



26th March 2010

UN HRC REFERENCE: 2009LOPG

Submission to the review by the Independent Expert on water and sanitation on private sector participation and the right to water.

WaterAid staff from a number of countries contributed information to one or more of the questions below.

1) How should service providers behave in relation to the provision of water?

Service providers have to meet downward and upward accountabilities. Their service provisions have for instance to be in line with the contract which they signed with local authorities. They have as well to respond to customers requirements in term of quality and quantity. (Madagascar)

They have to meet the minimum standard at national and international levels: minimum quantity according to policy, quality of water according to certain criteria, accessibility of the water point (which include the minimal distance) and gender and vulnerable sensitivity, a good balance between price including profit and the capacity to pay of consumers and the consumers involvement at least for the business plan. (Madagascar)

The main objective of the service providers is the fact they are most of the time profit oriented. Water is given to the people that are paying for the service. They do not take into account the poor people specifically in the billing of the service. This behavior of the private sector is quite normal because they are benefit oriented – however for this behavior to change, the government needs to regulate and contribute to poor people's access to water because there are many people that cannot afford to pay. (Burkina Faso)

Service providers in the least developed countries should develop pro poor strategies that include some social tariff that target and benefit the poor people. For this service providers need to understand how to target the poor in their intervention otherwise the poor people will be paying the high cost for water. (Burkina Faso)

The responsibility of the private sector when participating in wash is to ensure quality design and construction as well as effective operation and maintenance. The private sector should exercise corporate social responsibility. They should provide advisory services that are not just profit driven. (Uganda)

These bodies need to build their understanding of pro-poor programmes and projects within a rights based approach and therefore implement or mainstream these in their work. (Uganda)

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Service providers should respect the rights of customers by providing services in a manner that is inclusive and accessible to all. Tariff systems should reflect differences in willingness and ability to pay as a function of the differences in living standards in their operating environments. (Nigeria)

Service providers should recognize the rights of the customer by putting mechanisms in place that allow customers access to information on demand that will aid the customer in making a decision as to the quality and type of service being provided. (Nigeria)

In welfare states, the government should take on the responsibility of being the service provider and must ensure that people get their access to basic services that include access to water and sanitation. Government on one hand must set norms for water supply and these should be enforceable in nature. (India)

In the rural areas of developing countries the State, as a service provider, needs to heavily subsidise outreach programmes for communities at village level. Local government support to communities on operation and maintenance is an essential component of support for rural communities for people to have access to water. They need to backstop support systems, for example, part time trained personnel to fix water systems which communities do not have the knowledge, capacity or resources to maintain. (Technical Support Unit)

Parastatetals and various utility companies etc need to campaign, lobby and influence to attract investment that balances free water services as a basic need. In some developing countries there is limited experience of water authorities and water boards in contract management. (Uganda)

Use of inappropriate based models for repayment that leads to an accumulation of debt leaving a lack of capacity to consider some water for free to the public. (Uganda)

These bodies need to build their understanding of pro-poor programme and projects within a rights based approach and therefore implement or mainstream these in their work. (Uganda/ Burkina Faso/ Nigeria/ Pakistan/ Madagascar).

Donors should recognise water legalist framework and policy stipulations. They should support policy formulation that enables right to water to be achieved. They should design programmes for government implementation to this effect. They should have tougher penalties on government and state entities when rights to water are abused. (Uganda)

Corporates' should re-direct their business models and corporate social responsibility to pieces of work that enhance the right to water. (Uganda/Pakistan).

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Non Government Organisations (NGOs) and Community Based Organisations (CBOs) should supplement the efforts of public sector. They should identify policy gaps that hinder the right to water and propose solutions. They should voice the concerns of the communities they work for. They should influence financing and allocations towards Rights Based Approaches (RBA) in the water sector. They should mobilise resources for work that enhances rights to water. They should support the dissemination of best practice legalistic frameworks.

NGOs/CBOs should establish a forum for rights issues in the sector. (Uganda).

Contractors/ consultants / Masons should involve communities with designated roles in implementation of projects and services. Follow services standards as required of them. Take responsibility when their services violate rights. Advise government on aspects of the legal framework stipulating how they can develop work on the gaps as perceived by them because eventually it will affect the right to water down the line, including quality and citizens engagement (Uganda/Pakistan)

2) How should the government, who is the responsible entity for ensuring peoples access to water, behave in relation to service providers?

Government should set up “universal access” water laws. Universal access is defined as access to: 30l/day/ head and water point situated less than 500 m from house. (Madagascar)

Government should ensure that service provision should meet equity, inclusion and diversity principles. (Madagascar)

The government should formulate and implement a framework for private sector involvement. This framework should include terms and conditions on how each private sector provider will meet the right to water principles: sufficient quantity, affordability, equity and inclusion. (Madagascar)

Government should also set up an action framework which includes a) Coherent and realistic action plan for the private sector b) Stakeholders notably donor mobilisation c) State accountability vis-à-vis consumers and tax payers (Madagascar)

The government should be in charge of the planning, regulation, monitoring and evaluation of the service provisions at all levels. (Madagascar)

Government should provide the enabling environment (as they have done with other sectors) , provide policy direction, legislate frameworks that define in actions and guarantees rights to water , favourable tax regimes that encourage private sector to consider increased access to water, adequate investment and valuable investors in this area. (Uganda)

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Government should regulate (by providing standards, protocols and tariff structures that provide for the poor). (Uganda)

Government should build adequate capacity for infrastructure development, operation and maintenance among service providers. (Uganda)

Government should expand partnership to cater for water rights issues with organisations who have experience with this. (Uganda)

Government should extent quality assurance through engaging national bureau of standards in the water sector and ensure their work is visible with regard to water provision. (Uganda/Pakistan)

Government should create the enabling environment that allows for private sector participation that is competitive and allows for choice in decision making as to who should provide water for them. (Nigeria)

Government should demand that they are provided with the best advice from donors and multilaterals with regards to which models of service provision are suitable for their environments so that their investments in service provision especially in infrastructure development are effective in reaching the poor.

The government should ensure transparency in the call for tender, control and contribute to the poor people's access to safe drinking water. (Burkina Faso)

Government should ensure adequate checks and balances for delivery of quality work and services (Uganda/Pakistan)

Set up regulatory mechanisms and institution that ensure effective regulation of private sector operations and also protect the rights of the customer using effective legal mechanisms. (Nigeria/Pakistan)

In welfare states, the government should take on the responsibility of being the service provider and must ensure that people get their access to basic services that include access to water and sanitation. Government on one hand must set norms for water supply and these should be enforceable in nature. (India)

Government should play a role of regulation to ensure the water is affordable to the poor people. Small vendors need to be regulated in that way they will stop selling the water more than 10 times the original price to the poor people. Government should take corrective measures against illegal water sellers who sell bad quality water and exert excessive payments from the poor. (Burkina Faso/Pakistan)

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Government should ensure mechanisms are in place to enable people to participate in processes and procedures related to all aspects of water provision. The populations need to know their rights to water so they can demand services.

3) What provisions should be in place? / What are the obligations of the State?

In addition to 120 Non aligned states which declared in July 2009 in Sharm El Sheik their recognition of the right to water, there are now 27 EU states and 14 other European states (Declaration of the Council of the European Union March 22nd 2010). These 161 countries that have recognized the right to water should concretize their commitment into national constitutions, laws, policies and procedures to acknowledge their commitment to the progressive realization of their peoples right to water and enable all people to have their human need and demand for water addressed through the implementation of those measures.

A legal framework needs to be in place to ensure peoples right to access water. If there is a legal framework in place, that is not enough, this has to be followed up with appropriate acts, laws, rules and regulations, policies, guidelines, standards, redress mechanisms and budgets. The court can only direct the government, and cannot implement, since it is not the executing agency. Thus, fulfilment depends on the judiciary, executive and legislature performing their roles properly. Often, even if the judgment is favourable, getting them executed is another exercise, again requiring efforts, time and resources. (India)

States should develop regulatory mechanisms and enabling laws and policies that recognize, respect and protect the rights of citizens in addition to the obligations of government and service providers. (Nigeria)

States should make provision for implementing these laws and policies in the annual budgets and plans of government (Nigeria)

Government should ensure mechanisms are in place to enable people to participate in processes and procedures related to all aspects of water provision. The populations need to know their rights to water so they can demand services.

Rights centre around two important concepts of "ACCESS and CONTROL". Access without control only ensures that people may use but the control still is not with them and this may lead to exploitation of the resources by any outside agency. Access with control ensures that the people have the power to control their resources and its use and their lives. (India)

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4) What should States include in their Regulatory frameworks?

National governments should establish a robust regulatory framework for all service providers and enforce standards.

Government must set-up regulatory mechanism to stop over exploitation of water resources by industrial and other market forces. The regulatory mechanisms must ensure that appropriate steps are taken for water conservation and the existing laws for conservation are strictly adhered. The mechanism should include the strengthening and securing of drinking water sources.

The guidelines must include assuring safe and secure water for basic needs that include minimum water for drinking, cooking, sanitation, hygiene and washing, all necessary for leading a healthy life and one with dignity. The minimum quantity and quality and physical accessibility norms need to be laid out. This should be universal and irrespective of linkage to tenure, payment, etc.

Any individual who is denied access to this basic requirement should have the right to approach the body in charge of providing water to demand that arrangements be made to fulfill these needs and redressal mechanisms should be made available. Whatever the mechanism of provisioning adopted, the service provider should have the adequate finances, functionaries and capacity to undertake their responsibilities. There should be special provisions for marginalized communities and during disasters. (India)

States should ensure the water is affordable to the poor people - the small vendor needs to be regulated in a way they will stop selling the water up to and more than 10 times the original price to the poor people. (Burkina Faso/Pakistan)

Governments should ensure minimum standards of services expected by service providers especially private sector contracted to develop operate or maintain water facilities and services. (Uganda)

States should develop monitoring and evaluation systems that review performance with regard to regulations which could assist with regulations that are documented yet not operationalised. If a certain aspect needs to be considered but there is no documented policy stakeholders should be gathered to formulate solutions and aspects to regulate. (Uganda)

Government regulatory frameworks should stipulate how to control norms and quality. They should give attention to mechanisms for setting up fair competition amongst actors and good governance in general. Governments' regulatory procedures should integrate the equity dimension. (Madagascar)

The right to water assumes government recognizes situations when it should provide not only in times of crises but for every day use. Private sector feel government should offer

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financial guarantees in times of crisis and wells as favorable tax regimes that can be converted into increase water access. (Burkina Faso)

Special recognition of financing mechanism and collaborative lineages that stipulate roles and responsibilities to water rights, other than general statements that identify who could possibly be involved. (Burkina Faso)

5) Apart from Regulation what additional measures, structures and institutions are necessary?

Governments should lead in the development of national frameworks to plan, coordinate and monitor the delivery of services. Sanitation and water service delivery should be pro-poor, responsive to people's needs and equitably distributed so that the poorest and most marginalised groups have access. In planning and implementing services governments should be accountable and transparent to the people they exist to serve.

Governments receiving aid should develop a framework of 'three ones' that allocates responsibilities for financing, coordination and monitoring and evaluation:

- One country plan: to establish the targets, costs and financing gaps
- One coordinating mechanism: to design and coordinate the delivery of services. The government should work with civil society organisations, sector practitioners, service providers, domestic stakeholders and donors
- One monitoring and evaluating framework: to assess progress, diagnose bottlenecks and promote remedial actions. Governments and donors should convene annual sector review and planning meetings to keep Parliament and the relevant domestic stakeholders informed of progress

The government should lead an extraordinary effort on sanitation. Governments must lead the enormous effort necessary to end the marginalisation and neglect of sanitation. There should be a publicly agreed plan and strategy, sufficient budgets and clearly identified lead agencies that act as a focal point of accountability for delivery of the country's sanitation services. The planning process should be country owned and the outcome of widespread participation in the policy design, implementation and monitoring process.

Donors should support learning and knowledge sharing among local agencies on effective delivery of sanitation services.

Governments should call on donor technical assistance to build and strengthen policy communities in-country. In order to build the human resources and policy delivery capacity of the sector in developing countries, donors should draw primarily on the intellectual resources and technical knowledge from within in-country institutions.

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Donors' procurements of technical assistance should, in the first instance, aim to support and strengthen domestic policy communities in the sector.

National governments within developing countries need to make a serious commitment to addressing weak sector governance at the local level. They should urgently address the weaknesses of agencies that are responsible for delivering sanitation and water services:

Strong local government agencies must be responsible for ensuring accountable, accessible and responsive services. The operating principle in targeting services must be to ensure that sanitation and water reach the poor and most marginalised groups. National government and donors should focus on addressing the capacity weaknesses of local level delivery systems, particularly chronic skills shortages. Finance must be delivered in sufficient quantities and in a predictable and stable way.

Local governments should open up to civil society participation in their planning and budgeting process and respond to community led initiatives.

Priorities the poor when improving urban sanitation and water services.

Legal barriers that particularly constrain the provision of these services to the urban poor should be removed. National governments should establish a robust regulatory framework for all service providers and enforce standards. Water and sanitation public utilities need to reform and improve their performance.

Non-state providers should be integrated effectively into the public service system where they will be subject to its mechanisms of accountability, consumer scrutiny and regulation. Local stakeholders must be involved in determining the direction of reform and the utilities must be open to consumer scrutiny.

Services must be targeted at the poorest and most marginalised groups.

Services must be designed with the participation of poor and marginalised people. Their interests should be represented in the agencies, utilities and community managed schemes that design, manage, operate, regulate and monitor services.

Comprehensive surveys and mapping should be undertaken to identify areas most in need. Based on this information, services must then be targeted at and designed for the poor and most marginalised groups, including women, disabled people and older people.

There should be budgetary provision to implement these regulatory frameworks

An effective and independent monitoring and evaluation framework that includes government, private sector and customer representatives and civil society

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A capacity development plan to support the human resource requirements for implementing the mechanisms that ensure all peoples right to water

The populations need to know their rights to water so they can demand services

Even if institutions exist structural, there are inadequate human resources. Which need to be filled and capacity enhance to meet their roles. In urban water authorities also need to be targeted in terms of strengthening.

Strengthening and increasing the number of reverse expos which bring together private sector, CSO and consumers.

Strengthening private sector associations.

Consumer's association bureaus and boards.

Good M&E systems across aboard of private sectors as well as governments.

Effective communication strategies so that people know what their entitlements are and who the responsible bodies are for ensuring access to water.

Civil society mobilization and citizen action to promote the right to water

Government capacity building programmes for effective delivery of services

The formulation of legal framework and policies which are in line with the right to water

There should be joint monitoring and audit mechanisms in place and forums to promote community participation and transparency. These forums should have legal recognition and should include citizens from all walks of life

6. Specific instances when private sector participation from a human rights perspective, have contributed or undermined the realisation of human rights:

With regard to the duty to provide, which requires governments not to interfere unjustly with a persons means of access to water and sanitation, disconnections of WASH services due to network and power cuts and fluctuation issues, without an alternative and appropriate water and sanitation option sometimes with out sufficient justification.

With regard to Governments duty to protect, citizens are not deliberately protected from services providers of WASH who change unaffordable rates especially the urban poor.

Pollution of water resources still go on as the government monitoring systems which is still are centrally coordinated located are overwhelmed.

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The need for comprehensive strategies which translates policy provisions into actions and redistributes roles and responsibilities among different stakeholders for follow up and accountability (with or without facilitation) remains. These strategies will enhance preparation and better coordination of sector investment plans in the micro and macro policy development. Without this access is challenged and water access is there not guaranteed and the right to water is affected.

New developments have emerged in our sector since the various frameworks were developed. With regard to PPP model that is profit driven, Uganda has embraced private participation as one of their strategies or approaches but without strengthening their regulation and updating the frameworks with various salient issues which also affect adequate collaboration between national and local /lower local actors. Private sector is better developed in other sector like education gains from which can support the universal primary and secondary education which has guaranteed the right to education in Uganda; however it's not easy to say the same for the water sector.

7. How can existing frameworks on private sector responsibility for human rights protection (including the work of the social representatives of the secretary general on human rights and transnational corporations and other business enterprises, the OECD guidelines, the global compact etc) be used to guide our understanding of private sector responsibility in water and sanitation service provision.

Summary of findings:

The guidance aimed at business and identified in the consultation briefⁱ offers little beyond guidance beyond that made in General Comment 15 and provides **no clarity on the responsibilities of the private sector** in relation to **human rights protection and water and sanitation service provision**; and is therefore of **limited use in guiding understanding** in the context of the outlined responsibilities.

Recommendations:

- Clearer guidance is required in order to guide our understanding of private sector responsibility in water and sanitation service provision
- Alongside relativist approaches, rights guidance should explore absolutist models for application
- Investigate how capacity can be developed to support the implementation of policy frameworks designed to protect rights and enable appropriate remedy

OHCHR Special Representative of the Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises

In 2008 the Human Rights Council welcomed the “protect, respect and remedy” policy framework proposed by the Special Representative of the

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Secretary-General on the issue of human rights and transnational corporations and other business enterprisesⁱⁱ

This framework rests on three pillars:

1. State duty to protect against human rights abuses by third parties
2. The corporate responsibility to respect human rights
3. Greater access to remedy for victims

The framework is adopts a relativist approach to rights and speaks of human rights at a macro level without detailing rights at a micro level. Therefore issues relating to water and sanitation service provision are not specifically addressed and OHCHR guidance diminishes in value at a micro level.

Taken at a macro level the identified relativist framework is critical flawed as it is reliant on governments having appropriate policy and enforcement measures in place. This is palpably not the case as there are policy failings and capacity issues across Northern and Southern Governments. For example, from a UK context the Corporate Responsibility Coalition identifyⁱⁱⁱ that 'authoritative guidance for UK companies' and 'solutions and accountability when breaches occur' in countries outside of the UK is currently lacking. This means that people whose rights are being negatively impacted by the actions of business are not able to seek redress in the country where the rights abuse took place and are also unable to seek remedy in the country where a business is headquartered. Indeed rights guidance for business completely overlooks an absolutist framework which is an area that might require further exploration.

Government failings are identified by Prof. John Ruggie in April 2009^{iv} in his examination of the 'protect, respect and remedy' policy framework. This report details that governments are taking a narrow approach to managing business and human rights, and reflects that human rights are poorly integrated into other policy domains that directly shape the activities of business.

The OHCHR has produced a translation document^v for businesses which highlights water but makes no mention of sanitation. The guidance does clearly indicate that water is essential to meeting all other rights. However, in terms of privatisation of water services the advice is that the state must 'effectively regulate and control water services to maintain equal, affordable and physical access for sufficient, safe and acceptable water for personal and domestic uses'. This seeks to contextualise General Comment 15 but offers nothing in terms of guidance for private sector organisations involved in service delivery of water.

OECD Guidelines for Multinational Enterprises

The guidelines offered by the OECD deliver good working principles based on commonly accepted norms for business in relation governance and 'good' operational

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practices. Guidance offered is broad brush stroke and is equally applicable to all business by virtue of this fact will include those businesses involved in water and sanitation service provision.

However, no reference is made specifically to the right to water and sanitation. Rights are again framed by a relativist approach and guidance is delivered in a catch all sentence highlighting that companies 'should respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments'. As with the OHCHR guidelines, obeying domestic law is the first obligation of business but no account is taken as to whether the domestic legal and policy framework sufficiently addresses the protection of people's rights.

UN Global Compact

The UN Global Compact offers guidance in support of international recognised human rights frameworks and adopts an absolutist approach to rights^{vi}. Guidance is focused at a macro level and human rights are captured in two key guiding principles that can be applied in a broad sense to guide business understanding of responsibilities. The principles are:

- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
- Principle 2: Business should make sure that they are not complicit in human rights abuses.

As the Compact operates at a macro level no specific reference is made to water and sanitation and the interpretation and application of the Global Compact guidance is left undefined. The intentions of General Comment 15 are implicit in the two principles focused on human rights protection, so do offer some assistance in understanding the responsibilities of the private sector in relation to service provision. While some direction is able to be applied it is not transparent and is open to subjective interpretation.

The CEO Water Mandate has been developed as a Global Compact initiative aimed to offer greater guidance to business in relation to water. Guidance is being developed on the following issues: direct operations, supply chain and watershed management, collective action, public policy, community engagement, and transparency. The focus of this initiative is on business water use rather than on service provision and offers little in the development of our understanding of service provision. No reference is made to sanitation

Conclusion

The guidance explored above offers little beyond the intent of General Comment 15. No clarity on the responsibilities of the private sector in relation to human rights protection and water and sanitation service provision is offered. The available literature is

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insufficient in guiding understanding of the responsibilities of the private sector and the activities of business are presented as being dependent on government. This begs the question as to whether respect of human rights is absolute and the extent to which business defers these responsibilities based on relativist considerations made in the OHCHR and OECD guidelines. This has critical implications on the stewardship of the private sector in relation to rights and service delivery along with other human rights considerations.

END.

This submission from WaterAid to the UN HRC Independent Expert on water and sanitation - call for submissions on private sector participation and the right to water – was prepared by Mary O' Connell drawing on contributions from WaterAid colleagues in Burkina Faso, Nigeria, Pakistan, Madagascar, India, Uganda and the UK. Dated 260310

ⁱ Guidance identified includes the OHCHR Special Representative of the Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises, OECD guidelines, and the Global Compact

ⁱⁱ A/HRC/8/5

ⁱⁱⁱ <http://corporate-responsibility.org/>

^{iv} [Business and human rights: Towards operationalizing the “protect, respect and remedy” framework](#). Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises

^v [Human Rights Translated: A Business Reference Guide](#) - Castan Centre for Human Rights Law, the International Business Leaders Forum, the OHCHR and UN Global Compact Office

^{vi} The Universal Declaration of Human Rights, The International Labour Organization's Declaration on Fundamental Principles and Rights at Work, The Rio Declaration on Environment and Development, The United Nations Convention Against Corruption

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