

NATIONS UNIES
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AUX DROITS DE L'HOMME

PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME

UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on extreme poverty and human rights; and the Special Rapporteur on the human right to safe drinking water and sanitation

REFERENCE: AL Business enterprises (2011) Poverty (1998-11) Water (2008-1)
GBR 3/2013

29 August 2013

Excellency,

We have the honour to address you in our capacities as Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on extreme poverty and human rights; and Special Rapporteur on the human right to safe drinking water and sanitation pursuant to Human Rights Council resolution 17/4, 17/13, and 16/2.

In this connection, we would like to bring to your Excellency's Government's attention information we have received concerning the following information.

According to the information received:

Water affordability in England and Wales is currently a major concern. Current water bills might not be affordable for a large number of people, according to a report by the House of Commons Library. Nearly one-third of those on the lowest incomes already have to pay more than 3 per cent of their income for their water and sewerage bills. The Government treats this level of 3 per cent of income as a 'sustainability indicator', i.e. if people are paying more than 3 per cent of their income for water and sewerage they are regarded as being affected by 'water poverty'. The numbers paying above this level fell from 2000, but are now increasing, due to the new rise in water prices over and above inflation. According to a survey, 23.6 per cent of households in England and Wales paid more than 3 per cent of their net income after housing cost on water and sewerage in 2009-2010 and nearly half of which paid more than 5 per cent of household disposable income. It is a sharp increase from 9 per cent of households who were affected by 'water poverty' in 2002-2003.

Water prices have risen sharply in real terms since privatization of the water sector in 1989. Taking account of the rise (to £388 per household) announced for 2013-2014, water bills have since then trebled, at a time when other inflation has only

doubled. This means that 'real' water bills (after allowing for inflation) have risen 50 per cent since 1989.

When looking at how the newly announced bills compare with those of a decade ago, 2003-04, the average combined water and sewerage bill in England and Wales has leapt 64 per cent – from £236 to £388. But this masks huge variations: the increases for Wessex Water and Southern Water are 82 per cent (from £263 to £478) and 78 per cent (from £252 to £449) respectively, while Thames Water and Northumbrian customers have seen their bills increase by 74 per cent (£203 to £354) and 73 per cent (£207 to £359). This is far in excess of inflation. The retail price index between January 2003 and December 2012 was 36.1 per cent.

At the same time, operating profits have in some cases doubled within a decade. For example, Northumbrian Water's operating profit increased from £165.3m in 2001-02 to £338.8m in 2011-12, while South West Water's grew from £107m to £204.7m.

National Debtline received a record 19,667 calls for help with water debts in 2012 (up from 12,225 in 2011). The figure is an increase of 251% since 2007. And a National Debtline's spokesman affirmed, in his interview to Express news on 2 February 2013, that this was one of the fastest-growing debt problems they were dealing with.

The two systems for assisting those with difficulties in paying have been reportedly inadequate. The vulnerable groups scheme (or WaterSure), administered by the private companies, allegedly sets excessively narrow and inflexible eligibility criteria for metered consumers with above average consumption: the take-up rate of this assistance is extremely low. The Water White Paper published in July 2012 by the Environment Food and Rural Affairs Committee of the House of Commons sets out the Government's policy on metering, which recognizes that water companies are best placed to find the appropriate local solution in discussion with their customers. Whilst many customers would benefit from switching to a metered charge, some customers particularly who suffer 'water poverty' may see their bills increase. The second system consists of charitable handouts provided by the companies themselves at their own discretion.

With privatisation of the water sector, the broad expectation from policy makers is reportedly that as the water companies made profits, investors would continue to inject money in the water sector, and the price limits have been set in order to create this incentive. OFWAT's (the Water Services Regulation Authority) aim at each price review has reportedly been to ensure that returns assumed should provide shareholders with sufficient incentives to provide additional funds, either in the form of retained earnings or new equity, to enable companies to make new investment where this is appropriate.

But in practice, there has been reportedly a sharp and steady increase in debts, and an actual reduction in shareholder equity. The gearing of the water companies has risen from an average of 0% to an average of 60%, with a number of companies having gearings over 75%. Instead of shareholders investing money in the industry, there has been a significant withdrawal of shareholder equity from the water companies.

According to the latest available accounts Thames Water, for example, paid total dividends to its shareholders of £1.18bn in the five years to March 2012. In 2012 the company enjoyed operating profits of £650m. However, the same company is currently seeking government support for the planned £4.1bn "super sewer" under the Thames. The costs of the new super-sewer could reportedly add £70 to £80 to all customers' bills per year, not including inflation by 2020.

'Water poverty' is allegedly caused mainly a) by private operators' uncontrolled profit-seeking practices; b) by the OFWAT's selectively defined remit to exclude the protection of vulnerable consumers; and c) the Government's inadequate policy to reduce 'water poverty'. The Government, in June 2013, stated that "The Government has published guidance to water companies to enable them to develop social tariffs for introduction from April 2013. That guidance makes it clear that the Government expects each water company to consider bringing forward a social tariff as part of its overall strategy for addressing water affordability. A number of water companies are planning to introduce social tariffs this year, with several more currently consulting their customers with the intention of introducing new social tariff in the future". However, the Government's response so far seems to be slow and inadequate to reverse rapidly escalating 'water poverty'. Even if the social tariffs are introduced, household consumers reportedly may not benefit from this 'protection' as the proposed market reform only applies to non-household consumers.

Furthermore, according to the information we received there are accountability challenges of the water companies, due to their ownership by private equity (PE) funds which are less accountable than stock exchange companies, as they are not subject to stock exchange disclosure rules. Under the current system the water companies themselves seem to be accountable only to their shareholders; however neither the companies nor the shareholders are subject to any democratic accountability. In addition, the functioning of OFWAT is financed from license fees charged to private companies, and OFWAT, for instance, has led the process of extension of notice termination to 25 years; a process that directly results in ensuring its economic and financial viability. Therefore, according to the information received, OFWAT has difficulty under the current system in identifying private companies' misbehaviour or illegal behaviour such as an overestimation of capital investments and a miscalculation of key figures on customer debt, customer service and leakage. Citizens also do not have a means to bring a complaint when their rights to water and sanitation have been violated.

In addition, we have received information that a legislative reform of the water sector is being carried out and that the Government has, under section 5 of the

draft Water Bill (on ‘Summary of the impact assessment’), referred to the compatibility of the provisions of the draft Bill with the European Convention on Human Rights; and under section 6 (on ‘Other specific impact tests’), to the impact of all policies and measures in the draft Bill with the Equality Act 2010 and the Human Rights Act 1998 (which incorporated the European Convention on Human Rights into domestic law), concluding that there is no adverse impact. We believe, however, that the current legislative process provides a unique opportunity to explicitly recognize and integrate the human rights to water and sanitation as recognised by the United Nations General Assembly and Human Rights Council (and later supported by Your Excellency’s Government), into the national legislation.

While we do not wish to prejudge the accuracy of these allegations, we would like to remind your Excellency’s Government of its obligations under various international human rights instruments, in particular the International Covenant on Economic, Social and Cultural Rights (ICESCR, ratified by the UK on 20 May 1976), the Convention on the Elimination of All Forms of Discrimination against Women (ratified by the UK on 7 April 1986) and the Convention on the Rights of the Child (ratified by the UK 16 December 1991) which entail general and procedural human rights obligations related to access to safe drinking water and sanitation. Furthermore, on 28 July 2010 the United Nations General Assembly explicitly recognized water and sanitation as a fundamental human right. In 2010, the Human Rights Council (resolution 15/9) explicitly reaffirmed that safe and clean drinking water and sanitation are a fundamental human right, derived from the right to an adequate standard of living and inextricably related to the right to highest attainable standard of physical and mental health, as well as the right to life and human dignity.

According to Article 2(1) of the ICESCR, States parties must devote the “maximum available resources” to ensure the “progressive realization” of all economic, social and cultural rights (including the right to water and sanitation). In General Comment 3 (para. 9), the Committee on Economic, Social and Culture Rights (CESCR) stressed the existence of a strong presumption that deliberately retrogressive measures that affect the level of enjoyment of economic, social and cultural rights are in violation of the State’s obligation under Article 2(1). In adopting retrogressive measures, States must demonstrate that they have been introduced after “the most careful consideration” of all alternatives and that they are “fully justified by reference to the totality of the rights provided for in the Covenant”.

The human right to water, like any human right, imposes three types of obligations on States parties: obligations to respect, to protect and to fulfil. The obligations to respect require that States parties refrain from interfering with existing access. The obligations to protect require State parties to prevent third parties from interfering with the enjoyment of the right to water. The obligations to fulfil call on States to adopt the necessary measures to enable and assist individuals to enjoy the right and to ensure direct provision as a last resort, when individuals are, for reasons beyond their control, unable to provide for themselves.

The human rights framework does not dictate a particular form of service delivery and leaves it to States to determine the best ways to implement their human rights obligations. However, the State cannot exempt itself from its human rights obligations when involving non-State actors in service provision. On the contrary, when non-State actors are involved in service provision, there is a shift to an even stronger focus on the obligation of the State to protect.

The CESCR, in its General Comment No.15, emphasizes that “States parties must prevent [third parties] from compromising equal, affordable, and physical access to sufficient, safe and acceptable water”. Involving non-State actors requires, inter alia, clearly defining the scope of functions delegated to them, overseeing their activities through setting regulatory standards and monitoring compliance.

As reiterated by the Human Rights Council in its Resolution 15/9, States have the primary responsibility to ensure the full realization of all human rights, and the delegation of the delivery of safe drinking water and/or sanitation services to a third party does not exempt the State from its human rights obligations. Given the fact that in the UK the water industry is run by the private sector, the obligation remains with the UK Government to ensure that, throughout the operation of services, private sector actions do not result in violations of the right to water and sanitation.

In order to accomplish this, adequate regulation is required. The CESCR’s General Comment No. 15 on the right to water sets out specific standards for providers to comply with in line with the normative content of the human right to water and sanitation:

a) Sufficient quantity; b) Water quality and safety of sanitation facilities; c) Regularity of supply; d) Acceptability of water and sanitation services; e) Accessibility of services; and g) Affordability of services. Regulation must also set standards about pricing. Water and sanitation services do not have to be provided for free and tariffs are necessary to ensure the sustainability of service provision. To meet human rights standards, the essential criterion is that tariffs and connection costs are designed in such a way as to make them affordable to all people (including through social policies).

These standards are complemented by the overarching human rights principles of non-discrimination, participation, sustainability and accountability, which are set forth across the core international human rights instruments and have been reaffirmed through commitments made by States at global development conferences (from the World Conference on Human Rights (1993) to the UN Conference on Sustainable Development “Rio+20” (2012) in the form of declarations and programmes of action.

Non-discrimination. Article 2(2) of the ICESCR recognizes the obligation of States parties to guarantee that the rights enunciated in the Covenant “will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” According to CESCR General Comment 15, “Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds”

(para. 12). Water and sanitation services must therefore be provided without discrimination of any form, and particular care must be taken to provide services to those who are not able to provide for themselves, as well as to excluded individuals and groups and those at risk;

Participation. Article 25 (a) of the International Covenant on Civil and Political Rights provides that every citizen shall have the right to “take part in the conduct of public affairs, directly or through freely chosen representatives”. All actions that have an impact on people’s access to water and sanitation services must provide meaningful opportunities for engagement. CESCR General Comment 15 states that “to adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process” (para. 37 (f) of). To enable genuine participation, this requires disclosure of adequate and sufficient information and actual access to information, referring in particular to the instruments/contracts that delegate service provision. Users, particularly those who are vulnerable or under-represented, must have the opportunity to participate in decision-making relating to their access to water and sanitation. Transparency and access to information are essential for participation to be meaningful;

Sustainability. CESCR General Comment 15 states that “The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations” (para. 11). Water, especially fresh water, is a limited natural resource that must be used in a sustainable way to ensure its availability, accessibility, good quality and affordability by future generations. Any water and sanitation related policies must include a component on sustainable exploitation and measures to prevent exhaustion of water resources. To ensure sustainability of water sources, environmental, development and human rights policies must be coherent and mutually complementary.

Accountability. Accountability and access to effective remedies are essential, as service providers and the State can be held accountable for deteriorating services, unmet performance standards, unjustified tariff increases, inadequate social policies or other breaches. To ensure accountability, roles and responsibilities have to be clearly designated and made transparent.

CESCR General Comment 15 states that “Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels” (para. 55). Accountability can be achieved through judicial, quasi-judicial, administrative, political and social mechanisms at the national and international levels. Irrespective of the obligation of the State to establish accountability mechanisms and ensure access to these, service providers have a responsibility to put in place grievance mechanisms that allow individuals to bring alleged human rights abuses to their attention.

States have the obligation to ensure that non-State service providers fulfil their human rights responsibilities throughout their work processes; integrate human rights into impact assessments as appropriate; develop effective organizational-level grievance

mechanisms for users and refrain from obstructing access to State-based accountability mechanisms.

States cannot derogate this responsibility in relation to the private water companies especially when their business activities, the provision of water and sanitation services, are characterized by special features, different from other businesses: the services relate directly to the fulfilment of human rights. Furthermore, States cannot transfer this responsibility to the economic regulator.

States are encouraged to build human rights impact assessments into the process of deciding on the means of service provision and monitoring such provision, as well as to adopt legislation that imposes on service providers the obligation to carry out a human rights impact assessment.

Service providers have a responsibility to undertake these assessments as part of exercising due diligence to become aware of the actual and potential impact of their action on the human rights to water and sanitation. On that basis, the State and service providers can work together to integrate human rights into water and sanitation policies, thereby ensuring compliance with human rights law, preventing human rights violations and maximizing positive effects.

We would also like to draw the attention of your Excellency's Government to the existence of the Guiding Principles on Extreme Poverty and Human Rights (A/HRC/21/39), unanimously adopted by the Human Rights Council at its 21st session (resolution 21/11). Your Excellency's Government may find paras. 77-78 (dealing with the rights to water and sanitation), and paras. 99-102 (on the role of non-State actors, including business enterprises) particularly relevant in this case. We would particularly like to draw the attention of your Excellency's Government to the fact that the Guiding Principles affirm that States should "implement measures to ensure that persons living in poverty are not charged higher rates for water services owing to consumption levels". They also stress that "States should ensure the affordability of facilities, goods and services relevant to those living in poverty. No one should be denied access to essential services because of an inability to pay" (para 58). Finally, "States should ensure that facilities, goods and services used by persons living in poverty are of the highest attainable quality, including by monitoring the quality of public and private service providers. Providers must be well-qualified and aware of the particular needs of persons living in poverty." (para 60).

Furthermore the Guiding Principles on Business and Human Rights (A/HRC/17/31), unanimously adopted by the Human Rights Council in June 2011, are relevant to the impact of business activities on all human rights, including the right to water. The Guiding Principles clarify and outline the State duty to protect human rights against adverse impacts by business; the corporate responsibility to respect human rights; and the need to ensure access to remedy for victims of business-related human rights abuse.

We would particularly like to draw the attention of your Excellency's Government to the fact that the Guiding Principles on Business and Human Rights affirm that as part

of their international human rights obligations, States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights (Guiding Principle 5), and further indicate that "States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights. Failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself. As a necessary step, the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms."

The Guiding Principles on Business and Human Rights further affirm that States should set out clearly the expectation that business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations, meaning that business enterprises are expected to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved. As part of meeting this responsibility, they should have in place a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights. Human rights due diligence should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. It should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships. The process should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

It is our responsibility, according to the mandate entrusted to us by the Human Rights Council, to clarify all allegations brought to our attention. We would therefore greatly appreciate detailed information from your Government concerning the above situation and about the measures taken by the competent authorities. We would be grateful for your cooperation and would appreciate to receive information and your observations on the following matters:

1. Are the facts summarized above accurate?
2. What measures has the Government taken to ensure that the population has access to drinking water and sanitation that is affordable, safe, sufficient and accessible for all without discrimination?
3. Under the current legislative reform the Government stressed the need to build long-term resilience of the water sector in terms of infrastructure, supply and networks. What is the Government's position in relation to the need to strengthen the legal protection of the rights to water and sanitation pursuant to its international obligations under the ICESCR? How was it reflected in the draft Water Bill?

4. Under its international obligation to protect, which requires States to prevent third parties from interfering in any way with the enjoyment of the human right to water and sanitation, what actions has the Government taken to contain and sanction the licit and illicit profit-seeking practices that result in undue and excessive price increases for customers, including vulnerable customers? Has the Government contemplated the tightening of the regulatory process, and the introduction of more stringent transparency and accountability measures in the current reform agenda?

5. Please furnish details regarding the independence of OFWAT's functions, as a non-ministerial government department. To whom is it accountable and what systems of accountability are in place?

6. How has the Government ensured that OFWAT carries out its duties, primary and secondary, in compliance with the RTWS human rights framework? What measures has the Government take to ensure that OFWAT can independently prioritize the human rights to water and sanitation when it is financially reliant on the water companies?

7. What actions has the Government taken to induce the OFWAT to fulfil its duty to protect all customers, including vulnerable customers?

8. The UK Government's White Paper clearly articulates the fact that water is an important resource for life and is indispensable for economic growth. Given this laudable position, what kind of mechanisms has the Government established at the national or regional level to bring together all the different interests and stakeholders for public debate on water policies?

9. What actions have the Government taken to ensure the effectiveness of the social tariffs it is expecting water companies to introduce? How does the Government intend to tackle affordability issues, in the short and long-term, when neither the companies, nor the functioning of market laws will tackle them?

10. Given the fact that WaterSure (the vulnerable groups' scheme) is publicly funded, how does the Government ensure that its eligibility criteria work effectively for those in need? This scheme only applies to metered consumers. What measures has the Government devised to protect vulnerable groups in unmetered households?

11. In areas of serious water stress, where water companies are able to bring forward universal metering programmes, how does the Government intend to support low income families and vulnerable groups who do not meet the WaterSure criteria?

12. What steps has your Excellency's Government taken to implement the UN Guiding Principles on Business and Human Rights, in particular in relation to the private delivery of services that may impact upon the enjoyment of human rights?

We would appreciate a response within sixty days. Your Excellency's Government's response will be made available in a report to the Human Rights Council for its consideration.

While waiting for your response, we urge your Excellency's Government to take all necessary measures to guarantee that the rights and freedoms of the above mentioned persons are respected and, in the event that your investigations support or suggest the above allegations to be correct, the accountability of any person responsible of the alleged violations should be ensured. We also request that your Excellency's Government adopt effective measures to prevent the recurrence of these acts.

Please accept, Excellency, the assurances of our highest consideration.

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