**Online consultation on private sector participation and the human rights to safe drinking water and sanitation**

**Organized by the UN Special Rapporteur on the human rights to safe drinking water and sanitation, Mr. Léo Heller**

18 September 2019, 25 September 2019, 2 October2019 and 9 October 2019

[**Registration**](https://doodle.com/poll/58fysgyepnqpnqhm)

Pursuant to the UN Human Rights Council Resolution 33/10 of 2016, the Special Rapporteur[[1]](#footnote-1) on the human rights to safe drinking water and sanitation, Mr. Léo Heller, is mandated to work on identifying challenges and obstacles to the full realization of the rights, as well as protection gaps, good practices and enabling factors. As part of his mandate, the Special Rapporteur prepares and presents two thematic reports per year. The Special Rapporteur’s thematic report to the 75th session of the UN General Assembly in 2020 will focus on private sector participation and the human rights to safe drinking water and sanitation.

# Background

Traditionally, the provision of water and sanitation services to populations was a responsibility primarily undertaken by governments, and the public bodies under their control. However, in the late 20th century, the role of private entities expanded around the world. Through various legal arrangements, private companies have been afforded a greater presence in the sector, and, resultantly, their operations have come to affect the outcomes of service provision of a significant amount of the global population.

While risks to human rights exist within models that are wholly publicly operated, or where the private sector is limited to more subsidiary roles, such as the supply of materials or the maintenance of infrastructure, the common role of the private sector in substantive provision of water and sanitation engenders a need to consider the impact of these arrangements. This report intends to frame the discussion regarding private sector participation in the water and sanitation sector through the human rights framework, assessing its potential impacts and evaluating the response required in order to ensure that the human rights to water and sanitation are properly fulfilled, protected and respected.

The Committee on Economic, Social and Cultural Rights, in its [General Comment no. 15](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2002%2f11&Lang=en), refers to both privately or publicly provided water services, emphasizing the State’s obligation to protect human rights, by preventing services operated and controlled by third parties from denying equal access to safe water and by preventing abuses by, among others, establishing an effective regulatory system. As acknowledged by the former Special Rapporteur, the human rights to water and sanitation do not require States to utilise any particular model of service provision, and in this regard the use of private sector actors is allowed ([A/HRC/15/31](https://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/15/31&Lang=E), para. 15).

In the report to be presented to the General Assembly in 2020, the Special Rapporteur attempts to provide an interpretation that goes beyond this acknowledgement and examines whether the means of the service provision (i.e., different models) are linked to and have impact on the outcome of those service provisions, namely, the way individuals access water and sanitation and ultimately the enjoyment of individual user’s human rights to water and sanitation. Furthermore, the Special Rapporteur intends to explore how those impacts on the enjoyment of human rights to water and sanitation resulting from the private provision can be prevented and mitigated from a human rights perspective.

# Objectives of the report

This report seeks to develop an analysis on the effects of private sector participation in water and sanitation provision on the realization of the human rights to water and sanitation by mapping human rights risks related to this modality of service provision. With this exercise, the Special Rapporteur intends to give guidance to States on decision-making relating to the incorporation of the private sector on service provision, to assist the private sector to gain a greater understanding of human rights and to share with the general audience his concerns on this matter.

This report seeks to add value to the discussion on private sector participation in the water and sanitation sector by:

* Furthering the understanding of the risks of private sector participation to the enjoyment of the human rights to water and sanitation and drawing light on the structural factors and other elements which make private sector participation risky for human rights;
* Providing recommendations/guidelines to States regarding their process of decision-making relating to the incorporation of the private sector into service provision and the regulation of the actions of private water and sanitation providers in order to ensure the respect and realization of human rights;
* Developing recommendations/guidelines for the private sector relating to the realization of the human rights to water and sanitation; and
* Reflecting on how States might act in order to address and minimize the risk of human rights violations by private actors in the context of water and sanitation service provision.

# Information about online consultation

In order to consult as many stakeholders as possible, the Special Rapporteur and his team are organizing online bilateral consultations via Skype on this thematic report, as follows:

* Date of online consultation: Wednesday -18 Sept, 25 Sept, 2 October and 19 October.
* Registration: Please register [here](https://doodle.com/poll/58fysgyepnqpnqhm) and indicate your availability to participate in an online consultation session by indicating your name and contact details (email and Skype ID) in one of the proposed time slots. After signing up, you will receive a confirmation email.
* Number of participants: We would invite maximum of two participants to join each consultation session via Skype.
* Format: The 45 min consultation session will follow this concept note and the questions herein. Participants are free to choose specific areas of their focus and expertise.

For any other information, please contact us at [srwatsan@ohchr.org](mailto:srwatsan@ohchr.org) with a copy to: [ahreumlee@ohchr.org](mailto:ahreumlee@ohchr.org)

# PROGRAMME

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| SESSION 1 Scope of report |

Guiding Questions for discussion:

1. How can the scope of the report be further clarified?
2. Which other elements should the report take into consideration?

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| **The scope of this report includes:** | **The scope does NOT include :** |
| * Private sector actors (for-profit organizations) | * Non-profit organization that undertake service provision * Informal service providers * Community-led service provision * State-owned enterprises |
| * Enterprises that government owns capital and shares in, but where a large proportion of shares are owned by private investors. | * State owned-enterprises, i.e., any corporate entity in which the government owns almost all the capital or the voting shares |
| * Private sector participation with specific focus on service provision | * Private sector participation in subsidiary activities across the whole water and sanitation cycle by, inter alia, supplying materials and equipment, developing engineering designs and building infrastructure |
| * Impact of remunicipalization and human rights risk of private sector participation | * Comparative analysis on risks and advantages of water and sanitation provision by public and private entities |
| * Both water and sanitation services |  |
| * Assess the level of human rights risks and reasons behind those risks that private sector participation brings when for-profit organizations are heavily involved in service provision | * Whether human rights dictates a specific type of model or service provision |

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| SESSION 2 Typology of private sector participation and trends |

The operation of the water and sanitation sector in States requires a considerable amount of resources, both human, financial and material, in order to ensure it works efficiently and effectively, meeting all of the requirements of the normative frameworks of the rights to water and sanitation. States have sometimes considered that they are unable to fulfil all of these resources or are sometimes unwilling to be fully involved in these activities, and, for this reason, it is common for private actors to operate in subsidiary aspects of the provision by, inter alia, supplying materials and equipment, developing engineering designs and building the infrastructure necessary for water and sanitation provision to be achieved. In other situations, States delegate the bulk of service provision to private actors. The report will look at the situation of the direct participation of the private sector in providing water and sanitation to populations over the long-term, particularly the model of privatization of public services that was adopted in certain States in the 1980s and 1990s, and which continues today.

Guiding questions for discussion:

1. What are the trends with regards to private sector participation in the water and sanitation sector?
2. Are there any trends in the way that multinational providers exercise power (i.e. to gain more responsibilities, to get more favourable contractual terms, to press for more economically favourable operating conditions, to press for reduction in standards?)
3. Are there any instances where States have remunicipalised and then returned to private provision? If so, why?
4. Data indicates that whilst the number of water and sanitation contracts provided to private businesses has declined globally, the number of people serviced by private providers has increased. Is that true? Why is this?
5. What is the relationship between SDGs and private sector participation? Do the SDGs really encourage more privatization in the water sector?
6. Has there been any increase in private sector engagement following the introduction of the SDGs?
7. Are there any differences in trends in private water provision and private sanitation provision?

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| SESSION 3 Human right risks and concerns relating to private sector participation on the human rights to water and sanitation |

The human rights to safe drinking water and sanitation are explicitly recognized by the UN General Assembly (resolution 64/292) and the Human Rights Council (resolution 15/9), which derive from the right to an adequate standard of living, protected under, article 11 of ICESCR. The UN General Assembly (resolution 70/169) and the Human Rights Council (resolution 33/10) recognized that water and sanitation are two distinct but interrelated human rights. In particular, “the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living”.

The discussion on risks posed by private sector participation to the realization of the human rights to water and sanitation highlights that risks might be enabled and exacerbated by the framework within which private sector participation occurs. For instance, the water and sanitation sector operates as a natural monopoly, wherein high infrastructure costs and other barriers mean that where services are privatised they are dominated by a single provider which exercises considerable amounts of control over the sector. Competition within privatized water and sanitation sectors is often limited, largely owing to provision being contracted out to these single private actors for lengthy periods of 20 to 30 years. These realities, coupled with the commercial focus of private actors, where the attempt to maximise profits often leads providers to minimize investment in service improvements so as to boost revenues, and, particularly in the natural monopoly context, a lack of effective regulation can generate significant concerns regarding the potential human rights impacts of private sector participation.

Guiding Questions for discussion:

1. What human rights risks from private provision of services potentially have a direct impact on the enjoyment of the human rights to water and sanitation? What human rights risks indirectly impact?
2. What human rights risks are specific to the water and sanitation sector and service provision when private actors are heavily involved?
3. How are the human rights risks different according to the level of private sector involvement? What type of private sector involvement (models) are more risky in terms of the human rights to water and sanitation?
4. How are the human rights risks and impact different when it comes to the right to sanitation?
5. What impacts and risks arise on other rights?

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| SESSION 4 Gaps in human rights protection in the context of private sector participation |

Given the on-going prevalence of private sector participation in States’ water and sanitation sectors, and the potential negative impacts of that participation, it is necessary to determine how private sector participation fits within the framework of human rights protections afforded to users, and to what extent actors operating within the framework of private sector participation can be deemed to have obligations and responsibilities under international human rights law.

Furthermore, in addition to gaps in the legal and regulatory framework, in States where the government has adopted models of provision in which private sector actors play a key role in water and sanitation provision, imbalances of power between private providers and the government can pose challenges to the realization of human rights to water and sanitation. This is particularly so when private sector actors are large, multinational organisations which have access to financial resources that, in some cases, dwarf those that are available to the government. These power imbalances can cause particular difficulties for all stakeholders within the water and sanitation framework, leaving them vulnerable to the commercial interests of private providers. Furthermore, even where the actions of private providers are challenged in judicial forums, or where States take a stand against poor standards of provision and remove contracts from private entities, the enormous wealth of these actors enables them to expend millions of dollars on court battles, which is often not possible for States, particularly developing States.

Guiding questions for discussion:

1. What challenges (both legal and non-legal) and gaps exist to protect the human rights to water and sanitation in the context of private sector participation?
2. Is the current international, regional and national legal and regulatory framework sufficient to address human rights gaps that arises when private sector are involved in the provision of water and sanitation?
3. Are there any instances of home-States introducing specific regulations or legislation that requires water and sanitation providers to respect human rights when operating abroad?
4. What enabling environments could assist in reducing the gaps and challenges faced when private actors are heavily involved in water and sanitation services?
5. What policies can or have been utilised in order to ensure the power of multinationals does not eclipse that of the state in order to ensure the state is able to retain effective regulatory oversight of the provider’s actions?
6. Are you aware of any innovative policies that have been utilised in order to enforce private water and sanitation companies comply with human rights?
7. How far do private water and sanitation actors take into account soft law provisions, such as the United Nations Guiding Principles on Business and Human Rights, when designing and implementing their services? What is the due diligence process in the context of water and sanitation provision?
8. When multi-nationals undertake service provision outside of their home-State and establish subsidiaries in the host country, is there any standard constitution of the subsidiary?
9. Does the parent company usually retain full control of the services provided, with the subsidiary just being a legal vehicle? What is the rationale behind this approach?
10. To what extent are parent companies usually responsible for the actions of their subsidiaries?
11. Do regulatory approaches differ depending on contract type? Is it the case that in longer term contracts or full divestiture situations regulation tends to be tighter?
12. Do private providers have a preferred contract type? What are the current trends in this respect?
13. Are you aware of any contractual provisions that have required private providers to respect human rights?
14. To what extent (if at all) do contractual terms between the State and private water and sanitation providers seek to mitigate these and other human rights risks?

1. Special Rapporteurs are part of what is known as the Special Procedures of the Human Rights Council. Special Procedures, the largest body of independent experts in the UN Human Rights system, is the general name of the Council’s independent fact-finding and monitoring mechanisms that address either specific country situations or thematic issues in all parts of the world. Special Procedures’ experts work on a voluntary basis; they are not UN staff and do not receive a salary for their work. They are independent from any government or organization and serve in their individual capacity. [↑](#footnote-ref-1)