

## **Submission to Special Rapporteur on the Right to Drinking Water and Sanitation**

### **Righting Finance Initiative<sup>1</sup>**

April 30, 2013

This submission is a contribution to the Special Rapporteur's 2013 Annual Report and therefore focuses on the topics to be addressed by that report. These are, as announced by the Special Rapporteur, "sustainability and non-retrogression in the realization of the human rights to water and sanitation."

We hope that this report can be a critical move towards a model funded in the universalization of access to water and sanitation for all. Respect for human rights, human dignity, the environment and livelihoods of peoples are all dependent to a great measure on the rights to water and sanitation.

The right to water and sanitation is, like other economic, social and cultural rights, subject to the stipulation of progressive realization. According to Article 2 of the ICESCR, State Parties undertake to take steps "to the maximum of their available resources" to "progressively" achieve the full realization of the rights contained therein, an obligation that implies the obligation of "non-retrogression" on the fulfillment of such rights.

The obligation of non-retrogression recognizes limits, as established also by the CESCR in its General Comment No. 3: any deliberately retrogressive measures "would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."<sup>2</sup>

There are other standards, however, that should also be respected and qualify the exception to the obligation of non-retrogression. The Committee on Economic, Social and Cultural Rights recently reminded governments that, while the proposed policy changes may bring some measure of retrogression, they have to meet some standards, too. First, they should be temporary, only intended for the time of crisis. Second, they should be proportionate and necessary, in the sense that any other measure, or failure to act, would be more detrimental to economic, social and cultural rights. Third, they should be non-discriminatory, and comprise all other measures, including tax measures, to support social transfers to mitigate inequalities and ensure the rights of disadvantaged and marginalized individuals and groups are not disproportionately affected. Fourth, they should identify the minimum

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<sup>1</sup> Steering Committee members of the initiative are the following organizations and networks with human rights advocacy mandates: Association for Women's Rights in Development –AWID, Center for Economic and Social Rights –CESR, Center for Women's Global Leadership –CWGL, Center of Concern, CIVICUS: World Alliance for Citizen Participation, Development Alternatives with Women for a New Era –DAWN, International Network for Economic, Social and Cultural Rights –ESCR-Net – (Working Group on Economic Policy and Human Rights), IBASE (Brazil), Social Watch.

<sup>2</sup> At para. 9.

core content of rights (or a social protection floor as developed by the International Labor Organization) and ensure its protection at all times.<sup>3</sup>

We would like to add that programs to mitigate inequalities should have a gender perspective and address the growing feminization of poverty. Women are one of the groups most affected and discriminated, discrimination that tends to be aggravated in cases they belong to other discriminated groups (e.g. ethnic minorities, afrodescendents, elderly women, girls and adolescents, women with disabilities, women with no home, no job, displaced, widows, victims of violence, women living and affected with HIV AIDS, migrants, sex workers, domestic workers, LGBT).

We welcome the Special Rapporteur's decision to focus jointly on sustainability, which she defines in the following way: "The realisation of the rights to water and sanitation requires a long-term perspective that aims at ensuring the enjoyment of these rights for present and future generations, as well as adequate use of available resources over time. The impact of some measures in times of economic or financial constraints may be linked with the sustainability of the services, infrastructures or overall investments."<sup>4</sup>

This is a dimension not frequently explored and, yet, an important one which complements the maximum available resources. Indeed, one could say that sustainability refers to having a long term view towards the use of maximum available resources, a view that is more needed as we seek to ensure water management processes can attend both the basic needs of world's population and conservation of the resources and ecosystems. Needless to say, stronger public management of water will be necessary to strike such balance in a way consistent with human rights principles.

### **Some reflections on contractionary macroeconomic policies ("austerity") measures**

The report of the Special Rapporteur should make reference to the threat posed to the progressive realization of the right to water by contractionary macroeconomic programs (generally known as "austerity" measures). In the post-crisis period, the adoption of such programs has become widespread, ostensibly motivated by the need to fend off fiscal and debt sustainability concerns.

Even though our considerations in this section refer to measures adopted in response to crises, it is important to highlight that several governments adopt such measures without necessarily a situation of crisis in place. We hold that these considerations are, a fortiori, applicable when there is no crisis to justify the introduction of such measures.

Typical measures that are part of austerity programs include budget cuts and private sector participation in the provision of services. Budget cuts can have direct repercussions on the accessibility and affordability of water services, such as when they are implemented through an across-the-board increase in tariffs charged for publicly-provided water services, or target subsidies provided to sectors of

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<sup>3</sup> CESCR 2012. Letter to All State Parties to the Covenant on Economic, Social and Cultural Rights, May 16.

<sup>4</sup> Special Rapporteur 2013. Questoinnaire.

the population that need them in order to access the service. They could also affect the right to water indirectly, as when they bring job and wage reductions for segments of the population that depended on such income to pay for water services. The private sector provision of services can take different modalities but it often results in across-the-board increases in tariffs that price out of access segments of the population.

Private sector provision represents a threat to accessibility and can increase territorial inequality because it is less cost-efficient to supply water to rural, remote areas of informal settlements, so a profit-oriented mentality may lead to simply drop or decrease investment in provision to such areas. Urban-rural disparities in access to the right to water are, thus, exacerbated. Private sector provision of water services can interact with income disparities to increase the marginalize of people with lower incomes, as the private sector profit incentive can raise the overall price of water, effectively limiting economic accessibility for lower income sections of society by pricing them out of available and decent quality water supplies.

Across the board tariff increases also impact women the most because it is on them that the burden of collecting water in low-income households tends to fall. In this regard, research has shown that women tend to be the most affected by cutbacks in provision of sanitation and safe water and that this burden translates into more hours of unpaid domestic work and their ability to engage in alternative economic, social or political activities.<sup>5</sup>

We believe that only measures undertaken after a careful analysis of whether they are the best policy path to a recovery satisfy the requirement that “any other measure, or failure to act, would be more detrimental to economic, social and cultural rights.” In what follows, we intend to offer some ideas on how best to carry out such analysis.

### **On budget cuts:**

In the case of budget cuts, the analysis should be informed by an assessment of the track record of contractionary (as opposed to expansionary) measures.

Budget cuts are often justified upon the theoretical ground that they will lead to improved fiscal and public debt ratios by awaking the “animal spirit” of the private sector which would fill the gap left by the public withdrawal. However, the rate of success of budget cuts in achieving this outcome is very low. A review of 133 programs in 70 countries found that the level of growth that was supposed to follow such policy prescriptions systematically undershot projections.<sup>6</sup> Another review of such measures when

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<sup>5</sup> UNIFEM 2000. Progress of the World’s Women 2000, at 13. For more details on how important the relationship between the impact of water and sanitation in women’s health, education and livelihoods is, see UNDP 2006. Human Development Report: Power, poverty and the global water crisis.

<sup>6</sup> IMF 2004. Evaluation of the IMF’s Role in Poverty Reduction Strategy Papers and the Poverty Reduction and Growth Facility. Evaluation Report by the Independent Evaluation Office. International Monetary Fund.

introduced in times of crisis showed an even lower performance, with the distance between projection and actual performance widening in some cases to more than 12 percentage points of GDP.<sup>7</sup>

The International Monetary Fund recently recognized that its recent programs in European countries undergoing debt crises, it had underestimated the contractionary impact their economies would suffer as a result.<sup>8</sup> Studies have shown that the performance of a contractionary fiscal policy program can be pulled further down by contractionary programs in neighboring countries with close financial and trade links.<sup>9</sup>

We do not contest that there will always be some element of imponderability in projecting growth as a result of certain policy measures. However, in case of doubt, the presumption should be towards the adoption of measures that are not harmful to human rights or, in this case, presumption should be towards non-retrogressive measures. This is especially the case when the inclusive nature of the promised growth, even if achieved, is in question. Governments should ensure continued monitoring of the impacts of such measures.

#### **On private participation in service provision:**

Private sector participation in the provision of services is usually justified as a measure to generate fiscal gains or savings. The gains, the argument goes, would come from the one-off revenue earned through the sale of state-owned assets, when private sector participation entails that modality. On longer term basis, the assumptions are that private sector participation will free the State of fiscal responsibility by shifting onto the private providers the costs of provision, including capital investment to build and maintain infrastructure, making the provision more efficient and removing incentives for rent-seeking by making provision subject to the transparency of market discipline and independent regulatory monitoring.

While examples of successful provision of services under private provision exist, the above assumptions are often either not borne out by practice or contingent upon concomitant factors that may not be in place. The following questions should be the matter of transparent and participatory reflection in order to decide on reforms towards private participation in the provision of water services.

*What will be the net gains from the private provision and, if costs for the public are identified, how are they distributed?*

The gains from the sale of state-owned assets are not necessarily net gains for the public. If the private provision entails tariff hikes, what the State will receive in one-off sales revenue should be compared with what will be recovered through increased tariff payments by the users over time. However, the

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<sup>7</sup> UNCTAD 2011. On the brink: Fiscal austerity threatens a global recession. Policy Brief No. 24. December.

<sup>8</sup> IMF 2012. World Economic Outlook: Coping with High Debt and Sluggish Growth. Box 1.1.

<sup>9</sup> Holland, Dawn 2012. Less Austerity, More Growth? Paper prepared for ENEPRI Conference: EU Growth Prospects in the Shadow of the Crisis. 22 October.

restructuring of tariffs may be more regressive than, for instance, what the taxation options to fund the same expenses may have been.

When the public services are not profitable, the sale often needs to go accompanied by State guarantees to make the company attractive to private investors. These guarantees may include regulatory risks, exchange rate risks, or even income risks. These guarantees represent contingent liabilities of the government that could come back as a burden on public resources.

The gains in a time of crisis will likely be lower than the gains from a privatization in good times. In times of recession the projected revenue stream of a company will be depressed, while bargaining power of a State pressed to generate revenue will be reduced. If a government reaches a decision to sell state assets, it is pertinent to query whether the timing of the sale will favor revenues consistent with the use of the “maximum available resources” by the government.

*How will the State guarantee that efficiency gains and other benefits provided to the private company translate into benefits for the users or greater investment?*

The profits realized by private providers do not necessarily, let alone automatically, translate into gains for the public. Neither do they guarantee greater investment or investment allocated to satisfy the needs of the most vulnerable or less privileged (e.g. expanding sectors for providing lowest-income segments). A review of privatization reforms found that contrary to expectations, private capital had not become the main source of investment.<sup>10</sup> The State often had to re-enter the sector to make up for insufficient investment from the private sector.<sup>11</sup> It is worth noting that in cases of privatizations, States that need to re-enter to provide investment or subsidize provision to lowest-income sectors are often forced to do so lacking the capacity to cross-subsidize that they had under a model of public service provision.

Effective remedies need to be available for holding companies accountable in case of failure to deliver on this front.

*How will the State prevent rent-seeking behavior by the private sector providers?*

The record of private provision in limiting rent-seeking is not impressive. This is especially the case when natural monopolies – as in the case of water infrastructure—exist.

## **On the extent of responsibility for crisis response measures**

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<sup>10</sup> Estache, Antonio 2005. PPI partnerships versus PPI divorces in LDCs (or are we switching from PPPI to PPDI?), World Bank and ECARES (Université Libre de Bruxelles), at 9; Estache, Antonio and Marianne Fay 2007. Current Debates on Infrastructure Policy: World Bank Policy Research Working Paper 4410, at 27.

<sup>11</sup> Estache, Antonio 2005. PPI partnerships versus PPI divorces in LDCs (or are we switching from PPPI to PPDI?), World Bank and ECARES (Université Libre de Bruxelles), at 8.

The assessment of State responsibility for measures taken in times of crisis should not cease at the point of the crisis response measure(s) in question but should extend into an inquiry about how the State reached such situation. States may face a budget crisis due to their failure to appropriately set in place mechanisms that could have reasonably been in place to avoid the use of budgetary resources for large bailout of private financial institutions or private creditors. In this regard, the maxim that “no one can be heard to invoke his own turpitude” becomes relevant.

Whether a legal prohibition to effect bailouts of failing financial firms exists, does not offer enough grounds to consider such obligation fulfilled. In a situation of insolvency of a large or interconnected financial institution that cannot be resolved without widely compromising the population’s access to vital banking services, the State will have no option but to rescue such entity. It is necessary to have in place, therefore, banking and financial firms’ resolution mechanisms that allow for a failing institution to be wound down without generating such risk. Moreover, while some expense of public resources may be unavoidable, the existence of a resolution mechanism can ensure expenses are kept in check by enabling a more efficient use of public resources and also guaranteeing that resources are fully recovered ex ante or ex post.

### **On the financialization of private sector participation**

We also believe it will be pertinent that, in addressing sustainability, the report by the Special Rapporteur should refer to the emerging trend of financialization of nature and services infrastructure and resources, including water and water infrastructure. Proposals under the guise of promoting a “Green Economy” are treating nature as a form of capital, “natural capital.” Granted, the UN Conference on Sustainable Development relativized the concept of Green Economy and recognized the diversity of approaches that can co-exist within such expression. But for many Green Economy proponents, it is still essential to give plants, animals and ecosystems a price in order to commodify biodiversity, water filtration, the protection of coral reefs, etc. It would be necessary to do this to set a monetary value on such elements and translate the cost of their conservation into economic terms so as to provide the basis for a market-based approach to finance certain conservation and sustainability functions.

This trend is independent from the crisis response measures addressed in previous section. But it dovetails, as the supply side, with a demand side that is expanded by such crisis response measures.

The promotion of private participation in services finds its counterpart in the promotion of schemes to promote an expansion of private debt and equity investment in infrastructure projects. A report by leaders from financial companies commissioned two years ago recommended a shift in the way that multilateral public lenders finance infrastructure to one that enables and facilitates private investment.

“The [High Level Panel] considers that the existing capital of MDBs could be made to work harder and smarter to “crowd in” substantially more private capital for infrastructure in developing countries. In this regard the HLP strongly supports the few initiatives already launched, or the process of being launched, by the MDBs. The HLP encourages the implementation of pilot projects to test new funding approaches, which could benefit from the experience of the IFC Asset Management Company (AMC), created in

2009. The efforts of the IFC and the AsDB to mobilise third party equity capital from private sources for investment in infrastructure should be encouraged and could be expanded to other MDBs.”<sup>12</sup>

That same report encourages the development of debt and capital markets for raising financing for infrastructure.

Of course, the possibility of providing increased finance to the infrastructure sector should be regarded as positive given the continuing large financing gap in that sector. However, increased reliance on private financial markets to finance infrastructure presents should be done with the utmost care in order to not compromise sustainability in the services provision, including water.

In this regard, it is worth noting that a stream of literature calls attention to the phenomenon of financialization of non-financial companies and lower capital investment.<sup>13</sup> This is explained in terms of greater pressure to deliver financial value for shareholders that is demanded by the need to be competitive in financial markets.

This is consistent with another fact. The growing financialization of the world economy witnessed in the last decades, while accompanied by a lower share of participation of wages in GDP, was also accompanied by a lower share of participation of investment in GDP.<sup>14</sup> This confirms the finding that profit growth does not necessarily translate into increases in investment.

This submission has called earlier for safeguards to avoid failures by private sector provision to deliver adequate levels of investment. In the light of trends towards greater financialization of infrastructure, such safeguards should take the form of financial regulations that ensure the delivery of infrastructure services will not be further removed from government control and responsibility to ensure sustainability of the services.

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<sup>12</sup> High Level Panel on Infrastructure. Recommendations to G20- Final Report. October 26, at para. 36.

<sup>13</sup> Milberg, William 2008. Shifting sources and uses of profits: sustaining US financialization with global value chains, *Economy and Society*, 37:3, 420 — 451; Mohammed, Seeraj 2012. The impact of the global financial crisis on the South African economy, in Deshpande, Ashwini and Keith Nurse (ed.) *The Global Economic Crisis and the Developing World: Implications and prospects for recovery and growth*, Routledge, at 268.

<sup>14</sup> Torres, Raymond 2012. Inequality and the Global Crisis: Evidence and Policies, in Burke, Sara and Puschra, Werner (Ed.). *Fixing Finance is not Enough*. Friedrich Ebert Foundation, Center of Concern and Club de Madrid.