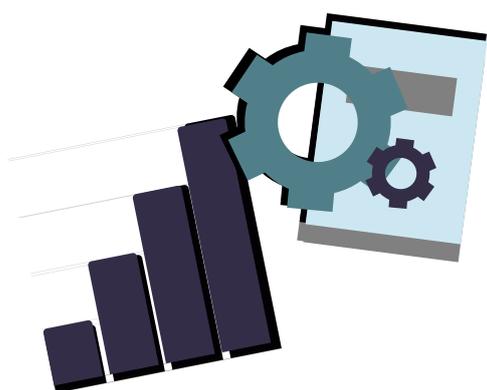
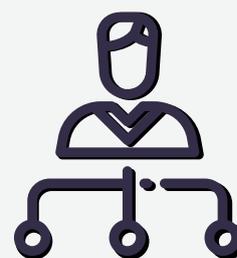
When privatization is expected to improve the standard of services, prices charged to users are supposed to increase to meet higher costs. Especially when operating under the premise of full cost recovery through tariffs, the type of provider (public or private) may not be neutral in terms of the impact on affordability, and service delivered by private operators, particularly those driven by the logic of profit maximization, raises concerns.

Whether the new prices are compatible with both the costs incurred and the State's obligation to use the maximum of its available resources.



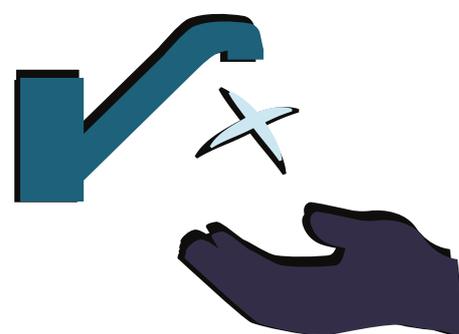
The extent to which the most disadvantaged populations are financially affected and their human rights are respected and protected.

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.



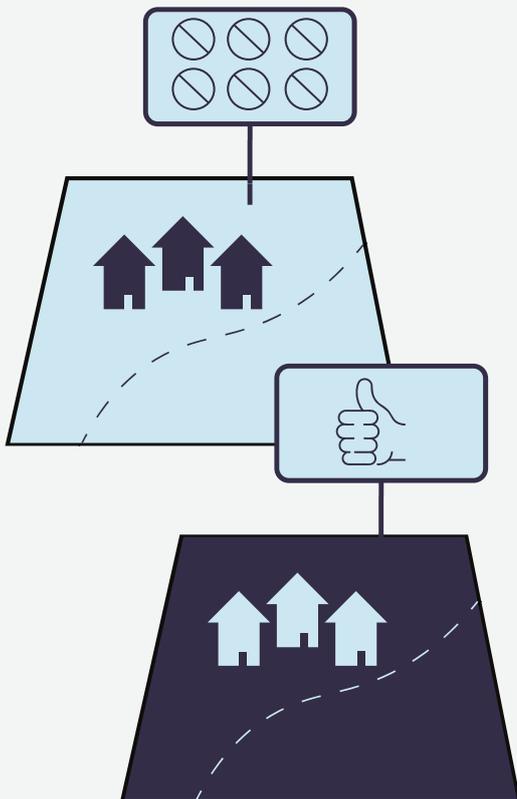
Private providers have an intrinsic interest in increasing revenues through tariffs and fees charged to users, and often exert a significant influence in related decision-making processes. In many cases, companies have technical expertise and resources to assess tariff reviews that dwarf those of public authorities in charge of this analysis. Information asymmetry and regulatory capture increase the risks of unaffordable prices for the poor, especially when there are no subsidy schemes.

Private companies tend to implement a policy of disconnecting users who are unable to pay their bills. 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 to users in poverty



NO IMPROVEMENT OR DETERIORATION OF SERVICES

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, tensions between the economic interests of companies and the social outcomes of the services often favour the former. Furthermore, when the privatization process is inadequately implemented, and investments do not arrive as committed, the public sector ends up taking the burden of addressing the shortcomings, as States remain duty bearers vis-à-vis the rights-holders.



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.

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.

SUSTAINABILITY

Private sector participation has an impact on the sustainability of water and sanitation services when the drive for increased profitability reduces investments. 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.

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.

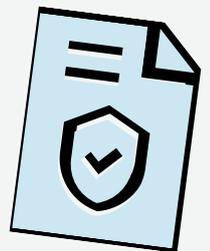


ACCESS TO INFORMATION, PARTICIPATION AND ACCOUNTABILITY

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.

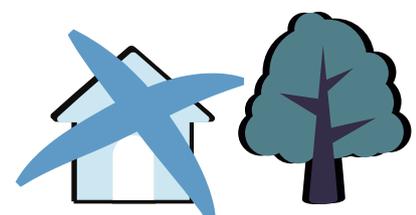
However, information disclosure alone is not always enough for participatory decisions. Contract arrangements and public procurements are very complex processes. For the non-expert, the information in technical terms about targets, costs and tariff adjustment methodologies does not suffice for informed participation.

The monitoring of provider performance is sometimes jeopardized in services operated by private companies due to information asymmetry.



LEAVING NO ONE BEHIND

Frequently, the private sector, backed by the contracting government, adopts a “redline” approach, excluding informal settlements or rural areas from its coverage area. 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.



ADDRESSING RISKS AND ESTABLISHING SAFEGUARDS

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.

RESPECT

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.

PROTECT

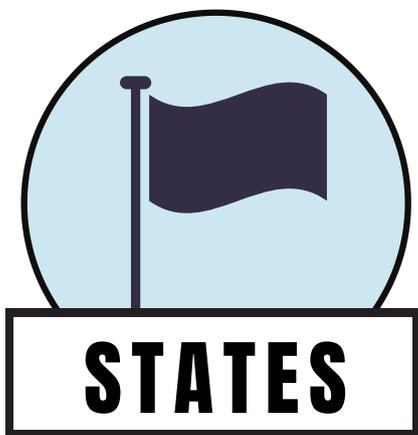
The obligation to protect requires States to consider sanctions and penalties, and enables civil suits by victims and the revocation of licences and public procurement contracts, among other actions, when business activities result in abuses of the human rights to water and sanitation.

FULFIL

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. These obligations require States to adopt several measures before, during and after privatization processes.

A HUMAN RIGHTS APPROACH

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.



1 PRIOR TO THE ADOPTION OF PRIVATIZATION

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. 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

2 DRAFTING CONTRACTS

If a State decides to privatize, contract drafting is a crucial stage in which to mitigate the risks of service deterioration, discrimination and affordability. 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.

Contracts must:

- clearly establish roles and responsibilities, and targets, giving special priority to unserved and underserved groups and to the consequences of non-compliance
- define targets related to quality, accessibility, acceptability, affordability and safety
- formulate indicators and benchmarks for monitoring human rights standards in such a way that they can be disaggregated by prohibited grounds of discrimination
- establish 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
- include clauses of a prohibition on retrogressive measures, such as disconnecting users who are unable to pay their bills, is a human rights imperative.

3 OPERATIONAL STAGE

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.

4 RENEGOTIATION OR TERMINATION STAGE

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. Renegotiations cannot entail retrogressive measures, which are considered human rights violations. Renegotiations should instead be used to adapt contracts to human rights requirements.

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;

(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.



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.

Private actors should avoid complicity with situations that might negatively affect the enjoyment of the human rights to water and sanitation.

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.*



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.

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 obligations that should be applied in situations where their operations involve the private provision of water and sanitation services.

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.*