

DRAFT

ACHPR General Comment on States' Obligations to Regulate Private Actors Involved in the Provision of Social Services

Explanatory note

This General Comment is 'a work-in-progress'. It reflects the Drafting Committee's current thinking on the human rights obligations related to social services under the Charter, amid the rapid rise of underregulated social service providers in Africa. It reflects the latest legal standards from across the continent, together with evolving norms expressed by States, and the human rights mechanisms of the United Nations. Crucially, the document is anchored in the jurisprudence of the African Commission, which has trodden this path before, and laid out valuable normative guidance. This draft is expected to go through a round of public consultation before its finalisation and adoption.

Background

On 4 March 2020, the African Commission on Human and Peoples' Rights (African Commission or Commission) adopted Resolution 434, on the 'Need to Develop Norms on States' Obligations to Regulate Private Actors in the Provision of Social Services'. This resolution built on Resolution 420, which emphasised the 'State Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services', adopted by the Commission on 14 May 2019.

Under Resolution 434, the Commission's Working Group on Economic, Social and Cultural Rights (ESCR Working Group) is mandated to adopt a soft law instrument to give States a clear indication of what their obligations are in the context of social services. Two members of the Working Group - Salima Namusobyia and Frans Viljoen - lead this process, under the guidance of Commissioner Mudford Mwandenga, the Working Group's Chairperson. Before Mwandenga was appointed Chairperson in June 2020, the process was led by Commissioner Jamesina King.

In executing its mandate, the ESCR Working Group is supported by five partners: the Centre for Human Rights, the University of Pretoria; the Dullah Omar Institute, University of the Western Cape; the Global Initiative for Social, Economic and Cultural Rights (GI-ESCR); the Initiative for Social and Economic Rights (ISER), and the Right to Education Initiative.

Process: The Draft General Comment has been developed in an open, transparent and consultative process. To date, the following developments have occurred:

- **Development of a background paper:** To initiate the process, a background paper was prepared by Asha Ramgobin, a doctoral candidate at the Centre for Human Rights. This paper included: (a) a brief charting of the terrain, setting out the nature of the problem, definitions and key issues to be addressed; (b) the form of the soft-law standard (principles versus a general comment); (c) the scope to be covered; and (d) a skeletal structure.
- **A first consultation with human rights experts:** A virtual experts' meeting was held (by Zoom) on 8 May 2020 to discuss the background paper, and develop a skeletal structure.
- **Development of a general comment:** On the basis of the guidance from the experts' meeting, a Drafting Committee was designated to develop successive versions of the draft general comment.
- **Expert consultation:** On 20 April 2021, the Drafting Committee hosted a second consultation with technical experts to review Draft 9 of the soft-law standard.
- **Further refinement:** At a number of subsequent meetings, the Drafting Committee further refined the draft.

- **First presentation to the Working Group:** On 30 November 2021, Viljoen and Namusobya presented the General Comment African Commission’s Secretariat

Form of the instrument:

Resolution 434 grants the Working Group a broad mandate to determine the appropriate soft-law standards to address this issue. According to the Commission’s past practice, there are four options: a ‘general comment’, a thematic resolution, a set of ‘guidelines’/’principles’, or a ‘study’. The Working Group has settled on a General Comment, as the most authoritative statement of State obligations in this context. This decision followed a six-month discussion involving the Working Group, NGOs with observer status before the Commission and sitting members of treaty bodies in the United Nations system.

General Comments are widely regarded as the most authoritative standard-setting instruments in a treaty body’s repertoire. Resolution 434, which deals with novel subject matter, requires the Commission to make a strong normative pronouncement using its most widely-recognised instrument. General comments are familiar to States, as all United Nations treaty bodies adopt this form of soft-law instrument. And although general comments and thematic resolutions both tend to concisely delineate specific state obligations, general comments are more extensive than thematic resolutions. Thematic resolutions are generally brief, and are adopted within a relatively short time frame. ‘Guidelines’ or ‘Principles’ tend to be extensive and wide-ranging. A ‘study’ is an in-depth exploration of a theme, without necessarily taking a definitive position on matters such as the exact nature of state obligations. By adopting a General Comment on this issue, the Commission can best provide focused normative guidance to states that is well understood.

Nevertheless, Resolution 434’s scope is wide. Nothing in it prescribes a specific soft-law format. However, adjusting the format will entail significant delays for the Drafting Committee, which has been working on a General Comment-style document since 2020. At this late stage, a transition to a new format will disrupt the drafting process and jeopardise plans for adoption in April 2022.

DRAFT TEXT

African Charter on Human and Peoples' Rights: General Comment on States' Obligations to Regulate Private Actors Involved in the Provision of Social Services

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1 Introduction

1.1 Context

- 1) In African Union Agenda 2063, Africa's great task is to establish an inclusive, more egalitarian continent with respect for the entire human rights framework.¹ A critical step to achieving this goal is the universal provision of 'social services'. This broad range of services – which can include anything from healthcare, piped water, to quality education – is not only integral to the welfare of the individual African, but is also an important indicator of a government's performance and its socio-political legitimacy.
- 2) The Universal Declaration of Human Rights (UDHR) is the first international instrument to ever explicitly mention social services. In Article 25, it proclaims a right to an adequate standard of living that includes 'food, clothing, housing, medical care and necessary *social services*.' Other formulations of this right were expressed in binding treaties at the international level. These include the 1966 International Covenant on Economic, Social and Cultural Rights,² and the 2006 International Convention on the Rights of Persons with Disabilities.³
- 3) In recent decades, the State obligation to ensure the provision of social services has faced many challenges. One of the most significant was the set of policy reforms introduced with the 'Washington Consensus'.⁴ For most of the 1980s and 1990s, governments, the private sector, and international financial institutions alike endorsed a range of economic policies which encouraged States to gradually withdraw from social service provision.⁵ During this

¹ African Union 'Agenda 2063: The Africa we Want', paras 27-31.

² Article 11, International Covenant on Civil and Political Rights.

³ Article 28, International Convention on the Rights of Persons with Disabilities.

⁴ The term Washington Consensus was coined in 1989 by J Williamson 'Democracy and the "Washington consensus"' (1993) 21 *World Development* 1331-1333. It describes a set of ten market-oriented policies popular among Washington-based policy institutions. These policies are: 1) fiscal discipline; 2) redirecting public expenditure; 3) tax reform; 4) financial liberalization; 5) adoption of a single, competitive exchange rate; 6) trade liberalization; 7) elimination of barriers to foreign direct investment; 8) privatisation of state-owned enterprises; 9) deregulation of market entry and competition; and 10) secure property rights. Originally developed for Latin America, the Washington Consensus policy reforms were also applied in the African context. In many African States, these reforms were a defining feature of the structural adjustment programs, implemented during the global recession and debt crisis of the 1980s, when Africa's external debt rose to unsustainable levels. See T Mkandawire and C Soludo 'Introduction: toward the broadening of development policy dialogue for Africa' (1999) 2-3 ("Africans recognized that their economic crisis required some fundamental adjustment, but raised serious reservations about the relevance and/or adequacy of the kind of adjustment being foisted upon them by the [Bretton Woods Institutions]").

⁵ See R Pongou, JA Salomon & M Ezzati 'Health impacts of macroeconomic crises and policies: determinants of variation in childhood malnutrition trends in Cameroon' (2006) 35 *International Journal of Epidemiology* 648-56. The authors attribute greater levels of malnutrition in children born between 1995 and 1998 than those born between 1988 and 1991 to government health expenditure cuts mandated by structural adjustment programmes between 1992 and 1994. See also CL Shandra, JM Shandra & B London 'World Bank structural

transition, private actors became increasingly involved in the provision of services traditionally delivered by governments.⁶ Steadily, the pursuit of macro-economic policies of liberalisation, privatisation and deregulation saw African policymakers neglect their obligation to build and maintain a strong, public social service infrastructure.

- 4) These developments have led to a long-standing debate about the proper role of private actors in social service provision. Some observers hold the ‘agnostic’ view, which asserts that human rights law is neutral to the private provision of social services.⁷ Under this assessment, the critical issue is not whether service delivery should be publicly or privately managed, but what is most effective in the context.⁸ However, critics of its view argue that the provision of social service is too important a task to be left to market forces alone.⁹ They warn that private service providers introduce a new philosophy of social service governance that profoundly alters how these services are delivered, who receives them first, and at what cost these services are made available.
- 5) These issues came to the fore in 2020, when the outbreak of SARS-CoV-2 (COVID-19) exposed stark contrasts in public and private social service provision. Vulnerable and marginalised groups suffered disproportionately from price hikes on essential items such as face masks and medicines.¹⁰ In education, COVID-19 exposed a lack of resilience in private systems, forcing governments to divert funds earmarked for other purposes to bail out failing

adjustment, water, and sanitation: a cross-national analysis of child mortality in Sub-Saharan Africa’ (2011) 24 *Organization & Environment* 107–29. The authors conclude that when Sub-Saharan African countries implement structural adjustment policies, these countries ‘tend to have higher levels of child mortality’.

⁶ See for example, DM Chirwa ‘Water privatisation and socio-economic rights in South Africa’ (2004) 8(2) *Law democracy and development* 181, 182-183.

⁷ See for example, FG Isa ‘Globalisation, privatisation and human rights’ in FG Isa & K de Feyter *Privatisation and Human Rights in the Age of Globalisation* (2015) 16-17; UN Special Rapporteur on Extreme Poverty ‘Privatisation and human rights’ UN Doc A/73/396, para 4; UN Special Rapporteur on the right to water ‘Human rights and the privatization of water and sanitation services’ UN Doc A/75/208, para 4. UN Special Rapporteur on Extreme Poverty ‘Privatisation and human rights’ UN Doc A/73/396, para 4; UN Special Rapporteur on the right to water ‘Human rights and the privatization of water and sanitation services’ UN Doc A/75/208, para 2.

⁸ Organization for Economic Cooperation and Development (OECD) Water Governance Initiative: “The critical question underlying the achievement of the human right to water and sanitation is not whether service delivery should be publicly or privately managed, but what is most effective in the context.”.

⁹ UN Special Rapporteur on the right to water ‘Human rights and the privatization of water and sanitation services’ UN Doc A/75/208, para 2.

¹⁰ *Competition Commission of South Africa v Dis-Chem Pharmacies Limited* CR00 (8 April 2020), paras 144-145 (‘In our view material price increases of life essential items such as surgical masks, even in the short run, in a health disaster such as the Covid-19 outbreak, warrants our intervention’); DG Mahler *et al* ‘The impact of COVID-19 (Coronavirus) on global poverty: Why Sub-Saharan Africa might be the region hardest hit’ (2020) <https://blogs.worldbank.org/opendata/impact-covid-19-coronavirus-global-poverty-why-sub-saharan-africa-might-be-region-hardest>.

private schools.¹¹ And in informal settlements, the absence of an accessible water supply left residents unable to perform frequent and proper handwashing – an essential frontline defence against the virus.

- 6) The pandemic revealed that instead of broadening access to social services, some commercial private actors have pursued profit-seeking strategies that make services inaccessible to large segments of the population.¹² There have also been increased reports of unethical clinical trials, during which experimental drugs are administered to patients without their consent or with insufficient disclosure of the risks.¹³ In the most extreme cases, private actors have delivered overpriced services of such poor quality that State agencies had to be reintroduced to the supply chain to undo the damage.¹⁴
- 7) In response to these challenges, the African Commission has adopted a range of norms and standards to address human rights abuses by private actors. These include the Pretoria Declaration on Economic, Social and Cultural Rights, the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights (ESCR Guidelines),¹⁵ and the State Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter (Tunis Guidelines).¹⁶ More recently, the Commission has also adopted Resolution 420, on the State Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services. Taken together, these instruments outline the obligation for States to provide social services to all, and to regulate the social service sector.
- 8) At the international level, crucial normative developments have also occurred. These include the United Nations Guiding Principles on Business and Human Rights, and the Committee on Economic, Social and Cultural Rights' General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. Outside the United Nations, civil society initiatives, such as the Abidjan Principles on the human rights obligations of States to provide public education and to regulate private

¹¹UN Special Rapporteur on the Right to Education 'Right to education: impact of the coronavirus disease crisis on the right to education – concerns, challenges and opportunities' UN Doc A/HRC/44/39, paras 69-70.

¹² UN Special Rapporteur on Extreme Poverty 'Privatisation and human rights' UN Doc A/73/396, paras 35.

¹³ See for example, WEMOS 'Clinical trials, realities in Zimbabwe: Dealing with Possible Unethical Research' (2016) 6, 13-14 & 32 <https://www.wemos.nl/wp-content/uploads/2016/06/report-Clinical-Trials-Realities-in-Zimbabwe-Dealing-with-Possible-Unethical-Research.pdf>; I Schipper 'The ethics of clinical trials in times of corona' *Centre for research on multinational corporations* 8 July 2020 <https://www.somo.nl/the-ethics-of-clinical-trials-in-times-of-corona/>.

¹⁴ UN Special Rapporteur on Extreme Poverty 'Privatisation and human rights' UN Doc A/73/396, paras 23-30.

¹⁵ African Commission on Human and Peoples' Rights 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (ESCR Guidelines).

¹⁶ African Commission on Human and Peoples' Rights 'State party reporting guidelines for economic, social and cultural rights in the African Charter on Human and Peoples' Rights' (Tunis reporting guidelines).

involvement in education (Abidjan Principles), have also provided critical guidance in this area.

- 9) These instruments – developed with the input of States, affected communities and many private actors themselves – provide a solid conceptual foundation for this General Comment, which continues the Commission’s evolving interpretation of the Charter,¹⁷ and takes into account recent experiences on the continent.

¹⁷ Article 45(1)(b), African Charter where the Commission is tasked ‘to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African Governments may base their legislation’.

1.2 Objectives

- 10) This General Comment outlines States' obligations to respect, protect, promote and fulfil all human rights, within their territories and extraterritorially. In particular, it aims to clarify, consolidate, and develop the State obligations to:
- a) ensure the provision of quality and accessible social services to all,
 - b) regulate all private actors that participate in social service provision; and
 - c) provide relevant guidance to States in preparing the submission of their periodic reports under Article 62 of the Charter.
- 11) The General Comment also addresses the private actor's duty to respect human rights in all their activities.¹⁸

¹⁸ A similar provision is found in the CRC Committee's General Comment 16, para 3 (For example, the CRC Committee notes that its 'general comment also addresses obligations regarding not-for-profit organizations that play a role in the provision of services that are critical to the enjoyment of children's rights').

2. General human rights standards applicable to social service provision

12) On their own, the social services provided by private actors cannot meet their central role in the realisation of human rights without a legal framework that guarantees compliance with international human rights law. To ensure this, a range of general standards are addressed below to guide States on their human rights obligations whenever private actors participate in the provision of social services.

2.1 The non-commercial character of social services

13) Under the African Charter, education,¹⁹ food,²⁰ healthcare,²¹ water,²² and social security²³ are not commodities for sale to those who can afford them, but basic human rights that all individuals are entitled to. Yet increasingly, private, commercial interests in Africa are transforming these public services into private commodities. This trend towards commercialisation undermines the object and purpose of the African Charter, which views social services not as commercial products, but as essential preconditions for the enjoyment of human rights.

14) As recognised in the Commission's periodic review, the increasing commercialisation of social services erodes their intrinsic public function and impairs the enjoyment all human rights, especially economic, social, and cultural rights.²⁴ This view reflects an emerging consensus under international human rights law, expressed by the UN Special Rapporteurs on

¹⁹ African Commission on Human and Peoples' Rights 'Concluding Observations & Recommendations on the 5th Periodic State Report of the Republic of Uganda (2010 – 2012)', para 36(c).

²⁰ African Commission on Human and Peoples' Rights 'Resolution 289: on the food crisis in Somalia' [ACHPR/Res.289\(EXT.OS/XVI\)2014](#); African Commission on Human and Peoples' Rights 'Resolution 374: on the right to food and food insecurity in Africa' [ACHPR/ Res. 374 \(LX\) 2017/](#). Communication 155/ 96, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, 27 October 2001, para 64 ('The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation'); African Commission 'ESCR Guidelines' (n 17 above), paras 83, 86(a), 86(g), 86(x).

²¹ African Commission on Human and Peoples' Rights 'Resolution 434: on the need to develop norms on States' obligations to regulate private actors involved in the provision of social services' ACHPR/Res. 434 (EXT.OS/ XXVII), para ii/

²² African Commission on Human and Peoples' Rights 'Guidelines on the Right to Water in Africa', preambular para 19.

²³ African Commission on Human and Peoples' Rights 'Pretoria declaration on economic, social and cultural rights in Africa' (2004), para 10.

²⁴ See, for example, African Commission on Human and Peoples' Rights 'Concluding Observations relating to the 14th Periodic Report of Niger (2014-2016) on the Implementation of the African Charter of Human and Peoples' Rights' (2018), para 208; African Commission on Human and Peoples' Rights 'Concluding Observations and Recommendations on the 5th Periodic State Report of the Republic of Uganda (2010-2012)' (2015), para 80.

education,²⁵ extreme poverty,²⁶ water,²⁷ and housing,²⁸ as well as in the Abidjan Principles,²⁹ and the Commission's own Water Guidelines,³⁰ that social services must not be subject to commercialisation.

15) However, private social service provision does not necessarily result in commercialisation. In fact, under effective regulation, democratically controlled, non-commercial private actors can be important players in ensuring universal access to social services. For example, in many rural areas,³¹ community-based water management systems have been effective short-term solutions for the realisation of the right to water, especially in circumstances where piped infrastructure is not immediately feasible.³² Similarly, in the context of education, linguistic and religious minorities have established non-commercial independent schools, which transfer knowledge about their community's culture, history, traditions and language when public schools lack the resources or expertise.³³ These community-led initiatives can support broader State efforts to realise the rights in the Charter, and ensure the universal provision of social services to all. Therefore, under certain circumstances, States must facilitate and regulate democratic, non-commercial provision by communities, as part of their long-term strategy to progressively realise economic, social and cultural rights.³⁴

²⁵ UN Special Rapporteur on the Right to Education 'Protecting the right to education against commercialization' UN Doc A/HRC/44/39, para 97 ("The Special Rapporteur would like to emphasize the need for States to [...] uproot commercialization in education").

²⁶

²⁷ UN Special Rapporteur on the right to water 'Risks and impacts of the commodification and financialization of water on the human rights to safe drinking water and sanitation' UN Doc A/76/159 ("the commodification of water [...] **puts at risk** the exercise of human rights, especially for those living in poverty").

²⁸ UN Special Rapporteur on the Right to Housing 'Adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' UN Doc A/HRC/34/51, para 77, calling for a ("transformation of the relationship between the State and the financial sector, whereby human rights implementation becomes the overriding goal, not a subsidiary or neglected obligation").

²⁹ See for example, Principles 39(d), 48(c)(iii) & 65(d).

³⁰ African Commission on Human and Peoples' Rights 'Guidelines on the Right to Water in Africa', para 32.2 (the Commission affirms that water services must not be delegated where delegation would "**constitute or contribute to the marketisation or commercialisation of water**").

³¹ UN Special Rapporteur on the right to water 'Service regulation' UN Doc A/HRC/36/45, para 70 ('**Community-based organizations are taking on an important role in informal [water] service provision, stepping in where the State is not involved in such activities**'); UNDP 'Adaptive community water initiative: Delivering water and sanitation to poor communities' (2012), 2 & 4 ('**local communities have the most knowledge about their living environment and community needs, and should be empowered to find solutions and make decisions while addressing water and sanitation issues**').

³² African Commission on Human and Peoples' Rights 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (ESCR Guidelines), para 92(i).

³³ UN Special Rapporteur on the right to education 'Right to education: the cultural dimensions of the right to education, or the right to education as a cultural right' UN Doc A/HRC/47/32, para 42.

³⁴ African Commission on Human and Peoples' Rights 'Guidelines on the Right to Water in Africa', para 8.7.

2.2 Public service obligations to protect the collective interest in social services

16) The provision of social services is an inherent public activity, critical for the realisation of economic, social, and cultural rights. When a private actor participates in social service provision, it exercises a core public function³⁵ that necessitates a high level of protection of the collective interest. These interests require States to impose a range of ‘public service obligations’ on all actors involved in social service delivery.³⁶ Public service obligations refer to a set of norms and regulations that ensure that the State obligations to respect, protect, promote and fulfil human rights are upheld, even when private actors manage the day-to-day aspects of social service provision. This ensures that when private actors decide to participate in social service delivery, they subsume their private interests into the broader, public objective of providing quality services to all. To execute this objective, States must ensure that all social services are:

- a) **available to all individuals on an equal basis and without discrimination.** For services such as education and essential healthcare, these services must be free, as required by international human rights law. Wherever necessary, the State must also provide other services (including water) at no cost to the user, to ensure non-discriminatory access. Further, States must also impose restrictions on fees and other tariffs, including price ceilings and fee exemptions;
- b) **accessible, even in times of emergency;**
- c) **acceptable to the users;**
- d) **of the highest attainable quality; and**
- e) **adequately monitored, controlled, and subject open to democratic public accountability.**

³⁵ UN Special Rapporteur on the Right to Education ‘Public private partnerships and the right to education’, UN Doc A/70/342, para 82.

³⁶ CESCR Committee ‘General Comment 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’ UN Doc E/C.12/GC/24, para 21; see also CRC Committee ‘General Comment 5: General measures of implementation of the Convention on the Rights of the Child’ (“The Committee emphasizes that States parties to the Convention have a **legal obligation** to respect and ensure the rights of children as stipulated in the Convention, which includes **the obligation to ensure that non-State service providers operate in accordance with its provisions, thus creating indirect obligations on such actors**”), para 6.

2.3 Core obligations in the context of social service delivery

17) At the very least, States must meet their core obligations to ensure the satisfaction of essential levels of rights,³⁷ and their related social services, with a priority for vulnerable and marginalised groups.³⁸ Where States fail to meet their core obligations due to a lack of available resources, they must publicly demonstrate that every effort has been made to use all resources at their disposal to meet their core obligations as a matter of priority.³⁹

2.4 Progressive realisation and temporal accountability

18) In recent years, the concept of ‘progressive realisation’ has been misused by States to evade their obligations under the Charter and to justify repeated failures to ensure the universal provision of social services. As a consequence, many communities have endured decades of deprivation, as they wait for water, healthcare and other social services that never arrive.⁴⁰ In the Commission’s view, these excessive delays – and the political inertia that prolongs them – is incompatible with the State obligation to progressively realise economic, social and cultural rights.

19) Progressive realisation does not allow States to implement their obligations with piecemeal improvements.⁴¹ Instead, it prescribes a comprehensive obligation to take a series of immediate steps that achieve visible results, which can be assessed against pre-determined benchmarks, with objectives that evolve over time. To achieve this, States must set short, medium and long-term goals to ensure the quality, availability, accessibility and acceptability of social services for all, while eliminating inequality in the enjoyment of the services between different categories of individuals and communities.⁴² Accordingly, States must outline a clear plan, detailing specific activities and concrete benchmarks, aimed at achieving their social service targets within a specific timeframe.

³⁷ CESCR Committee ‘General Comment 3: The nature of States parties’ obligations’ UN Doc E/1991/23, para 10.

³⁸ *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (2001), paras 65 & 66; African Commission on Human and Peoples’ Rights ‘Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights’ (ESCR Guidelines), para 17; CESCR Committee ‘General Comment 3: The nature of States parties’ obligations’ UN Doc E/1991/23, para 10.

³⁹ Modelled after CESCR Committee ‘General Comment 3: The nature of States parties’ obligations’ UN Doc E/1991/23, para 10 & Principle 18, Abidjan Principles.

⁴⁰ For an example of the delays in implementing social services, see M Langford & S Kahanovitz ‘South Africa: Rethinking Enforcement Narratives’ (2016) in M Langford, CA Rodríguez Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: making it stick*, 315, 322-333.

⁴¹ UN Rapporteur on the Right to safe drinking water and sanitation ‘Progressive realization of the human right to water and sanitation’ UN Doc [A/HRC/45/10](#), para 8.

⁴² UN Rapporteur on the Right to safe drinking water and sanitation ‘Progressive realization of the human right to water and sanitation’ UN Doc [A/HRC/45/10](#), paras 8 & 51.

20) These plans must impose safeguards for temporal accountability. These safeguards must specify (in months) clear timeframes for project completion, and a set of criminal and civil sanctions for any impermissible delays.

2.5 Prohibition of retrogressive measures

- 21) There is a rebuttable presumption that retrogressive measures violate the economic, social and cultural rights protected in the Charter.⁴³ A measure is retrogressive if it diminishes the full enjoyment of a right's normative content, including its availability, accessibility, acceptability, adaptability, or quality. For example, water disconnection, cuts to social security payments, and insufficient maintenance of infrastructure necessary for social service provision, are all retrogressive measures presumed to be in violation of the Charter. The delegation of a social service to private actors may also constitute a retrogressive measure, in situations where it reduces access to social services.
- 22) If retrogressive measures are taken, States have the burden of proving that the measures comply with the Charter. These measures must:⁴⁴
- a) be temporary in nature and effect, and remain in place only as long as they are necessary, while being extendable upon review;⁴⁵
 - b) pursue a legitimate aim, in accordance with the aims set out in Article 27(2) of the Charter;
 - c) be necessary, in that they must be justifiable after careful consideration of all less restrictive alternatives;⁴⁶
 - d) be proportionate, in the sense that a failure to act or the adoption of any other policy would be more detrimental to the legitimate aim pursued;
 - e) be non-discriminatory, in the sense that they do not disproportionately affect the rights of vulnerable and marginalised groups, and can mitigate against the inequalities that can emerge in times of crisis;
 - f) involve the full and effective participation of affected groups; and
 - g) protect the core content of economic, social and cultural rights at all times.⁴⁷

2.6 The rights to equality and non-discrimination

⁴³ African Commission on Human and Peoples' Rights 'Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (ESCR Guidelines), para 20.

⁴⁴ Reflects the content of Principle 45, Abidjan Principles; African Commission on Human and Peoples' Rights 'Guidelines on the Right to Water in Africa', para 6.3.

⁴⁵ Principle 45(a), Abidjan Principles.

⁴⁶ Principle 45(b), Abidjan Principles. Note, the Principles fuse necessity and proportionality under one heading, and use one standard to reflect both concepts. It is not advisable that the Commission adopt this approach.

⁴⁷ Principle 45(f), Abidjan Principles.

- 23) Social services have strong redistributive impacts, and are critical for realising the rights to equality and non-discrimination.⁴⁸ However, the emergence of commercial social services on the continent has frustrated these impacts, leading to increased inequalities and discrimination, especially on the grounds of income. This has been the case in the education sector, where Commission has noted how commercial private schools have heightened the risk of ‘discrimination against children from low-income households’.⁴⁹ In healthcare, commercial private actors have raised overall prices, placing life-saving procedures out of reach for poor communities.⁵⁰ Article 2 of the Charter, which expressly prohibits discrimination based on ‘fortune’, makes it clear that economic capacities must never obstruct an individual’s enjoyment of economic, social and cultural rights, and the social services required to implement these rights. Therefore, in a range of contexts, States must provide certain services on a low or no-fee basis, to ensure provision to everyone, regardless of their financial position.
- 24) Rights-holders accessing social services are often discriminated against on a range of grounds at the same time, which are referred to as intersectional discrimination. In its General Recommendation 28, the Committee on the Elimination of Discrimination Against Women described intersectionality as a ‘basic concept’ that underpins the prohibition against discrimination.
- 25) To align the provision of social services with the rights to equality and non-discrimination, States must:⁵¹
- a) identify and prevent discriminatory practices, including multiple, intersectional, associative, and perceptive discrimination, and sources of inequality in the enjoyment of social services;
 - b) protect individuals from discrimination by all social service providers; and
 - c) ensure equal and universal access to quality social services.⁵²

2.7 Public participation and transparency

⁴⁸ Article 2, African Charter on Human and Peoples’ Rights.

⁴⁹ African Commission on Human and Peoples’ Rights ‘Concluding Observations & Recommendations on the 5th Periodic State Report of the Republic of Uganda (2010 – 2012)’, para 80. For the risk of discrimination outside of Africa, see UN Special Rapporteur on the Right to Education ‘Privatization and the right to education’ UN Doc A/69/402, para 32.

⁵⁰ S Choonara & J Eyles ‘Out of control: profit-seeking behaviour, unnecessary medical procedures and rising costs of private medical care in South Africa’ (2016) 1 *BMJ Global Health* 13.

⁵¹ Principle 26, Abidjan Principles.

⁵² Article 13(3), African Charter on Human and Peoples’ Rights.

- 26) In the African Charter on Democracy, Governance and Elections, States committed themselves to ensuring ‘transparent and accountable’⁵³ governments that foster ‘popular participation in partnership with civil society’.⁵⁴ To ensure this, States must guarantee that all individuals have a right to participate in the design and administration of social services. Rights-aligned participation ensures that the poorest and most marginalised groups can make their voices heard, premised on the principal foundations of dignity, non-discrimination and equality. Therefore, in contrast to some ‘participatory’ processes that are pro forma, tokenistic or undertaken to endow predetermined outcomes with legitimacy, rights-aligned participation aims to transform the social service, by designing it around human rights standards. This applies to all social services, public and private.
- 27) Service providers must promote and seek out the active, free, informed and meaningful participation of social service rights-holders at all stages of the design, implementation and evaluation of policies that affect them. Their participation must be based on a comprehensive analysis of their rights, capacity and vulnerabilities, power relations, gender relations, and the roles of different actors and institutions. Participation may take place through elections, grassroots action, lobbying, public speaking, hearings, and other forms of governance whereby various interests and communities participate in shaping the laws and decisions that affect them.
- 28) In many contexts, especially where indigenous peoples are concerned, the right to public participation extends beyond the right to be heard or consulted, and actually requires affected groups to make decisions themselves, in accordance with their customs and traditions.⁵⁵ This includes the obligation to secure free, prior and informed consent (FPIC).⁵⁶ The Commission has noted many situations, where failure to secure FPIC can lead to situations of violence, litigation, operational delays, abrupt disconnection of services and even loss of life. To avoid this, States must take positive measures to ensure that all people, including marginalised and vulnerable groups, are given a real opportunity to take part in and influence the provision of public social services, including any decisions or policies which aim to delegate service provision to private actors. An essential component of this obligation is the need for accessible and transparent information. States must create and promote a culture of transparency by providing access to information that is objective, comprehensible, clear and

⁵³ Article 12(1), African Charter on Democracy, Elections and Governance.

⁵⁴ Article 27(2), African Charter on Democracy, Elections and Governance.

⁵⁵ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, Communication 276/ 03, 25 November 2009, paras 162 and 291.

⁵⁶ UN Special Rapporteur on the rights of indigenous peoples ‘Human rights impacts and consultation processes’ UN Doc A/HRC/45/34, paras 59-63.

consistent and is made available to everyone in different formats and in an appropriate language.

2.8 State responsibility for the provision of social services

29) The State cannot exempt itself from its human rights obligations by involving private actors in social service provision. While private actors may participate in social service provision, States are always fully responsible for any human rights violations that may occur. Therefore, when a private actor participates in social service provision and violates human rights in the process, the State can still be held directly responsible under international law. For this reason, the Commission held in *Haregewoin Gebre-Sellaise & Institute for Human Rights and Development in Africa (on behalf of former Dergue officials) v Ethiopia*, that if a state neglects to ensure the rights in the African Charter, this omission can itself 'constitute a violation, even if the State or its agents are not the immediate cause of the violation.'⁵⁷ Therefore, States must impose and enforce laws, regulations and policies to ensure that all private actors operating under their jurisdiction respect human rights.

⁵⁷ Communication 301/ 05, *Haregewoin Gebre- Sellaise & IHRDA (on behalf of former Dergue officials) v Ethiopia*, 7 November 2011, para 130; Communication 292/ 04, *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*, 22 May 2008, para 83.

3 The State obligation to ensure the provision of public social services

30) In the African human rights system, the obligation to ensure the provision of social services has a long history. Its roots trace back to Article 13(3) of the African Charter, which guarantees the right of all citizens the right to ‘access to public [...] services in strict equality’ before the law. In 2007, African States developed this obligation in the African Charter on Democracy, Elections and Governance. In Article 41, States committed to ‘provide and enable access to basic social services’ for all people under their jurisdiction. Two years later, in the African Union (AU) Convention for the Protection and Assistance of Internally Displaced Persons, AU States reaffirmed their social service obligations, committing to provide ‘internally displaced persons [with] food, water, shelter, medical care and other health services, sanitation, education, and any other *social services*.’⁵⁸ In 2010, the Commission analysed these provisions holistically, and called on States to ‘ensure the provision of basic social services (such as water, electricity, education and health care) and equitable access to resources.’⁵⁹

3.1 The obligation to establish and maintain a functional, effective and quality system for the provision of public social services

31) State parties to the African Charter have an obligation to ensure the public provision of social services, rooted in the Charter itself,⁶⁰ in general international human rights law,⁶¹ reflected widely in State practice.⁶² The Commission,⁶³ the CESCR Committee,⁶⁴ the CRC Committee

⁵⁸ Article 9(2)(b), African Union Convention for the Protection and Assistance of Internally Displaced Persons.

⁵⁹ African Commission on Human and Peoples’ Rights ‘ESCR Guidelines’, para 33.

⁶⁰ Article 13(3), African Charter (“**Every individual shall have the right of access to public [...] services in strict equality of all persons before the law**”).

⁶¹ General Comment No. 14 on the right to health makes repeated reference to the role of private health providers including a reference to the state’s obligations including “the provision of a public, private or mixed health insurance system which is affordable to all.” CESCR General Comment No. 14, *supra* note 47, ¶ 36.

⁶² See for example Section 34(1), South African Schools Act 84 of 1996, which provides that the State ‘must fund public schools from public revenue’; similarly, Kenya’s Health Act 21 of 2017 requires Kenya to ensure the distribution of ‘**publicly owned health institutions**, including hospitals, health centers, pharmacies, clinics and laboratories, as are deemed necessary for the promotive, preventive and rehabilitative health services.’. Article 8, Translated Constitution of the Central African Republic 2016 (“The State guarantees to all the right of access to the establishments of **public care** as well as the benefit of adequate medical treatments provided by professionals trained and endowed with the necessary equipment).

⁶³ See for example African Commission on Human and Peoples’ Rights ‘Concluding Observations: Uganda 5th Periodic Report’, para 80: (“***the Government [is] gradually releasing itself from the obligation to provide quality public education, which could result in discrimination against children from low-income households***”).

⁶⁴ CESCR Committee ‘Concluding Observations: Kenya’ UN Doc E /C.12/KEN/CO/2-5, para 58: (“***the Committee recommends that the State party take all necessary measures to strengthen its public education sector***”); CESCR Committee ‘General Comment 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’ UN Doc E/C.12/GC/24, para 23 (“***The obligation to fulfil requires States [...] in certain cases, to directly provide goods and services essential***”).

and a host of UN special mechanisms, have explicitly called for the State provision of ‘basic services’,⁶⁵ such as ‘public healthcare’,⁶⁶ ‘public housing’,⁶⁷ ‘electricity’,⁶⁸ education,⁶⁹ and ‘social assistance’.⁷⁰

32) A critical component of this obligation is the State’s duty to provide certain services to rights holders *directly*. This, for example, is the situation in primary education, where States have a core obligation to provide *public* education on a non-discriminatory basis.⁷¹ In the Commission’s assessment, the obligation to provide social services directly will also apply in other circumstances, in order to ensure access to ‘essential foodstuffs’, ‘essential primary health care’, or ‘basic shelter and housing’.⁷²

to such enjoyment”); CESCR Committee ‘General Comment 13: The right to education’ UN Doc E/C.12/1999/10, para 48 (“*it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances*”). CESCR Committee ‘Concluding Observations: Kenya’ UN Doc E/C.12/KEN/CO/2-5, para 58: (“*the Committee recommends that the State party take all necessary measures to strengthen its public education sector*”); CESCR Committee ‘General Comment 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’ UN Doc E/C.12/GC/24, para 23 (“*The obligation to fulfil requires States [...] in certain cases, to directly provide goods and services essential to such enjoyment*”); CESCR Committee ‘General Comment 13: The right to education’ UN Doc E/C.12/1999/10, para 48: (“*it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances*”).

⁶⁵ African Commission on Human and Peoples’ Rights *Communications 25/ 89- 47/ 90- 56/ 91- 100/ 93, Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jehovah v DRC, 4 April 1996*, para 47; See also CESCR ‘Concluding observations on the initial report of Indonesia’ (19 June 2014) UN Doc E/C.12/IDN/CO/1; CRC Committee ‘Concluding observations: Paraguay’ (10 February 2010) UN Doc CRC/C/PRY/CO/3.

⁶⁶ CESCR ‘Concluding observations on the third periodic report of the Bolivarian Republic of Venezuela’ (7 July 2015) UN Doc E/C.12/VEN/CO/3, para 27.

⁶⁷ CESCR ‘Concluding observations on the initial to third reports of the United Republic of Tanzania’ (13 December 2012) UN Doc E/C.12/TZA/CO/1-3; CESCR ‘Concluding observations on Ethiopia’ (31 May 2012) UN Doc E/C.12/ETH/CO/1-3, para 20; CESCR ‘Concluding observations on the initial and second periodic reports of Djibouti’ (30 December 2013), UN Doc E/C.12/DJI/CO/1-2.

⁶⁸ African Commission on Human and Peoples’ Rights ‘Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights’ (ESCR Guidelines), para 33; African Commission on Human and Peoples’ Rights *Communications 25/ 89- 47/ 90- 56/ 91- 100/ 93, Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jehovah v DRC, 4 April 1996*, para 47.

⁶⁹ CESCR Committee ‘Concluding Observations on the Periodic Report of Kenya’ UN Doc E/C.12/KEN/CO/2-5, paras 57-58 (The Committee expresses its concern “that inadequacies in the public schooling system have led to the proliferation of so-called ‘low-cost private schools’ which has led to segregation or discriminatory access to education particularly for disadvantaged and marginalized children”).

⁷⁰ CESCR Committee ‘General Comment 19: The right to social security E/C.12/GC/19, para 50:

⁷¹ CESCR Committee ‘General Comment 13: The right to education’ UN Doc E/C.12/1999/10, para 57.

⁷² Modelled after CESCR Committee ‘General Comment 3: The nature of States parties’ obligations’ UN Doc E/1991/23 (the Committee is of the view that a **minimum core obligation** to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights **is incumbent upon every State Party**. Thus, for example, a State party in which any significant number of individuals is **deprived of essential foodstuffs**, or **essential primary health care**, or **basic shelter and housing**, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*).
”

33) Services of this nature must be provided in a public system. The term 'public' in this context requires a different understanding from the one that is predominant in many parts of the continent and the world. Public services have in practice not always been developed and governed as true public services. They have at many times served the interests of the wealthy and powerful, contributing to the oppression or exclusion of certain groups. In this General Comment the term 'public' is less concerned with the public nature of the body delivering the services, than with the practical modalities of *how* the service is delivered. In this understanding, public provision of social services is distinctive in that it allows for the equal and democratic involvement of all members of the community or society in their design, organisation, governance, financing, delivery and monitoring, of social services, in the exclusive pursuit of the public interest. As a result, publicly delivered social services must be able to take a long-term perspective, and must be democratically accountable to the public.

3.2 The obligation to adequately fund public services

- 34) The obligation to provide certain social services directly cannot be realised without sufficient resources being mobilised, allocated and spent in an accountable, effective, efficient, equitable, participatory, transparent and sustainable manner. Under Article 1 of the Charter, States have an obligation to mobilise the maximum available resources towards social service provision. This obligation refers not only to financial resources, but *all* resources, existing and potential, including natural, human, technological, institutional and informational resources.⁷³
- 35) When budgeting for public social services, States must ensure that their spending must not fall below the level required by domestic or international funding commitments, such as the percentage of gross domestic product earmarked in development goals.⁷⁴ Further, budgetary allocations must reduce inequalities in the enjoyment of social services between different groups. This requires States to make evidence-based, per capita allocations for different groups, disaggregated by age, social and economic status, geography, ethnicity, income, gender, disability and other grounds of discrimination.⁷⁵
- 36) Where social service responsibilities are shared between a national government and a subnational government, States must ensure that sub-national governments have sufficient funding to meet their social service targets. These funds must be dispersed fully, as soon as possible, to avoid any delay in social service delivery.⁷⁶
- 37) States must also reserve sufficient funds to deliver social services during emergencies, including the outbreak of war, natural disasters or public health crises.⁷⁷ These funds must be administered through a designated entity, during ordinary circumstance and emergencies.

⁷³ UN Special Rapporteur on the human rights to safe drinking water and sanitation ‘Progressive realization of the human rights to water and sanitation’ UN Doc A/HRC/45/10, para 20; R Robertson ‘Measuring State compliance with the obligation to devote the “maximum of available resources” to realizing economic, social and cultural rights’ 16 *Human Rights Quarterly* 693–714.

⁷⁴ Principle 15, Abidjan Principles. Minor adjustments made to eliminate references to education.

⁷⁵ CRC Committee ‘General Comment 19: Public budgeting for the realisation of children’s rights’ UN Doc CRC/C/GC/19, paras 67 & 68.

⁷⁶ UN Special Rapporteur on the right to water ‘Financing, budgeting and budget tracking for the realisation of the human rights to water and sanitation’ (2014), 35 https://unhabitat.org/sites/default/files/download-manager-files/1413368678wipdm_Book3_Finance.pdf.

⁷⁷ UN Special Rapporteur on the right to education ‘Right to education in emergency situations’ UN Doc A/HRC/8/10, para 67 (‘The Special Rapporteur underlines that emergencies do not relieve States from their obligation to take all appropriate measures to ensure the realization of the right to education [and to ensure] financial support for primary education in order to guarantee that it continues to be available during emergencies’).

States must take proactive steps to ensure the delivery of social services even during circumstances of fragility and protracted crisis.⁷⁸

⁷⁸ UN Special Rapporteur on the right to education ‘Right to education in emergency situations’ UN Doc A/HRC/8/10, para 95; CRC Committee in ‘General Comment 19: Public budgeting for the realisation of children’s rights’ UN Doc CRC/C/GC/19, para 31.

4 The State obligation to regulate private provision of social services

38) Regulation is the central pillar of the State's obligation to *protect* human rights. The regulatory obligation is derived from Article 1 of the African Charter, which requires States to adapt their domestic legal order to the norms of the African human rights system. The obligation to regulate social services follows from the understanding that although some private actors positively contribute to the provision of social services, some of them fail to live up to the mandate delegated to them, thereby triggering a range of harms in the communities they serve. To prevent this, regulation aims to anticipate these harms before they occur, and prevent any recurrences. The Commission emphasised the importance of regulation in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, where it held:

[t]he State is obliged to protect right-holders against other subjects [...]. This obligation requires the State to [create and maintain] an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms.⁷⁹

39) This regulatory 'interplay' requires States to adopt administrative, legislative, investigative, adjudicatory and other measures to prevent, and when applicable, mitigate, investigate, punish and redress any human rights abuses under their jurisdiction, regardless of the public or private nature of the entity providing the social service.⁸⁰ This obligation extends to all ancillary goods, facilities and activities required for the provision of social services.

40) Regulation ensures that social services are delivered on time to the communities that need them, and that the quality of these services is progressively improved. To execute this critical function, States must establish, maintain and strengthen an effective regulatory system to ensure that private actors respect human rights in social service provision. This system must a) set human rights standards for the social service in question, b) monitor and evaluate compliance by service providers, c) prohibit, punish and redress human rights violations, and d) facilitate democratic public participation in the regulatory process, in accordance with the obligations set out below.

4.1 The obligation to establish regulatory standards

⁷⁹ Communication 155/ 96, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, 27 October 2001, para 46.

⁸⁰ *Ximenes-Lopes v Brazil* IACtHR Series C 149 (2006), para 85.

41) Regulation is only effective if it is anchored in well-formulated performance standards. These standards must be clear, objective, and where necessary, quantitative, to enable private social service providers to comply efficiently. Regulatory standards must not only withstand technical scrutiny, but must also contain explicit reference to the State's human rights obligations under the African Charter. These standards must be designed in a participatory process involving all stakeholders, including the communities being serviced, civil society organisations, and private service providers themselves. States must ensure that their regulations enforce the public service obligations outlined above, by addressing the following issues:⁸¹

- a) the administration of the private social service provider, including:
 - i) the process for registration and licensing, and the conditions for their withdrawal;
 - ii) reporting requirements to the State, such as financial and operational or quality information;
 - iii) full and effective participation of communities, trade unions, and other civil society organisations;
 - iv) labour standards;
 - v) where necessary, the level of fees and other direct and indirect charges, paying particular attention to the risk of over-indebtedness and the State's obligation to ensure that social services are accessible;
 - vi) access to information by the general public;
- b) the protection of rights of access in the context of failure or delay in the payment of tariffs, where tariffs are appropriate;
- c) minimum requirements regarding accessibility, including access for persons with disabilities in line with the obligation to guarantee reasonable accommodation, and ensuring that service providers do not directly or indirectly charge additional fees for these accommodations;
- d) protection of communities, against excessive marketing or advertising by the service provider that supplies them;

⁸¹ Modelled after Abidjan Principles, Principle 55.

- e) privacy and data protection, ensuring in particular respect for the rule of law and ethical practices with regards to personal data. States must also ensure that no personal information, including biometric data, be collected or retained without consent, or be shared with third parties without express consent, including for commercial, immigration, political or security purposes.

4.2 Monitoring and evaluation

42) Many States have strong regulations on paper, but have no efficient mechanisms for monitoring compliance with these standards in practical terms.⁸² Monitoring - which includes processes such as inspection, data collection, and routine evaluation - is a vital tool for ensuring that service providers obey the applicable regulations, and for assessing the State's own compliance with its obligation to realise economic, social and cultural rights.

43) Effective monitoring requires States to collect, analyse and disseminate accurate information on the activities of all social service providers, as well as their long and short-term systemic impacts on economic, social and cultural rights.⁸³ This requires domestic law to impose a duty of disclosure on service providers, compelling them to cooperate with the regulatory authorities, and provide complete and reliable information which details the quality of the services they offer, complaints received from users and any challenges faced in extending services to underserved areas.

44) In the context of State obligation to constantly improve the level of realisation of the rights related to social services, monitoring informed by human rights is essential for understanding current levels of access to social services. It enables States to make a context-specific situational analysis that informs public policy, measures progress, and evaluates performance and overall outcomes. Further, it must enable the State to anticipate the risk of retrogression, and institute measures to avoid it.

4.3 Enforcement and accountability

45) States must enforce the regulations they promulgate. This requires regulators to carry out a serious investigation of all alleged human rights violations linked to social service provision, identify those responsible, impose the appropriate punishment and to ensure the victims receive adequate compensation.

⁸² UN Special Rapporteur on the Right to Water 'Different levels and types of services and the human rights to water and sanitation' UN Doc A/70/203, para 46 (Noting that in many contexts '[a] regulatory framework and standards for piped [water] systems are generally available, [but] are not always effectively put in place and monitored.')

⁸³ Principle 85, Abidjan Principles.

46) When enforcing regulations, States must take all necessary steps to prevent a denial of justice and ensure the right to effective remedy and reparation. States have a positive obligation to remove substantive, procedural and practical barriers to remedies, including by establishing parent company or group liability regimes, providing legal aid and other funding schemes to claimants, enabling human rights-related class actions and public interest litigation. In the context of investigations, States must facilitate access to relevant information and the collection of evidence abroad, including witness testimony, and allowing such evidence to be presented in judicial proceedings. Where victims lack the resources to pursue a legal remedy, States must ensure that civil legal aid is made available.⁸⁴

4.4 Democratic public participation

47) Regulatory decision-making processes must ensure genuine public participation. Every individual and group have the right to participate actively, freely and in a meaningful way in the process of setting service standards that may affect their enjoyment of economic, social and cultural rights. States must take adequate steps to ensure that all people, including marginalised and vulnerable groups, are given a real opportunity to take part in and influence the making of regulations, as well as their monitoring and enforcement.

4.5 Safeguards against regulatory capture

48) Many private actors have a vested interest in a weak and ineffective regulatory environment.⁸⁵ Often, these actors use their expertise in the industry, and close proximity to the regulator, to pressure authorities into adopting weak human rights protections.⁸⁶ This phenomenon is referred to as ‘regulatory capture’ – where an interest group uses its influence or resources to secure a favourable regulatory decision, or even, regulatory indecision.

49) Regulatory capture takes many forms, from the explicitly illegal (bribery and intimidation), to more pernicious methods (such as lobbying by powerful interest groups). In the most severe

⁸⁴ CESCR Committee ‘Concluding observations: Canada’ UN Doc E/C.12/CAN/C0/4 (Calling on Canada to “ensure that civil legal aid with regard to economic, social and cultural rights is provided to poor people in the provinces and territories”).

⁸⁵ According to Feroz, there are four factors that enable regulated interest groups to capture of the regulator: (1) superior economic resources, (2) interest in the beneficial outcome that can be derived by controlling the regulatory process, (3) sound organisational capabilities and (4) industry-specific technical knowledge. See EH Feroz ‘Financial Accounting Standards Setting: A Social Science Perspective’ (1987) 5 *Advances in Accounting*, 3-14.

⁸⁶ SA Shapiro ‘The complexity of regulatory capture: diagnosis, causality and remediation’ 17 *Roger Williams University Law Review*, 101, 117 (“lobbyists, participate more frequently in filing rulemaking comments, have far more informal contacts with regulators than do public interest groups”); GJ Stigler ‘The Theory of Economic Regulation’ (1971) *The Bell Journal of Economics and Management Science* 3 (arguing that, eventually, the regulatory system “is acquired by the industry and is designed and operated primarily for its benefit”).

cases, the interest group exerts unmitigated control over the regulator, and can prescribe its objectives, steer its rulemaking and even supply it with personnel.⁸⁷

50) To address these risks, States must ensure that their regulatory institutions are immune to pressure from illegitimate interests. States must lay down adequate safeguards to prevent conflicts of interest in the regulatory process, by introducing laws that compel civil servants to disclose all meetings with commercial actors, and the subject matter that was discussed, as well as any potential conflicts of interest, including professional, familial and other conflicts. Further, when regulators make calls for public input on new regulations, they must distinguish between legitimate, high-quality research, on the one hand, and unreliable, industry-sponsored contributions that advance private interests, on the other. States must also consider incorporating a ‘public advocate’ in the regulatory process, to ensure that the interests of vulnerable marginalised groups are upheld at each stage of regulation.

⁸⁷ EM Wirsching ‘The revolving door for political elites: an empirical analysis of the linkages between government officials’ professional background and financial regulation’ <https://www.oecd.org/corruption/integrity-forum/academic-papers/Wirsching.pdf>.

5 Conditions for the delegation of public resources to support private actors involved in social service provision

51) Under international human rights law, the State has *no obligation* to delegate resources to private social service providers.⁸⁸ Therefore, States are well within their rights to deny subsidies, or other methods of support to private actors under their jurisdiction. In certain contexts, however, especially in times of crisis or emergency, it may be necessary for States to temporarily direct public money, expertise or labour to private actors, in order to ensure social services are enjoyed by the communities that require them. This support, for example, would be appropriate to avoid the interruption of water services during emergencies, or to enable children with disabilities to access quality education in a language they understand. In these situations, States may only engage with the private sector if they strictly observe the substantive, procedural, and operational requirements set out below.

5.1 Substantive requirements for the delegation of public resources

52) Any potential public funding to an eligible private actor must meet all the following substantive requirements:⁸⁹

- a) it must be a time-bound measure, which the State publicly demonstrates to be the only effective option to advance the realisation of human rights in the situation in question in order to:
 - i. ensure short-term access to social services where the State publicly demonstrates that there is no other option which would realise the applicable economic, social, and cultural rights; or
 - ii. integrate private institutions that have previously operated independently into the public social service system; or
 - iii. to ensure that all private entities provide the same quality of services.
- b) it does not foreseeably risk or delay the development of a public social service system of the highest attainable quality;

⁸⁸ See for example: *Belgian Linguistic Case (No 2)* (1979–80) 1 EHRR 252 (European Court of Human Rights) paras 7-13; *Lindgren v Sweden*, Communication No 299/1988; UN Doc. CCPR/C/40/D/298-299/1988 (1990); *Carl Henrik Blom v Sweden*, Communication No. 191/1985, UN Doc CCOR/OP/2; *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education* [2013] ZACC 10 (South African Constitutional Court).

⁸⁹ Modelled after Principle 65, Abidjan Principles & African Commission on Human and Peoples' Rights 'Guidelines on the Right to Water in Africa', para 32.2. Only affected changes to better reflect this General Comment's broader scope, which looks beyond education and water.

- c) it does not lead to a diversion of public resources that would constitute an impermissible retrogressive measure, in particular by lowering standards for state-delivered social services;
- d) it does not constitute or contribute to the commercialisation of the delivery of social services;
- e) it ensures equal access to the public and does not privilege access to a specific group or geographical region;
- f) it does not create a foreseeable risk that the funded private actor could exercise an undue influence on the service or account for such a substantial part of the system that it risks undermining economic, social and cultural rights; and
- g) it does not create a foreseeable risk of any other systemic impact on social services, paying particular attention to obligations related to non-discrimination, and equality.

5.2 Procedural requirements for the delegation of public resources

53) Any allocation of public funding to an eligible private actor must meet all of the following procedural requirements:⁹⁰

- a) before the funding is considered, there must be an adequate regulatory framework put in place addressing the due process, rules and modalities for such funding, including regulations for (b) to (d) below;
- b) before the funding is determined:
 - i. the State must publicly demonstrate that such public funding meets all of the substantive, procedural, and other requirements; and
 - ii. the State assesses and publicly demonstrates its capacity and intent to continuously monitor and regulate the private actor's ability to meet the applicable standards;
- c) the decision to award funding must move through a participatory, inclusive, transparent, and accountable consultation process involving a meaningful opportunity for full and effective participation by all stakeholders. The process must include

⁹⁰ Modelled after Principle 66 of the Abidjan Principles. Only affected changes to better reflect this General Comment's broader scope, which looks beyond education.

human rights impact assessments, and the State must facilitate full access to all relevant information.

- d) the funding must be reversible, upon regular review by national entities which have the express mandate, and the institutional and regulatory capacity to monitor and regulate private institutions that receive state resources for the delivery of social services.

5.3 Operational requirements for the delegation of public resources

54) State funding for private institutions must meet the following operational requirements:⁹¹

- a) The State must impose the same standards on private institutions that it imposes on public ones, including the effective protection of working conditions and terms of employment, labour, and union rights.
- b) States must take all effective measures to overcome as effectively and expeditiously as possible the inability to deliver or manage any aspect of the provision of social services which justified funding a private actor. In so doing, States must ensure that the funding reinforces and is regularly assessed against State capacity to meet their obligations to realise the economic, social and cultural rights protected under human rights law.
- c) Any public funding of an eligible private institution must be subject to prior, continuous, and retrospective human rights impact assessments, which are made public, and are used to continually re-evaluate the contribution of the funding to the delivery of social services, and if necessary, change or terminate the funding. The assessment must measure both the individual and systemic effect of each private actor receiving the funding, in the short and long term, and involve all stakeholders, including beneficiaries, communities, unions, and other civil society organisations.
- d) The cost of the human rights impact assessment, regulation, and other obligations of the States must be considered as part of the evaluation of the cost of the arrangement for funding, with due consideration given to the State's obligation to deliver social services of the highest attainable quality for all to the maximum of its available resources.
- e) States must make the continued provision of funding conditional on the fulfilment of the required standards, and ensure that all contracts permit the State to withdraw from the funding without prejudice if the standards are not met, while ensuring the continued enjoyment of social services. They must withdraw any public funding where it substantially nullifies or impairs the realisation of the social, economic and cultural rights, and the development of a public social service system.

⁹¹ Modelled after Principle 67 of the Abidjan Principles. Only affected changes to better reflect this General Comment's broader scope, which looks beyond education.

- f) States must ensure that all private actors receiving state funds for the delivery of social services make all proprietary data and material that could help to improve the public social service system available without a licence, within a reasonable time defined by law, to the relevant public authorities. This must be done with due respect for the right to privacy, and the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which they are the author.

5.4 Private social service providers ineligible for delegation for public funding of private actors

55) States must not fund or support, directly or indirectly, any private actor that:

- a) abuses the rights to equality and non-discrimination, including by being selective; or expelling or sorting rights-holders, whether directly or indirectly, on the basis of the socio-economic disadvantage, or any other prohibited ground;⁹²
- b) is commercial and excessively pursues its own self-interest;⁹³
- c) charges fees that substantially undermine access to social services;⁹⁴
- d) does not meet any of the public service obligations applicable;⁹⁵
- e) does not comply with all of its domestic or international financial obligations;⁹⁶ or contributes to an adverse systemic impact on the enjoyment of social services or undermines the realisation of human rights in any other way.⁹⁷

⁹² Modelled after Principle 73(a), Abidjan Principles.

⁹³ Modelled after Principle 73(b), Abidjan Principles.

⁹⁴ Modelled after Principle 73(c), Abidjan Principles.

⁹⁵ Modelled after Principle 73(d), Abidjan Principles.

⁹⁶ Modelled after Principle 73(e), Abidjan Principles.

⁹⁷ Modelled after Principle 73(f), Abidjan Principles.

6 Human rights consequences for actors other than States⁹⁸

56) Principally, this General Comment addresses State parties to the African Charter. However, as observed in the Commission's *SERAC* decision,⁹⁹ and many others,¹⁰⁰ States are not the only actors whose actions can ignite human rights consequences. Private actors (domestic and transnational) as well as intergovernmental organisations, have had well documented impacts on human rights in the region, both positive and negative. Therefore, even though this General Comment is primarily directed at State parties to the African Charter, the guidance it provides can assist intergovernmental organisations and private actors as well. Issues relevant to both these actors are addressed below.

6.1 Human rights consequences for private actors

6.1.1 The nature of the duties under the African Charter

57) The African Charter¹⁰¹ imposes direct duties on private actors in articles 27, 28, and 29.¹⁰² Many of these duties have a binding legal character, including the duty to pay taxes,¹⁰³ and respect the rights of others,¹⁰⁴ which are well-established in the Commission's jurisprudence,¹⁰⁵ its soft law standards,¹⁰⁶ and its recommendations to African States.¹⁰⁷

⁹⁸ This title modelled after similar headings in the IC ESCR in CESCR Committee 'General Comment 13: The right to education' UN Doc E/C.12/1999/10, para 60; CESCR Committee 'General Comment 15: The right to water' UN Doc E/C.12/2000/11, 60.

⁹⁹ Communication 155/ 96, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, 27 October 2001, para 54.

¹⁰⁰ Communication 301/ 05, *Haregewoin Gebre- Sellaise & IHRDA (on behalf of former Dergue officials) v Ethiopia*, 7 November 2011, para 130; Communication 292/ 04, *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*, 22 May 2008, para 83.

¹⁰¹ Note, the African Charter is not the only instrument that contemplates duties for private actors. Consider, Article 3(1), Convention on the Rights and Responsibilities of the Child: "In all actions concerning children, whether undertaken by **public** or **private** social welfare institutions courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

¹⁰² Articles 27-29, African Charter on Human and Peoples' Rights.

¹⁰³ Article 29(6), African Charter on Human and Peoples' Rights.

¹⁰⁴ Article 27(2), African Charter on Human and Peoples' Rights.

¹⁰⁵ Communications 105/ 93, 128/ 94, 130/ 94 and 152/ 96, *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*, October 1998, paras 68 and 69. Before the African Court, see African Court on Human and Peoples' Rights, *In the Matter of Lohé Issa Konaté v Burkina Faso*, App. No. 004/ 2013, Judgment on the Merits, 5 December 2014, para 134.

¹⁰⁶ African Commission on Human and Peoples' Rights 'Advisory note to the African group in Geneva on the legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises (legally binding instrument)' 2021, at 4; Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, October 2011, para. 15 ('the duty of the individual to pay taxes imposed by the African Charter implies that there is an obligation on the State to institute an effective and fair taxation system and a budgeting process).

¹⁰⁷ African Commission on Human and Peoples' Rights 'Advisory note to the African group in Geneva on the legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises (legally binding instrument)' 2021, at 4 ("Under the African Charter,

58) These duties affirm the Charter's central object and purpose, which is for *all* members of society - individuals, families, local communities, non-governmental organisations, and the private business sector - to work collaboratively to achieve the universal enjoyment of human rights on the continent.¹⁰⁸ Although commercial actors are important stakeholders for the achievement of these goals, the Charter must never be interpreted as a justification for commercial activity in the social service sector. Any commercial actors participating in social service provision does so *voluntarily*, and subject to strict requirements under the African Charter. One of these requirements is for private actors to exercise human rights due diligence, to ensure that none of their operations interfere with the enjoyment of human rights, or facilitate the abuse of rights by any third party. This content of this duty is discussed in more detail below.

6.1.2 Mandatory human rights due diligence

59) Since it was outlined in the UN Guiding Principles on Business and Human Rights, mandatory human rights due diligence has increasingly become the backbone of private actor compliance with international human rights law.¹⁰⁹ Across the continent, a range of States are implementing proposals to integrate human rights due diligence into their company law and national action plans,¹¹⁰ in an Africa-wide commitment to hold private actors accountable for their human rights abuses.

60) To execute their duty to perform due diligence, private social service providers must take comprehensive and proactive measures to uncover human rights risks, actual and potential, over the entire life cycle of their operations, to identify risks, prevent them from happening, and mitigate them when they occur.¹¹¹ This duty goes beyond doing no harm, and requires

obligations of business enterprises towards rights holders have a **clear legislative basis**. Article 27 of the African Charter provides for the duties of individuals and its sub-provision 2 lays down the obligation to exercise rights 'with due regard to the rights of others'. Clearly, if this obligation can be imposed on individuals, there is an even stronger moral and legal basis for attributing these obligations to corporations and companies.'").

¹⁰⁸ African Charter on Human and Peoples' Rights, preambular paras 4, 5, 6, 7, & 8; see also the CESCR Committee 'General Comment 12: Right to adequate food' UN Doc E/C.12/1999/5, para 20: ('While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, **all members of society** - individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the **private business sector** - have responsibilities in the realization of the right to adequate food.').

¹⁰⁹ UN Working Group on the issue of human rights and transnational corporations and other business enterprises 'Corporate human rights due diligence – emerging practices, challenges and ways forward' UN Doc A/73/163, para 10(a).

¹¹⁰ See for example, Kenya <https://globalnaps.org/country-issue/human-rights-due-diligence-kenya/>; Uganda 'National Action Plan: Business and Human Rights'; Tanzania 'National Human Rights Action Plan' http://www.ohchr.org/Documents/Issues/Education/Training/actions-plans/Excerpts/Tanzania_en%202013-2017.pdf.

¹¹¹ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework' UN Doc A/HRC/11/13, para 71.

that private actors adopt a duty of care, compelling them to remedy any adverse human rights effects they contribute to. This has four key elements. First, private actors must undertake human rights impact assessments to identify and assess actual or potential harms their activities cause, or which may be directly linked to their operations, products or services.¹¹² Second, the private actor must integrate the outcomes of these human rights impact assessments across their operations, taking appropriate action according to its involvement in the harm.¹¹³ Third, the private actor must track the effectiveness of measures and processes to address adverse human rights impacts in order to know if they are working.¹¹⁴ Fourth, the private actor must communicate to the public exactly how these impacts are being addressed while demonstrating to stakeholders — victims in particular — that there are adequate policies to implement respect for human rights in practice.¹¹⁵

61) To implement each of these four elements, private actors must do the following:

- a) establish human rights mechanisms, that regularly assess any adverse impacts their operations, practices, services, and products may have on human and peoples' rights;¹¹⁶
- b) integrate the findings of their impact assessments into corporate culture, management, and operation;¹¹⁷
- c) consult with affected groups and provide platforms for meaningful participation before, during and after the project cycle;¹¹⁸

¹¹² UN Working Group on the issue of human rights and transnational corporations and other business enterprises 'Corporate human rights due diligence – emerging practices, challenges and ways forward' UN Doc A/73/163, para 10(a).

¹¹³ UN Working Group on the issue of human rights and transnational corporations and other business enterprises 'Corporate human rights due diligence – emerging practices, challenges and ways forward' UN Doc A/73/163, para 10(b).

¹¹⁴ UN Working Group on the issue of human rights and transnational corporations and other business enterprises 'Corporate human rights due diligence – emerging practices, challenges and ways forward' UN Doc A/73/163, para 10(c).

¹¹⁵ UN Working Group on the issue of human rights and transnational corporations and other business enterprises 'Corporate human rights due diligence – emerging practices, challenges and ways forward' UN Doc A/73/163, para 10(d).

¹¹⁶ UN Working Group on the issue of human rights and transnational corporations and other business enterprises 'Corporate human rights due diligence – emerging practices, challenges and ways forward' UN Doc A/73/163, para 10(a); Principle 13(a), UN Guiding Principles on Business and Human Rights.

¹¹⁷ UN Working Group on the issue of human rights and transnational corporations and other business enterprises 'Corporate human rights due diligence – emerging practices, challenges and ways forward' UN Doc A/73/163, para 10(b); Principle 19(b), Guiding Principles on Business and Human Rights.

¹¹⁸ CESCR Committee 'General Comment 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' UN Doc E/C.12/GC/24, para 18.

- d) disclose financial and operational information to the public in an accessible and transparent manner, in accordance with the relevant freedom of information laws;
- e) pay their fair share of taxes;¹¹⁹
- f) respect labour rights;
- g) refrain from imposing or facilitating policies that would nullify or impair State capacity to meet international human rights obligations.¹²⁰

6.2 Human rights consequences for intergovernmental actors

62) The African Union, the United Nations, their specialised agencies and other intergovernmental actors are critical stakeholders for the realisation of economic, social and cultural rights on the continent. These organisations are encouraged to support State efforts to provide social services and regulate private actor conduct. This support may include technical cooperation, financial assistance, institutional capacity development, and knowledge sharing.

63) States that participate in or transfer their decision-making to an intergovernmental organisation, including international financial institutions, or a global fund, must take steps to ensure that the relevant organisation acts in accordance with the international human rights obligations of that State. Accordingly, States must:¹²¹

- a) closely monitor the conduct of the intergovernmental organisation, including its policies, omissions, and other acts, to ensure that it does not interfere with the enjoyment of social services;
- b) instruct their representatives to the intergovernmental organisation to oppose policies or other acts that would nullify or impair the capacity of any State to meet its social services obligations;¹²²
- c) promote policies within the intergovernmental organisation that enhance States' abilities to respect, protect, fulfil and promote human rights.

¹¹⁹ Article 29(6), African Charter.

¹²⁰ Modelled after Principle 76, Abidjan Principles.

¹²¹ Modelled after Principle 22, Abidjan Principles.

¹²² Modelled after Principle 76, Abidjan Principles.

7 Reporting obligations

64) The State reporting process under Article 62 of the African Charter is an essential mechanism for identifying and reviewing best practices in social service provision by States and private actors. Not only does it offer States an opportunity to conduct introspection and evaluate their progress in implementing the Charter, it also allows the Commission to engage in a constructive dialogue with the State, to address new issues affecting human rights, and to improve methods of responding to these challenges. To improve this process, States must, in their timely periodic reports to the African Commission demonstrate the following:

- a) the extent to which economic, social and cultural rights are protected by a constitution, bill of rights, basic law, other national legislation and, if applicable, what provisions are made for derogations, restrictions or limitations;
- b) the extent to which private actors are involved in the provision of social services, and their reported adverse effects on human rights;
- c) the structure of their regulatory framework for private actors involved in social service provision, including details about the regulatory bodies involved, the responsibilities they execute and the actors over which they exercise jurisdiction;
- d) the extent to which private actors have been held accountable for human rights abuses under their jurisdiction;
- e) whether the provisions of the African Charter and this General Comment can be and have been invoked before, or directly enforced by the States' courts, tribunals or administrative authorities;
- f) which judicial, administrative and other authorities have jurisdiction over the implementation human rights and social services, together with the extent of their competence;
- g) the judicial and other appropriate remedies in place enabling those directly or indirectly affected to obtain redress in cases where access to social services has been denied, with reference to examples of relevant decisions or case law;
- h) structural or other significant obstacles arising from factors outside the State party's control that impede the universal provision of social services;

- i) whether the State accepts the jurisdiction of the African Court on Human and Peoples' Rights, or any other human rights mechanism and, if so, the nature and progress of all cases involving it; and
- j) the budget allocations and trends, in percentages of national or regional budgets or gross domestic product, allocated specifically to the implementation of the public social services.