

Draft Guidelines on the Right to Water in Africa

Submission by the Global Initiative for Economic, Social and Cultural Rights to the Working Group on Economic, Social and Cultural Rights in Africa, one of the special mechanisms of the African Commission on Human and Peoples' Rights

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Introduction

1. The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) is an international non-governmental human rights organisation that believes transformative change to end endemic problems of social and economic injustice is possible only through a human rights lens. The vision of GI-ESCR is a world where the human rights framework reflects the real-world experiences of all of us, effectively furthering social and economic justice and human dignity, and catalysing change from the local to the global, back to the local.¹
2. GI-ESCR welcomes the opportunity to provide input on the Draft Guidelines on the Right to Water in Africa (Draft Guidelines), developed by the Working Group on Economic, Social and Cultural Rights in Africa, one of the special mechanisms of the African Commission on Human and Peoples' Rights.
3. This submission focuses on Section 40 of the Draft Guidelines addressing delegation of water services provision to private entities. This focus comes in light of evidence on the potential for specific challenges for the realisation of human rights that may arise where the private sector participates in the delivery of social services, including water services. For instance, in his mission report on his visit to Kenya, the United Nations (UN) Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen, concluded that

¹ <http://www.globalinitiative-escr.org/>

the privatisation of water was among the factors contributing to the growth of social and economic inequality among indigenous communities.²

4. This submission draws from the experience of GI-ESCR in analysing the impact of private actors' involvement in social services delivery, in particular health and education, and unpacking the related human rights legal framework,³ including by supporting the development of human rights Guiding Principles on private actors in education.⁴ The draft of these Guiding Principles, which are currently undergoing a public consultation process,⁵ can be found here <http://bit.ly/2MAHkrL>. Much of the legal framework developed in that draft could also be relevant for the right to water, and we recommend considering how the guidelines may best be aligned where relevant, in particular with section 5 e) of the Guiding Principles. This submission considers some of these potential connections, but it is not exhaustive.

5. This submission addresses the State responsibility for the impact of the activities of all private water providers; public service obligations; strengthening of regulations and the participatory process prior to the delegation of water services provision to private entities; and provisions on assessment and monitoring and oversight. These sections include recommendations to the Working Group.

State responsibility for the impact of the activities of all private water providers

6. It is essential to emphasise that, however States decide to organise the delivery of water services, they retain the responsibility for the impact of the activities of all private water providers in all circumstances.⁶ Where private actors are involved, whether as part of a delegation of services or not, States must ensure the respect, protection, and fulfilment of the right to water for all. The involvement of private actor can in no way justify harm to the right to water.

7. Such harm should be considered to include, *inter alia*, cases where private actors' involvement:

- a. interfere with the right to non-discrimination and equality;⁷
- b. leads to the commercialisation of water;
- c. undermines the core obligations under the right to water⁸ and the nature of water provision as a public service;
- d. undermines transparency, public accountability, or public participation by the concerned stakeholders; or
- e. amounts to a retrogressive measure as defined under international human rights law.⁹

² Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Mission to Kenya, A/HRC/4/32/Add.3, February 2007, para 83, available on <https://uhri.ohchr.org/document/highlight/867204d7-fdf5-4a3a-b9cb-6526f2d289ce/e9081b17-3e3e-4cf2-abe6-5f80d391dfa5/water%20private%20privatization>.

³ <https://www.gi-escr.org/private-actors-social-services/>

⁴ <http://bit.ly/GPprivatisation>

⁵ See <http://bit.ly/GPsConsultation>.

⁶ UN Committee on the Rights of the Child (CRC), *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, 17 April 2013, CRC/C/GC/16, available at: <http://www.refworld.org/docid/51ef9cd24.html>, paras 33 and 34.

⁷ CESCR General Comment 15 on the right to water, E/C.12/2002/11, paras 13, 14, 15 and 16.

⁸ CESCR General Comment 15 on the right to water, E/C.12/2002/11, para 19.

⁹ CESCR General Comment 15 on the right to water, E/C.12/2002/11, para 19 and CESCR General Comment 3 on the Nature of States Parties' Obligations, E/1991/23, para 9.

8. The State also remains responsible for the protection of labour laws. It should be made clear that should a delegation of public services take place, it must be done in accordance with the right to work, and not be used as a means to undermine the right to unionise and broader labour rights.

Regulations and public service obligations

9. States must regulate adequately private operators impact the realisation of the right to water. This draws from the state obligation to protect the right to water by preventing third parties, including corporations and agents working under their authority, from interfering with the enjoyment of the right.¹⁰ This obligation mandates States to prevent non-state actors from ‘compromising equal, affordable, and physical access to sufficient, safe and acceptable water’.¹¹

10. However, as highlighted by the UN Committee on Economic, Social and Cultural Rights, where private providers have a role specifically in the delivery of social services including water, the private providers should be subjected to more stringent regulations which impose ‘public service obligations’.¹² We recommend maintaining this legal concept, which is common in many jurisdictions, and which highlights the special role that the delivery of water and other social services has for the realisation of economic, social and cultural rights.

Regulations preceding the delegation of water services provision to private entities

11. GI-ESCR supports the Working Group’s emphasis that any delegation of water service provision should only take place in the context of “*a clear and efficient regulatory framework that ensures sustainable, participatory and non-discriminatory access*” to water.¹³

12. However, we propose that, under human rights law, certain types of private actors should never be supported by States. These are all the private actors that may breach human rights, including those that:

- a. Discriminate, including by being selective, whether directly or indirectly, on the basis of the economic status of the learner, family, or community, or on the basis of any another any ground prohibited under international human rights law that leads to a violation of the right to equality and non- discrimination; or
- b. Are commercially-orientated or for-profit; or
- c. Are not subject to democratic control by the populations that they serve; or
- d. Are not of adequate quality; or
- e. Are inadequately regulated or accredited; or
- f. Undermine the realisation of human rights in any other way.

¹⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, available at: <http://www.refworld.org/docid/4538838d11.html>, para 23.

¹¹ Ibid, para 24.

¹² CESCR General Comment 24 on State obligations under the ICESCR in the context of business activities, E/C.12/GC/24, para 21.

¹³ African Commission on Human & Peoples’ Rights, *Guidelines On The Right To Water In Africa – Draft For Comments*, Section 40.1.

Assessment prior to delegation

13. Inasmuch as the Draft Guidelines provide for stringent monitoring of and reporting by private providers of water, we propose the inclusion of a requirement to carry out a participatory assessment of the potential impacts of the introduction of the private provider, where plans or providers who do not meet the required standard can be discontinued or disqualified respectively. Where the consultative process determines a delegation may proceed, there must be a plan of action to avoid all foreseeable negative impacts and a threshold to disqualify providers where the risks are too high and/or the possible mitigation is not feasible.

14. It is also imperative to ensure that this assessment:

- a. measure the systemic effect of the private providers both on the short and long term;
- b. make the findings publicly available;
- c. inform the regulations put in place by the State in order to guarantee that the right to water is not undermined by the existence of private operators; and
- d. inform a plan of action to address the negative impacts identified, which plan of action should also be made public.

15. This requirement for comprehensive assessment has been emphasised by the UN Committee on the Rights of the Child in its Concluding observations for several countries including Senegal, Ghana and Tanzania.¹⁴

16. In addition, and further to Section 6 of the Draft Guidelines which addresses participation generally, it is worth expressly providing that prior to delegating services the public should be given an opportunity to participate in the decision-making process on whether to delegate service provision to private entities.¹⁵ There's no assumption under human rights law that it is necessary to delegate the provision of water. The decision itself to delegate must meet certain cumulative criteria, which the State has the burden to demonstrate it meets before considering delegating the service, including that such delegation:

- a. is the most effective and expeditious allocation of resources to realise the right to water, paying particular attention to obligations related to equality and non-discrimination;
- b. does not constitute a retrogressive measure as defined under international human rights law;

¹⁴ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third to fifth periodic reports of Senegal*, 21 November 2016, CRC/C/SEN/CO/3-5, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/SEN/CO/3-5&Lang=En, para 20 (c); UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third to fifth periodic reports of Ghana*, 9 June 2015, CRC/C/GHA/CO/3-5, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CRC/COC/GHA/20799&Lang=En, para 20 (b); UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third to fifth periodic reports of the United Republic of Tanzania*, 3 March 2015, CRC/C/TZA/CO/3-5, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/TZA/CO/3-5&Lang=En, para 22 (b).

¹⁵ Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, A/69/213, July 2014, para 71, available on <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/490/08/PDF/N1449008.pdf?OpenElement>.

- c. does not constitute or contribute to the marketisation or commercialisation of water;
- d. is set up in a way that it is possible in practice to reverse it or to transfer back the role of the private actor to public authorities; and
- e. does not create a real risk of nullifying or impairing the discharge by the State of any other its human rights obligations, particularly the obligation to prevent direct and indirect discrimination.

Monitoring and oversight

17. The independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, has emphasised that, “in considering the granting of concessions to private companies, ... the Government is obliged to establish regulations to ensure that private or semi-private entities do not infringe human rights.” She emphasised the importance of an independent regulatory body to oversee the actions of all actors in the water and wastewater sectors.¹⁶

18. Based on this observation, we recommend including a provision requiring that States ensure they establish effective independent regulatory bodies to exercise oversight over all private providers. Such bodies should be adequately funded and supported so that they have the theoretical and practical means to ensure the protection of the right to water when

¹⁶ Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, Draft preliminary note on the mission to Egypt, A/HRC/12/24/Add.2, August 2009, para 20, available on <https://uhri.ohchr.org/document/highlight/4372af77-447e-4c2a-b7a7-44678d2c7670/e9081b17-3e3e-4cf2-abe6-5f80d391dfa5/water%20private%20privatization>.