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SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandates of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; 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; the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; and the Special Rapporteur on the human right to safe drinking water and sanitation.

REFERENCE: JAL Housing (2000-9) Business enterprises (2011) Poverty (1998-11) Debt (2000-9) Water (2008-1)
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Excellency,

We have the honour to address you in our capacity as Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on extreme poverty and human rights; Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; and Special Rapporteur on the human right to safe drinking water and sanitation pursuant to Human Rights Council resolution 15/8, 17/4, 17/13, 16/14, and 16/2.

In this connection, we would like to bring to your Excellency's Government's attention information we have received concerning the protection of the human rights to water and sanitation in the context of ongoing processes of private sector participation in the provision of water services.

According to the information received:

The most recent private sector participation in water service provision began in Portugal in the 1990s. Law n.º46/77 interdicting the access of private companies and other entities of the same nature to economic activities in certain sectors, namely in the water sector, was, after a series of amendments, repealed and subsequently replaced by Law n.º88-A/97 which foresees private sector participation in the provision of water services through the modality of concession.

In line with the current Strategic Plan for Water Supply and Wastewater Services - PEAASAR II (2007-2013), which also encourages private sector participation through the promotion of incentives to outsourcing (in the operation and maintenance of services) and the removal of potential obstacles to the participation of the private sector, the Government of Portugal recently amended the abovementioned Law n. °88-A/97 in order to grant greater access to the private sector. According to information received, the privatization of water services is accelerated by the Government of Portugal as well in the context of the austerity measures aimed at increasing general government revenues and reducing public spending on public service providers.

Concerns over the way in which ongoing processes of private sector participation are being dealt with by some local government entities or municipalities have been brought to our attention by civil society organizations.

According to information received, some of these processes have neither been participatory nor transparent. At the decision-making level, no public consultation has been undertaken, no space was created for meaningful participation and the information regarding the contractual arrangements was not made accessible to the public. The decision to opt for private sector participation was allegedly regarded by the population as an imposition, for instance in the case of the ongoing process in the city of Odivelas.

It is reported that, as a result of private sector participation, the price of water has invariably increased in municipalities which have opted for this model of provision (i.e. Mafra, Paços de Ferreira, Marco de Canavezes, Aveiro, Barcelos). In these cases, the tariffs, their review and update and the inclusion or not of social tariffs are regulated by the specific contracts. In spite of the Water and Waste Services Regulation Authority (ERSAR)'s recommendations on tariffs and inclusion of social tariffs, there is still a great disparity across municipalities and there is allegedly negative impact on the affordability of water and sanitation particularly by low-income populations.

These price increases have reportedly neither been matched by an improvement in the quality of the services provided in terms of quality of water, network coverage and response in case of ruptures nor by investments in the maintenance of infrastructure or its modernization.

The number of complaints and requests of information received by the organization for the defence of consumers rights (DECO) regarding the price of water and the lack of transparency in relation to tariffs have increased to 2.900 complaints in 2012. Some municipalities increased indebtedness as a result of guaranteed minimum levels of water consumption to be paid even if not consumed by the population. The municipality of Barcelos, for instance, is currently indebted by 172 million Euros.

We are concerned about the affordability of water for the end user. The Government has affirmed that, as a result of the restructuring or privatization of the water sector, in 68% of cases the price of water would decrease. However, this decrease relates to the price of water provided in bulk (“em alta”), which will not necessarily reflect a decrease in the price of water for the end-user.

In this connection, it has also been brought to our attention that the number of contracts with water service providers has been decreasing. There have been numerous cases of unilateral rescission from contracts by end users. Given the current climate of economic crisis and increased poverty in Portugal, we are concerned about the reasons that motivated these rescissions.

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, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child which entail general and procedural human rights obligations related to access to safe drinking water and sanitation. Furthermore, on 28 July 2010 the UN 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 the highest attainable standard of physical and mental health, as well as the right to life and human dignity.

We would further like to note that even when resources are limited, as State party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), Portugal is legally bound to dedicate the maximum amount of resources available to progressively achieve the full realization of all economic, social and cultural rights including the right to water and sanitation. Portugal cannot rely upon the economic damage caused by the crises to justify actions or omissions which amount to violations of basic human rights obligations. While often economic, social and cultural rights are subject to the principle of ‘progressive realization’ depending on the availability of resources in each State, this principle also prescribes particular modes of conduct that are compulsory for all States regardless of their level of development. These obligations considerably limit the discretion of States with regard to the implementation of economic, social and cultural rights, and require immediate action.

Furthermore as a State party to the ICESCR Portugal has an immediate minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of all economic, social and cultural rights including the right to water and sanitation (CESCR, General Comment 3, para.10). The obligation to achieve these minimum essential levels is not dispensed with during times of crisis and recovery. Even during times of severe resource constraints, when available resources are demonstrably inadequate, the obligation remains for Portugal to demonstrate that every effort has been made to use all resources that are at its disposal, in an effort to satisfy, as matter of priority, core obligations to ensure minimum essential levels and to protect the most

disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes (CESCR, Statement on Allocation of Resources, E/C.12/2007/1 paras.4 and 6. See also CESCR, General Comment 3, para.12, General Comment 12, para.28; General Comment 14, para.18.)

The duty of the State to prioritize the rights of the poorest and most vulnerable people does not imply that the State may adopt a very narrow approach. States continue to have responsibilities to move as expeditiously and effectively as possible towards the widest possible enjoyment of rights by all, which means maintaining services beyond a basic level (CESCR General Comment 3, para.11)

Furthermore, in line with the ICESCR, there is a strong presumption that deliberately retrogressive measures that affect the level of enjoyment of economic, social and cultural rights are in violation of human rights standards (See, e.g., CESCR, General Comment 3, para.9 and General Comment 4, para.11.) The CESCR has noted that in adopting retrogressive measures States must demonstrate that they “have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources” (See, e.g., CESCR, General Comment 3, para.9; General Comment 13, para.45.) If a State uses “resource constraints” as an explanation for any retrogressive measure, the CESCR will assess the situation considering, inter alia, the country’s level of development, the severity of the breach, whether the situation concerned the enjoyment of the minimum core content, and whether the State had identified low-cost options, or had sought international assistance (E/C.12/2007/1 para.10).

In its General Comment No. 15 (2002), the Committee on Economic, Social and Cultural Rights clarified that the human right to water means that everyone is entitled to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses, which includes sanitation. The human right to sanitation means that everyone, without discrimination, has physical and affordable access to sanitation, in all spheres of life, which is safe, hygienic, secure, socially and culturally acceptable, provides privacy and ensures dignity.

The human right to water, like any human right, imposes three types of obligations on States parties: obligations to respect, to protect and to fulfill. 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. According to the Committee, “third parties include individuals groups, corporations and other entities as well as agents acting under their authority”. “The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water, and polluting and inequitably extracting from water resources, including natural resources, wells and other water distribution systems”. The obligations to fulfill 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 by 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 Committee 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.

This was reiterated by the Human Rights Council in its Resolution 15/9 where States were reminded of their obligation to ensure that non-State service providers fulfill 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.

The Committee on Economic, Social and Cultural Rights has stressed in General Comment 2 its concern of “the adverse impact of the debt burden and of the relevant adjustment measures on the enjoyment of economic, social and cultural rights in many countries”. “The Committee recognized that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity. Under such circumstances, however, endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent. States parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as “adjustment with a human face” or as promoting “the human dimension of development” requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment.”

In addition to this, and most importantly, all actions that have an impact on people’s access to water and sanitation services such as the decision to involve private sector participation must provide meaningful opportunities for engagement. The participation of all concerned must be active, free and meaningful. To enable genuine participation, this requires disclosure of adequate and sufficient information and actual access to information, referring in particular to the instruments that delegate service provision.

This has been highlighted not only by the Committee in its General Comment 15 but also by the Human Rights Council in its Resolution 15/9. Not least important is Directive n.º2003/4/CE on public access to environmental information which was transposed into Portuguese legislation by Law n.º19/2006 and which foresees not only the

public's right to access to information but also the State's obligation to disseminate such information.

The decision for, or against, delegating service provision to non-State actors should always be taken in light of the local circumstances and it should be preceded by an ex ante assessment that carefully considers the potential impact on the realization of human rights, including the rights to water and sanitation.

Once that fundamental decision has been taken, the subsequent process of tendering, bidding and contract negotiation also must be transparent. The terms of reference and the final contract should be made available for public scrutiny and commenting. Any instrument delegating service provision, including contracts, must meet human rights standards and ensure that the right to water is realized in an economically, environmentally and socially sustainable way. While ensuring this is the primary obligation of the State, non-State service providers are expected to exercise due diligence to prevent adverse human rights impacts.

Throughout the operation of services and where private sector participation is involved, the obligation remains with the State to ensure that this involvement does not result in violations of the right to water. Regulation is of paramount importance in this respect. Any regulatory framework or contract must set specific standards for providers to comply with while ensuring that those standards mirror the normative content of the human right to water and sanitation.

In addition, accountability and access to effective remedies are essential for closing this circle, 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.

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 into place grievance mechanisms that allow individuals to bring alleged human rights abuses to their attention.

Furthermore, in relation to the negative impact in the enjoyment and protection of the right to adequate housing, article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Portugal is a party, states that "the States Parties to present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including housing, and to the continuous improvement of living conditions".

With respect to the right to adequate housing, the Committee on Economic, Social and Cultural Rights (CESCR) stressed in its General Comment No. 4 that the right to housing should not be interpreted in a narrow or restrictive sense such as merely having a roof over one's head; rather, it should be seen as the right to live somewhere in security,

peace and dignity. With “due priority to those social groups living in unfavorable conditions,” the right to housing includes guaranteeing: (a) legal security of tenure; (b) availability of services, materials, facilities and infrastructure; (c) affordability; (d) habitability; (e) accessibility; (f) location; and (g) cultural adequacy. When discussing availability of adequate housing, the Committee has explicitly underlined the sustainable access to safe drinking water as well as sanitation and washing facilities, refuse disposal and site drainage, among other aspects. When discussing affordability, the Committee underscored that “personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised, [...] and that States parties ensure that the percentage of housing-related costs is, in general, commensurate with income levels”.

The Committee also added that “the right to housing should be ensured to all persons irrespective of income or access to economic resources” (paras. 7 and 8). The Committee also stressed (para. 6), that the enjoyment of the right to adequate housing must not be “subject to any form of discrimination”, in accordance with article 2(2) of the Covenant.

We would like to draw the attention of your Excellency’s Government to the Guiding Principles on extreme poverty and human rights (A/HRC/21/39), adopted by the Human Rights Council by consensus at its 21st session in September 2012 (resolution 21/11). Of particular relevance to this case are paragraphs 56 to 58 which summarize States’ obligations to provide the facilities, goods and services required for the enjoyment of human rights by people living in poverty. “Even where such facilities, goods and services are provided with the involvement of private sector or civil society entities, States are responsible for ensuring quality, affordability and coverage and have the duty to protect individuals against abuses committed by private service providers.” States should ensure the affordability and quality of facilities, goods and services used by people living in poverty, including by monitoring private service providers. Paragraphs 77 and 78 of the Guiding Principles, on the rights to water and sanitation, are also relevant with regard to this case.

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 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."

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 Excellency's 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. In the Portuguese legislation opening access to private sector participation in the provision of water services, how were human rights safeguarded?

2. Which measures have been taken by the Portuguese public authorities to ensure that the principles of meaningful participation, transparency and access to information are safeguarded, when considering the decision of delegating service provision to the private sector, including in the case of Odivelas?

3. Has your Excellency's Government ever undertaken or is it planning to undertake a human rights impact assessment, before deciding to delegate service provision to the private sector? If yes, please provide details including whether the assessment includes the principle of equality and non-discrimination and the normative contents of the human rights to water and sanitation and the right to adequate housing.

4. Having decided to delegate service provision and involve non-State actors, which measures have been taken to ensure transparency, non-discrimination and accountability throughout the process?

5. What guarantees has your Excellency's Government included in the contracts with the private sector to ensure that part of the profits are invested in ensuring the quality of water, the maintenance and modernization of the system?

6. Under its international obligation to protect the right to water, which requires States to prevent third parties from interfering in any way with the enjoyment of the right, what structures, systems or mechanisms has your Excellency's Government's put in place to monitor compliance of non-State service providers in relation to human rights standards?

7. What measures have been taken to ensure that water services, whether privately or publicly provided, are affordable for everyone? In cases where, as a result of private sector participation in the provision of services, the prices of water suffered a

substantial increase, what measures have been taken by your Excellency's Government's to address this situation, in particular in relation to people living in poverty?

8. Please provide details on the specific changes in personal or household financial costs associated with changes in the water and sanitation service provision to the private sector, as a proportion of the costs associated with housing and other basic costs. If available, please provide disaggregated information on the impact in the cost of living of these changes.

9. Please provide information on specific steps taken by your Excellency's Government to ensure that the costs required to ensure access to water and sanitation is commensurate with a reduction in income levels and increase in poverty levels.

10. Please provide information on the existence of remedies to challenge these measures and policies including in relation to threats to the enjoyment of the right to adequate housing due to increases in the cost of water and sanitation services, such as inability to pay rent, evictions, displacement and homelessness, due to increases in the costs of water and sanitation services. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised.

11. What has led so many end users to rescind from their contracts? Were these rescissions caused by a lack of means to pay? If so, which measures is your Excellency's Government's taking to ensure that these people will continue to have access to water and sanitation?

12. What is your Excellency's Government's position on the disconnection of water services for lack of payment?

13. Has your Excellency's Government received a letter from the European Commission instructing the imposition of water privatization as a condition for a "rescue" package? If so, please provide detailed information on this conditionality because it is concerning if privatization policies are pushed by loans' conditionalities instead of a democratic decision-making process.

14. What steps has your Excellency's Government taken to implement the UN Guiding Principles on Business and 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 right to safe drinking water and sanitation the right to adequate housing are respected and, in the event that your investigations support or suggest the above allegations to be correct, the accountability of any person and institution responsible of the alleged violations should be ensured. I 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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