

African Commission on Human and Peoples' Rights



GENERAL COMMENT 7
STATE OBLIGATIONS UNDER THE AFRICAN CHARTER ON
HUMAN AND PEOPLES' RIGHTS IN THE CONTEXT OF
PRIVATE PROVISION OF SOCIAL SERVICES

**General Comment 7: State obligations under
the African Charter on Human and Peoples'
Rights in the context of private provision of
social services**

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Preface

The African Commission on Human and Peoples' Rights is pleased to present General Comment 7 on State obligations under the African Charter on Human and Peoples' Rights with regard to social services in the context of private provision. This General Comment signals the Commission's continued interest in this important topic, as expressed in Resolution 420, on the State Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services, and Resolution 434, on the Need to Develop Norms on States' Obligations to Regulate Private Actors Involved in the Provision of Social Services.

In Resolution 420, the Commission noted with concern that instead of improving access to economic, social and cultural rights, many private actors were increasingly contributing to the 'low level of enjoyment' of these rights on the continent. Later, the Commission adopted Resolution 434, mandating the Working Group on Economic Social and Cultural Rights (Working Group) to develop norms to address this problem. Resolution 434, adopted just seven days before the World Health Organisation declared SARS-CoV-2 (COVID-19) an official pandemic, could not have arrived at a more appropriate time. In the months that followed, Africa saw the full effects of the pandemic, which were exacerbated by decades of underinvestment in public social services on the continent.

In light of these developments, this General Comment reflects many months of research and debate over the Commission's jurisprudence, its existing soft-law standards, and recent state practice on the continent. In carrying out its task, the Working Group was supported by five partners: the Centre for Human Rights, University of Pretoria; the Dullah Omar Institute, University of the Western Cape; the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR); the Initiative for Social and Economic Rights (ISER), the Open Society Foundation, and the Right to Education Initiative (RTEI). The Commission could not be more grateful for their invaluable contributions.

The Commission adopted this General Comment on 28 July 2022, during its 72nd Ordinary Session, held virtually.

Commissioner Mudford Mwandenga
Chairperson of the Working Group on Economic,
Social and Cultural Rights

A Introduction

- (1) In African Union (AU) Agenda 2063, the continent's 'great task' is to establish a more egalitarian Africa founded on 'good governance, democracy, respect for human rights, justice and the rule of law'.¹ A critical step towards achieving this goal is the universal provision of quality social services. This broad range of services – which can include anything from healthcare to piped water and quality education – ensures that the necessities of life are provided to all individuals, no matter the conditions of their birth. The provision of these services, therefore, is not only integral to the welfare of each African but is also an important indicator of a government's commitment to the objectives outlined in the African Charter on Human and Peoples' Rights (African Charter).

- (2) In the African regional human rights system, the State 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 'access to public [...] services in strict equality' before the law. In 2007, African States developed this obligation further in the African Charter on Democracy, Elections and Governance (African Democracy Charter) by committing themselves, in Article 41, to 'provide and enable access to basic social services' to everyone under their jurisdiction. Two years later, in the AU Convention for the Protection and Assistance of Internally Displaced Persons, AU States reaffirmed their social service obligations, committing themselves to provide 'internally displaced persons [with] food, water, shelter, medical care and other health services, sanitation, education, and any other social services'.² These obligations were expanded in 2022, with the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security (Social Protection and Social Security Protocol).³

- (3) Yet in recent decades the implementation of the State's obligation to provide social services has faced many challenges. One of the most significant was the set of policy reforms introduced with the 'Washington Consensus'. For most of the 1980s and 1990s, governments, the private sector,

and international financial institutions endorsed a range of economic policies that encouraged States to gradually withdraw from social service provision.⁴ During this transition, private actors became increasingly involved in the provision of services traditionally delivered by governments.⁵ Steadily, the pursuit of macro-economic policies of liberalisation, privatisation and deregulation saw African policymakers neglect or fail to comply with their obligation to build and maintain a strong, public social service infrastructure. This trend has continued well into the 21st century with more than 50 percent of governments in sub-Saharan Africa adopting new laws to facilitate public-private partnerships (PPP) between 2017 and 2020.⁶

- (4) These issues came to the fore in 2020, when the outbreak of COVID-19 further exposed stark contrasts between public and private social service provision. Across the continent, disadvantaged and marginalised groups suffered the disproportionate effects of price hikes on essential items such as face masks and medicines.⁷ In education, COVID-19 exposed a lack of resilience in the private sector, forcing governments to divert public funds to bail out failing private schools.⁸ And in informal settlements, the absence of an accessible water supply left residents unable to perform frequent and proper handwashing. Recent years have also witnessed reports of unethical clinical trials, where experimental drugs are administered to patients without their consent or with insufficient disclosure of the risks.⁹
- (5) Most significantly, the pandemic highlighted that instead of broadening access to social services, many commercial actors have pursued profit-seeking strategies that make these services more inaccessible to large segments of the population.¹⁰ 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.
- (6) Over the years, in response to these challenges, the African Commission on Human and Peoples' Rights (African Commission) has adopted a range of instruments to prevent and address human rights abuses by private actors. These

include the 2004 Pretoria Declaration on Economic, Social and Cultural Rights,¹¹ the 2010 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights (ESCR Guidelines),¹² and the 2011 State Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter.¹³ More recently, the Commission adopted Resolution 420, on the State Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services.¹⁴ This guidance was developed further in the Commission's 2019 Guidelines on the Right to Water in Africa (Water Guidelines).¹⁵ Resolution 420's content is reinforced by the Social Protection and Social Security Protocol.

- (7) At the international level, crucial normative developments have also occurred, such as the publication of the United Nations (UN) Guiding Principles on Business and Human Rights, and the adoption by the UN Committee on Economic, Social and Cultural Rights of the General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. Outside the UN, expert-led initiatives, such as the Abidjan Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education (Abidjan Principles) have also provided critical guidance in this area, which has been explicitly recognised by the Commission.¹⁶
- (8) 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, building on this strong base, continues the Commission's evolving interpretation of the Charter,¹⁷ and takes into account recent experiences on the continent. This General Comment outlines States' obligations to respect, protect, promote and fulfil all human rights, within their territories and extraterritorially. It aims to guide the interpretation and implementation of 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 the Commission with comprehensive information in their reports under Article 62 of the Charter.
- (9) The General Comment also addresses the duty incumbent on all private actors to respect human rights in their activities.

B General human rights standards applicable to social service provision

- (10) Under the African Charter, social services such as education,¹⁸ food,¹⁹ healthcare,²⁰ housing,²¹ social security²² water,²³ are not commodities for those who can afford them, but human rights guaranteed to all. When States provide the services that implement these rights, they must comply with the general standards outlined below, consistent with their obligation to respect, protect, promote, and fulfil all human rights.

The non-commercial character of social services

- (11) Increasingly commercial interests in Africa are transforming social 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. The Commission emphasised this point in the Guidelines on the Right to Water in Africa, noting, for example, that delegation of water services to a private actor should not 'contribute to the marketisation or commercialisation' of water and sanitation.²⁴
- (12) In the Commission's engagement with States under Article 62 of the Charter, it has noted an emerging pattern of government's attempting to 'release' themselves from their obligations to provide quality social services.²⁵ The consequent commercialisation of social services risks eroding their intrinsic public function and impairing the enjoyment of human rights.²⁶ This view reflects an emerging consensus under international human rights law, expressed by the UN Special Rapporteurs on

the right to education,²⁷ extreme poverty and human rights,²⁸ safe drinking water and sanitation,²⁹ and the right to adequate housing,³⁰ who have all affirmed that the commercialisation of social services is detrimental to human rights.

- (13) However, private provision need not necessarily result in the commercialisation of social services. Under effective and comprehensive regulation, democratically controlled, non-commercial private actors have the potential to contribute to ensuring universal access to social services. For example, in many rural areas, 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.³¹ Similarly, in the context of education, certain linguistic and religious minorities have established non-commercial independent schools, which, with adequate regulation and support, can transfer knowledge about their community's culture, history, traditions and languages when public schools lack the resources or expertise.³² These actors, that may, under certain conditions be considered to be 'public', may contribute to broader State efforts to realise the rights in the Charter, and ensure the universal provision of social services to all. In these cases, States could play the role of an *enabler*, helping maximise community-led contributions to the goals of the Charter.³³ Under certain circumstances, States should 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
- (14) The term 'public' as referred to in this General Comment may thus require a different understanding from the one that is predominant in many parts of the continent and the world. Public social services have in practice not always been developed and governed according to their *public* nature. 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 entity delivering the services, that generally is the State, than with the practical modalities of *how* the

service is delivered, and to what standards the service provider is held to account. 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, as opposed to commercial actors and their shareholders and investors which typically respond to a range of private interests.

Public service obligations and the collective interest in social services

(15) The provision of social services is an inherently public activity, critical for the enjoyment of human rights. Therefore, whenever a private actor participates in social service provision, they perform a core public function that demands a high level of protection of the collective interest.³⁵ This overriding public interest requires States to impose a range of ‘public service obligations’ on all actors involved in social service delivery. Public service obligations refer to a set of domestic norms and regulations that ensure that the State’s international obligation to respect, protect, promote and fulfil human rights is upheld, even when private actors may manage, control, or otherwise participate in the day-to-day aspects of social service provision.³⁶ Public services obligations require, among others, that when private actors decide to provide social services, they agree to forgo their private interests for the specific purposes of such provision, and take on the public interest as their primary objective. States must impose public service obligations to ensure that social services, at minimum, are:

- (a) available to all individuals on an equal basis and without discrimination;³⁷
- (b) accessible, even in times of emergency;³⁸
- (c) acceptable to the users;³⁹
- (d) of the highest attainable quality;⁴⁰
- (e) effectively regulated;⁴¹ and

- (f) and subject to democratic public accountability.
- (16) Therefore, public service obligations require in particular that social services are made available to all individuals, regardless of their geographical location, at a specified quality, and, depending on the circumstances, at no cost to the user, or at a subsidised, reduced cost below a market rate.

The rights to equality and non-discrimination

- (17) Social services have a strong redistributive potential, which can promote economic mobility, reduce inequalities, and assist States to realise the rights to equality and non-discrimination. However, the emergence of commercialised social services on the continent has distorted these impacts, leading to increased inequalities and discrimination, especially on the grounds of income. The Commission has observed this for instance in the education sector, noting how commercial private schools have heightened the risk of ‘discrimination against children from low-income households’.⁴² Private actors have also been linked to a rise in overall prices in the healthcare sector, placing life-saving procedures out of reach for poor communities.⁴³
- (18) Article 2 of the Charter, which expressly prohibits discrimination based on ‘fortune’, makes it clear that economic status must never obstruct an individual’s enjoyment of economic, social and cultural rights. Therefore, in a range of contexts, the rights to equality and non-discrimination require States to provide certain services on a low or no-fee basis, to ensure provision to everyone, regardless of their financial position. By making interventions that eliminate or significantly reduce costs for the user, States can address entrenched structural barriers that generate and perpetuate inequality over generations. To align the provision of social services with the rights to equality and non-discrimination, States must:
- (a) ensure equal and universal access to quality social services;
 - (b) protect individuals from discrimination by all social service providers; and

- (c) identify and address discriminatory practices, including multiple, intersectional, associative, and perceptive discrimination, while identifying and addressing sources of inequality in the enjoyment of social services.

The right to effective participation in public affairs

- (19) In the African Democracy Charter, States undertake to implement ‘transparent and accountable’⁴⁴ systems of government that foster ‘popular participation in partnership with civil society’.⁴⁵ This obligation corresponds to Article 13(1) of the Charter, which guarantees the right of all individuals to ‘participate freely in [their] government’. According to General Comment 25 of the Human Rights Committee, the right to participate in political and public affairs is a right to exercise an element of ‘political power’.⁴⁶ In other words, the public must have *meaningful* influence over decisions that affect them. This influence can only be realised in conjunction with a range of other rights, including freedom of expression and information, assembly, association, and equality.
- (20) By facilitating effective public participation, policymakers, regulators, and legislators can deepen their understanding of contentious issues, enabling them to better identify gaps in social service provision and develop lasting solutions. In this way, governments can ensure that their decision-making is informed and sustainable, while also guaranteeing that public institutions are more effective, accountable, and transparent. This enhances the legitimacy of government action and fosters a sense of communal ownership in State policy. Most importantly, public participation also constrains the ability of elites to impose their will on those who lack the resources to resist exploitation, which is a frequent concern with privatised social services.
- (21) As affirmed in the Guidelines on the Right to Water in Africa, States must establish mechanisms that proactively and deliberately enable the transparent, maximum, and effective participation of individuals and communities at the planning, decision-making, implementation, monitoring and evaluation stages of social service provision, in a manner that is democratic

and inclusive.⁴⁷ This obligation applies in all cases, whether the service provider is public or private.

- (22) In contrast to ‘participatory’ processes that are pro forma or tokenistic, rights-based participation aims to transform social services by designing them around the concerns and priorities of the public at large, and the specific community being served. In many contexts, especially where indigenous peoples are concerned, the right to participate in political and public affairs extends beyond the right to be heard or meaningfully consulted, and requires affected groups to make decisions themselves, in accordance with their customs and traditions.⁴⁸ This includes the obligation to secure free, prior and informed consent (FPIC).⁴⁹ When States fail to obtain FPIC, they expose communities and service providers to violence, litigation, operational delays, and even loss of life.⁵⁰
- (23) As highlighted in the Commission’s Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights’ (ESCR Guidelines), civil society plays a ‘key role’ in the implementation of economic, social and cultural rights.⁵¹ States should actively seek out civil society input on social service provision, and safeguard the independence of civil society organisations. States must not subvert public participation by imposing undue restrictions on the right of civil society to access financial or other support from the local private sources, the State itself, foreign States, international organisations, transnational donors and other external entities.⁵²

The right to access information

- (24) The right to access to information is an indispensable component of the State’s obligation to ensure the provision of social services.⁵³ When States make public information easily accessible, they demonstrate a strong commitment to fighting corruption,⁵⁴ eliminating inefficiencies, and maintaining a politically engaged population.⁵⁵ To ensure this, many States, in pursuit of meeting their obligation under Article 9(1) of the African Charter, have imposed robust access to information laws for the public sector, which enable civil society, law enforcement, and the victims of

human rights abuses to access vital information in the public interest. However, in the private sector, crucial information is often concealed by legal, financial and procedural obstacles that are incompatible with Article 9(1). Many of these laws make it impractical, or even impossible for rights-holders to access the information they need - even when this information serves the public interest. In the Commission's view, these burdensome disclosure requirements are incompatible with Article 9(1).

- (25) States must bring their access to information laws into conformity with the African Commission's Declaration of Principles on Freedom of Expression and Access to Information (FOE Declaration). The FOE Declaration, which reflect many of the norms set out in the Commission's Model Law on Access to Information,⁵⁶ requires States to make public information available 'expeditiously and inexpensively' under the principle of maximum disclosure.⁵⁷ Further, the FOE Declaration reaffirms the right of all individuals to access the information of private bodies, including commercial actors, where this information may 'assist in the exercise or protection of any right'.⁵⁸ Therefore, when any private or public actor engages in activities relevant to the provision of social services, they must 'proactively publish information of public interest, including information about their functions, powers, structure, officials, decisions, budgets, expenditure and other information relating to their activities expeditiously and inexpensively.'⁵⁹ This requirement also extends to private bodies that receive public resources in accordance with Section 5 below.

Progressive realisation and temporal accountability

- (26) In recent years, the concept of 'progressive realisation' has been misused by some States to evade their obligations under the Charter to justify successive failures to ensure the universal provision of social services. As a result, many communities have endured decades of deprivation, as they wait for water, healthcare and other social services that never arrive.⁶⁰ In the Commission's view, much of this slow progress is the result of a lack of will, rather than a lack of capacity. These unreasonable delays – and the political inertia that prolongs them – is incompatible with

the State obligation to progressively realise economic, social, and cultural rights.

- (27) Progressive realisation does not allow States to implement their obligations with piecemeal improvements.⁶¹ 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 availability, accessibility, acceptability and quality of social services for all, while addressing inequality in the enjoyment of the services between different categories of individuals and communities.⁶² States must ensure that a larger number and wider range of persons must have access to all economic, social and cultural rights over time to comply with this obligation. Accordingly, States must outline a clear national strategy for the provision of each social service, detailing concrete benchmarks and specific activities in order to achieve provision of social services within a definite timeframe. These strategies must impose safeguards for temporal accountability. These safeguards must specify clear timeframes for project completion and accountability mechanisms to address unreasonable delays.

Prohibition of retrogressive measures

- (28) When States take retrogressive measures, they must overcome a heavy burden of proof to demonstrate that their actions are justified under international human rights law. To do this, States must prove that their actions comply with the ‘totality of the rights’ provided for in the Charter and reflect the States immediate obligation to use the maximum available resources to progressively realise economic social and cultural rights.⁶³ A measure is retrogressive if it diminishes the enjoyment of a right’s full normative content, including its availability, accessibility, acceptability, adaptability, or quality. For example, water disconnection,⁶⁴ cuts to social security payments,⁶⁵ and insufficient maintenance of infrastructure necessary for social service provision,⁶⁶ are all retrogressive measures incompatible with the Charter. The delegation of resources to a private

actor will also be a retrogressive measure if it fails to meet the conditions outlined in Section 5 below.

- (29) If retrogressive measures are taken, the State must demonstrate that the measures:⁶⁷
- (a) are temporary in nature and effect, and remain in place only as long as they are necessary, while being extendable upon review;⁶⁸
 - (b) pursue a legitimate aim, in accordance with the aims set out in Article 27(2) of the Charter;
 - (c) are necessary, in the sense that a failure to act or the adoption of any other policy would be more detrimental to the legitimate aim pursued;
 - (d) are proportionate, in that they must be justifiable after careful consideration of all less restrictive alternatives;
 - (e) are 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.⁶⁹

State obligation for the provision of social services in all circumstances

- (30) The State cannot exempt itself from its human rights obligations by invoking the involvement of private actors in social service provision. States must impose and enforce laws, regulations and policies to ensure that all private actors operating under their jurisdiction respect human rights in all their operations, domestic and international. When a private actor participates in social service provision and abuses human rights in the process, the State can still be held directly responsible under international law. For this reason, the Commission has affirmed that if a State neglects to ensure the rights in the African Charter, this can itself 'constitute a violation, even if the State or its agents are not the immediate cause of the violation'.⁷⁰

Justiciability and access to remedies

- (31) Under international law, governments are obliged to carry out exhaustive and impartial investigations into allegations of violations of human rights, to identify, bring to justice and punish their perpetrators, be they private or public actors, and to provide remedy for the victims or their families. Remedies must be delivered by independent and effective redress mechanisms, including judicial mechanisms, empowered to determine whether a violation has occurred, order its cessation and deliver adequate, effective and comprehensive reparation to redress the harm done.⁷¹ This requires all States to ensure all the rights protected by the Charter are justiciable in their national legal systems, and ensure that any non-judicial remedies are reinforced by judicial review.⁷²
- (32) In a globalised world, a single private actor can abuse rights in multiple jurisdictions, across their entire supply chain. In these cases, victims face significant challenges when seeking remedy.⁷³ These range from a lack of political willingness to redress harms suffered, to procedural and legal hurdles which many victims lack the money or knowledge to overcome. In many cases, the legal system where the violation occurs is often an inadequate source of remedy due to weak enforcement, a lack of judicial independence, disregard for the rule of law, corruption among state officials or intimidation of human rights defenders. In these situations, victims are forced to seek remedy at 'home courts', where the private actor is headquartered. However, establishing jurisdiction in the company's home State has its own challenges, as victims face recurrent hurdles in jurisdiction. In those cases where jurisdiction is not an issue, victims must still overcome a host of extra-legal obstacles, such as amassing the resources, documentary evidence, and legal representation required to successfully launch their claim against a private actor.
- (33) To overcome these challenges, States must ensure access to prompt, effective and procedurally fair remedies, that redress all situations where the State fails to:⁷⁴

- (a) fulfil its obligations to provide access to quality, public social services; or
 - (b) prevent private actors from interfering with the enjoyment of social services.
- (34) Effective remedies must be made available in transnational situations, where litigation is often time-consuming and prohibitively expensive.⁷⁵ In these cases, a lack of mutual legal assistance or an unwillingness to enforce a foreign court's ruling can violate a victim's right to remedy. States should cooperate when providing remedies to victims of transnational human rights violations committed by private actors. In particular, States should remove the substantive, procedural and practical barriers around access to remedy in transnational cases.⁷⁶

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

- (35) Human dignity, which is a pillar upon which the African Charter is founded, is denied when individuals have no access to social services. Under international human rights law, the State must ensure an effective system for the provision of quality social services in order to respect, protect, promote, and fulfil their obligations with regards to human rights. Although States have reasonable discretion when designing their systems for social service provision, there should always be a quality public option. This system should be adequately funded, democratically controlled, and non-commercial in nature.

The obligation to provide quality public social services directly

- (36) The State obligation to provide public social services, is rooted in the Charter itself,⁷⁷ in general international human rights law,⁷⁸ and reflected widely in State practice.⁷⁹ The Commission,⁸⁰ the CESCR Committee,⁸¹ the CRC Committee and a host of United Nations special procedures, have explicitly called for the State provision of public services,⁸² such as 'public healthcare',⁸³ 'public housing',⁸⁴ 'electricity',⁸⁵ and education.⁸⁶ A critical component of this obligation is the State's duty to provide certain services

directly. This, for example, is the situation in education, where States have an obligation to provide quality *public* education.⁸⁷

The obligation to fund public services

- (37) The obligation to provide public social services cannot be realised without sufficient resources being mobilised, allocated and spent in an accountable, effective, efficient, equitable, participatory, transparent and sustainable manner.⁸⁸ Prioritising social services in budgetary policy contributes not only to realising the rights in the Charter, but also has a strong correlation with economic growth and sustainable development. Hence, all structures in government with a role in devising public budgets should exercise their functions in a way that realises the rights guaranteed in the Charter.
- (38) Under Article 1 of the Charter, States must take ‘legislative or other measures’ to give effect to economic, social and cultural rights,⁸⁹ to their maximum available resources. This requires States to use *all* resources, existing and potential, including natural, human, technological, institutional and informational resources.⁹⁰ To execute this obligation, States must:⁹¹
- (a) impose laws and policies to support resource mobilization, budget allocation and spending in order to fund the provision of public social services;
 - (b) collect, generate, and disseminate the necessary data and information to support the design and implementation of appropriate legislation, policies, programmes and budgets to advance the provision of public social services;
 - (c) ensure that budgets are systematically planned, enacted, implemented and accounted for at the national and subnational levels of the State; and
 - (d) mobilise, allocate and utilise public resources to fully implement approved legislation, policies, programmes and budgets relevant to the provision of public social services, including resources mobilised through:
 - (i) primarily domestic resources, such as fair and progressive taxation and other domestic income generating mechanisms; expansion of the revenue

base; reallocation of public expenditure; elimination of illicit financial flows, corruption, tax evasion, and tax avoidance; the use of fiscal and foreign exchange reserves; the management of debt by borrowing or restructuring existing debt; the development and adoption of an accommodating macroeconomic framework; or

- (ii) international assistance and co-operation.
- (39) When budgeting for public social services, States should allocate resources in a manner that reduces 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.⁹² Where social service obligations are shared between a national government and a subnational government, States should ensure that sub-national governments have sufficient funding to meet all the economic, social, and cultural obligations delegated to it. These funds should be dispersed fully, in compliance with the applicable legislation, as soon as possible, to avoid any delay in social service delivery.⁹³
- (40) Further, States should ensure that spending does not fall below the level required by domestic or international funding commitments, such as the percentage of gross domestic product earmarked in development goals.⁹⁴ States must also allocate sufficient funds to deliver social services during emergencies, including the outbreak of war, natural disasters or public health crises.⁹⁵ States must take proactive steps to ensure the provision of social services even during social, political or economic crisis.⁹⁶
- (41) Public resources dedicated to social service provision should be managed efficiently, to realise the States obligation to respect, protect, promote, and fulfil human rights. Approved expenditures should be executed in line with the enacted budget. Goods and services to advance human rights should be procured and delivered transparently and on time, and be of appropriate

quality. States parties should make efforts to overcome institutional barriers that impede efficient spending. Monitoring, evaluation and auditing of public funds should provide checks and balances that promote sound financial management.

- (i) What constitutes 'efficient spending' must be evaluated on the basis of human rights, and not exclusively in terms of financial cost.⁹⁷ In most hospitals, financial cost per treatment is often treated as a major indicator of efficiency. As a result, administrators tend to make short-term efficiency gains by reducing the amount of time a patient spends in hospitals. However, many patients require further care at home, which is often provided, unpaid, by their families. Therefore, efficiency may appear to increase as the cost of treating each patient decreases, but these apparent cost savings are borne by the relatives, who must reduce their time for other activities (such as sleep, school, and paid work) to care for their family members. Since most caretakers are women and girls, some measures that appear as 'efficient' can have negative ripple effects on the rights to education, to play, to seek work and human development.⁹⁸

- (42) Further, all expenditure should be justified by appropriate procurement processes. States have an obligation to uncover and remedy the root causes of ineffective and inefficient public spending, for example, poor quality of goods or services, inadequate financial management or procurement systems, leakages, untimely transfers, unclear roles and responsibilities, poor absorptive capacity, weak budget information systems and corruption. When States parties waste or mismanage resources aimed at advancing or implementing human rights, they have an obligation to explain why this has occurred and show how the causes have been addressed, their effects remedied, and which safeguards have been implemented to ensure non-repetition. States must eliminate wasteful expenditure. Expenditure is wasteful when:⁹⁹

- (a) it is not used for its intended purpose;
- (b) the government pays more than required for goods and services, or where it procures goods and services of inadequate quality;
- (c) its underlying allocations are not justified by evidence; or
- (d) it duplicates other expenditure.

D The State obligation to regulate private provision of social services

- (43) Regulation is a central pillar of the State's obligation to *protect* human rights.¹⁰⁰ States must regulate multinational corporations, local companies, and other private actors, not simply to ensure that they do not explicitly abuse rights, but also to ensure that these private actors support, rather than undermine, broader efforts to realise economic social and cultural rights.¹⁰¹ As affirmed in the Commission's jurisprudence, States must create and maintain an 'effective interplay of laws and regulations' to ensure groups and individuals can access quality social services without undue interference from private actors.¹⁰²
- (44) This regulatory interplay requires States to adopt administrative, legislative, investigative, adjudicatory and other measures to prevent, and when applicable, mitigate, investigate, punish and remedy any human rights abuses under their jurisdiction, regardless of the public or private nature of the entity providing the social service.¹⁰³ This obligation extends to all ancillary goods, facilities and activities related to the provision of social services.¹⁰⁴ Throughout the regulatory process, the State 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, (d) facilitate access to information and effective public participation, and (e) address regulatory capture in accordance with the obligations set out below.

The obligation to establish regulatory standards

- (45) Clear regulatory standards are the bedrock of an effective regulatory regime.¹⁰⁵ The term 'regulatory standards' refers to the

wide range of legally enforceable rules which impose mandatory requirements on social service providers, as well as the various non-binding advisory rules, for which there is a reasonable expectation of widespread compliance. States must organise their regulatory systems around a set of rules and benchmarks that enforce the human rights in the Charter.¹⁰⁶

- (46) The nature of the specific regulatory standard will depend on the social service in question, and the context it is provided in. For example, in the context of drinking water, regulatory standards should ensure access to a minimum essential amount of water that is sufficient, reliable, and safe for personal and domestic uses to prevent disease.¹⁰⁷ In the healthcare sector, regulations must ensure that all medicines meet scientifically appropriate standards for quality, safety, and efficacy, and are not subject to exploitative or unreasonable high prices.¹⁰⁸ With regard to social security, States must impose standards to prevent private actors from imposing eligibility restrictions on prohibited grounds such as HIV status.¹⁰⁹ And in connection with housing, States should impose regulatory standards that preserve security of tenure and affordability of housing for tenants, including through rent caps, controls or rent freezes where needed.¹¹⁰
- (47) States must therefore create a predictable legal environment, premised on standards that are accessible, clear, and consistent.¹¹¹ These standards must be designed in a participatory process involving all stakeholders, including the communities being served, civil society organisations, and private service providers themselves. At a minimum, regulatory standards must address the following:¹¹²
- (a) the administration of the private social service provider, including:
 - (i) the process for registration and licensing, and the conditions for their withdrawal;
 - (ii) the full and effective participation of communities, trade unions, and other civil society organisations in the private social service provision;

- (iii) the relevant labour standards, to ensure at the minimum the respect of applicable standards of the International Labour Organisation and other domestic and international standards;
 - (iv) where applicable, 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;¹¹³
 - (v) transparency of and access to all information relevant to human rights and the public interest, including their domestic and, where applicable, international administrative and financial structure; all potential fees and other charges for the communities or individuals they service, data about the quality of their operations, and information about the profit earned and any dividends paid out;
- (b) where applicable, the level of fees and other direct and indirect charges, paying particular attention to the State's obligation to ensure that social services are accessible;
 - (c) the protection of rights of access in the context of failure or delay in the payment of fees where they exist;
 - (d) the 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;
 - (e) the protection of the environment and communities from exploitative or harmful practices by private service providers;
 - (f) the protection of communities against excessive, exploitative, or misleading marketing or advertising by the service provider that supplies them;
 - (g) privacy and data protection, ensuring 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.

Monitoring and evaluation

Many States have strong regulations on paper but have no efficient mechanisms for monitoring compliance with these standards in practice.¹¹⁴ Monitoring includes processes such as inspection, data collection, and routine evaluation. It is a vital tool for ensuring that service providers comply with the applicable regulatory standards, and for assessing the State's own compliance with its obligation to realise economic, social and cultural rights. Monitoring and evaluation enable States to make a context-specific situational analysis to inform its public policy, measure its progress, and evaluate performance and overall outcomes. Further, it must enable the State to anticipate the risk of retrogression and other human rights abuses, and institute measures to avoid them.

- (48) 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. This requires domestic laws which impose a duty of proactive disclosure on service providers of complete and reliable information which details, at minimum: the quality of the services they offer, complaints received from users and any challenges faced in extending services to underserved areas. Such laws should reflect the standards laid down by the Commission in the FOE Declaration.¹¹⁵

Enforcement and accountability

- (49) Many private social service providers operate in impoverished or marginalised communities who lack access to justice. States must take all necessary steps to prevent a denial of justice and ensure the effective implementation of the right to effective remedy and or reparation. States have a positive obligation to remove substantive, procedural and practical barriers to remedies, including by establishing parent company or group liability regimes, enabling human rights-related class actions and public

interest litigation. If victims lack the resources to pursue a legal remedy, States should ensure that legal aid is made available.¹¹⁶

- (50) Where private actors do not comply with applicable standards and regulations, States must encourage compliance in the shortest possible time through measures such as providing appropriate expertise and offering support tools and management assistance, or, if non-compliance persists, by enforcing penalties. They should effectively seek remedies and compensation where applicable. Where, after having taken such measures, private social service providers are unable or unwilling to comply with standards and regulations, States should, following due process, cease their operations and where necessary find an alternative provision, after having:
- (a) given them adequate notice and a reasonable opportunity to comply with these standards; and
 - (b) ensured that there is continued enjoyment of human rights for all affected rights-holders.

Public participation in the regulatory process

- (51) Regulatory decision-making processes must ensure genuine and meaningful public participation.¹¹⁷ Every individual and group has the right to participate actively, freely and meaningfully in any regulatory process that may affect their enjoyment of economic, social and cultural rights. States must take adequate steps to ensure that all people, including marginalised groups, are given a real opportunity to take part in and influence the making of regulations, as well as their monitoring and enforcement. Therefore, States must establish mechanisms that proactively and deliberately enable the transparent, maximum, and effective participation of individuals and communities at all stages of planning, decision-making, implementation, monitoring and evaluation of social service provision in a democratic and inclusive manner.

Safeguards against regulatory capture

- (52) Some actors have a vested interest in a weak and ineffective regulatory environment. Often, these actors use their expertise

in the industry, or close proximity to the regulator, to pressure authorities into adopting weak human rights protections.¹¹⁸ This process, known as regulatory capture, occurs when an interest group uses its influence or resources to secure a favourable regulatory decision, or even, regulatory indecision. This 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 cases, the interest group exerts unmitigated control over the regulator, and can prescribe its objectives, steer its rulemaking, and even supply it with personnel.¹¹⁹

- (53) To address regulatory capture, 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. These can include laws that compel public officials and elected representatives to disclose all meetings with commercial actors, and the subject matter that was discussed. States should also require regulators to disclose any potential conflicts of interest, including professional, familial, and other conflicts. Further, when regulators make calls for public input on new regulations, they should guard against the use of unreliable, industry-sponsored contributions that advance private interests. States should 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.

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

- (54) Under international human rights law, the State has no obligation to delegate resources to private social service providers.¹²⁰ Therefore, States are not legally obligated to provide subsidies, or other methods of support to private actors under their jurisdiction. A common mechanism for directing public resources to private actors for the provision of social services are public-private partnerships (PPPs). PPPs vary, but often take the

form of long-term contractual arrangements between states and private actors, which see the private sector assuming a significant role in the provision of social service infrastructure, or the services themselves in return for payments, in the form of user fees, government funding, or other support. These arrangements often entail significant, binding, and unpredictable costs for the state, including fees for preparation, frequent renegotiations, subsidies, and financial guarantees paid by the public purse.

- (55) Still in certain contexts, 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, for example, would be appropriate to avoid the interruption of water services during emergencies or to enable children with disabilities to access quality and inclusive education. When States extend resources to private actors, they must strictly observe the substantive, procedural, and operational requirements set out below.

Substantive requirements for the delegation of public resources

- (56) Any allocation of public funding to an eligible private actor must meet all the following substantive requirements:¹²¹
- (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.
 - (c) it must not foreseeably risk or delay the development of a public social service system of the highest attainable quality;

- (d) it must 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;
- (e) it must not constitute or contribute to the commercialisation of the delivery of social services;
- (f) it must ensure equal access to the public and does not privilege access to a specific group or geographical region;
- (g) it must 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
- (h) it must not create a foreseeable risk of any other systemic harm to other social services, paying particular attention to obligations related to non-discrimination, and equality.

Procedural requirements for the delegation of public resources

- (57) Any allocation of public funding to an eligible private actor must meet all the following procedural requirements:¹²²
- (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 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 human rights impact assessments, and the State must facilitate full access to all relevant information; and

- (d) the funding must be arranged in such a way that it is possible in practice to reverse it or to transfer the role of the private actor to the State.

Operational requirements for the delegation of public resources

- (58) Any allocation of public funding to an eligible private actor must meet all of the following operational requirements:¹²³
 - (a) The State must, at minimum, impose the same standards on private institutions participating in social service provision 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 the provision of public funding to 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, in the short, medium and long term.
 - (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 State 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.
- (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.

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

- (59) States must prohibit the allocation of public funding to a private actor that:
 - (a) contributes to an adverse systemic impact on the enjoyment of social services or undermines the realisation of human rights in any other way;¹²⁴
 - (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;¹²⁵
 - (b) is commercial and excessively pursues its own self-interest;¹²⁶
 - (c) charges fees that substantially undermine access to social services;¹²⁷
 - (d) does not meet any of the public service obligations applicable;¹²⁸ and

- (e) does not comply with all of its domestic or international financial obligations.¹²⁹

F Human rights consequences for actors other than States

- (60) Principally, this General Comment addresses State parties to the African Charter. However, as observed in the Commission's jurisprudence, States are not the only actors whose conduct can ignite human rights consequences.¹³⁰ Domestic and transnational private actors, as well as intergovernmental organisations, have had well documented impacts on human rights, both positive and negative. Therefore, even though this General Comment is primarily directed at State parties to the Charter, the guidance it provides can assist intergovernmental organisations and private actors as well. Issues relevant to both these actors are addressed below.

Human rights consequences for private actors under the African Charter

- (61) The African Charter imposes direct duties on private actors in Articles 27, 28, and 29.¹³¹ Many of these duties have a binding legal character, including the duty to pay taxes¹³² and respect the rights of others,¹³³ which have been outlined in the Commission's jurisprudence,¹³⁴ its soft law standards,¹³⁵ and its recommendations to African States.¹³⁶
- (62) 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. Although private 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 Charter. One of these requirements is for private actors to exercise human rights due diligence to ensure that all their operations do not interfere

with the enjoyment of human rights or facilitate abuse of rights by any third party.

- (63) Across the continent, a range of States are implementing proposals to integrate human rights protection into their national action plans,¹³⁷ as part of their wider commitment to hold private actors accountable for human rights abuses on the continent. Many of these reflect the content of the UN Guiding Principles on Business and Human Rights, which provide a practical framework for private actors to respect human rights in their operations.
- (64) To implement the duties in the Charter, private actors must do the following:
- (a) put in place internal mechanisms to regularly assess any adverse impacts their operations, practices, services, and products may have on human and peoples' rights;¹³⁸
 - (b) integrate the findings of their impact assessments into corporate culture, management, and operation;¹³⁹
 - (c) consult with affected groups and provide platforms for meaningful participation before, during and after the project cycle;¹⁴⁰
 - (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;¹⁴¹
 - (f) respect labour rights; and
 - (g) refrain from imposing or facilitating policies that would nullify or impair State capacity to meet international human rights obligations.¹⁴²

Human rights consequences for intergovernmental actors

- (65) The AU, the UN, 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.

- (66) 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:¹⁴³
- (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;¹⁴⁴ and
 - (c) promote policies within the intergovernmental organisation that enhance States' abilities to respect, protect, fulfil and promote human rights.

G Reporting obligations

- (67) 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. To improve this process, State parties 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 their 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 any 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 Charter and this General Comment can be and have been invoked or directly enforced by their courts, tribunals or administrative authorities;
- (f) which judicial, administrative and other authorities have jurisdiction over the implementation of human rights and social services, and 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 their control that impede the universal provision of social services;
- (i) whether they accept 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, together with disaggregated data indicating what percentage of the budget has gone to private actors involved in the provision of social services if any.

- 1 African Union 'Agenda 2063: The Africa we want', paras 27-31; see also, para 11 referring to 'the provision of basic services including health, nutrition, education, shelter, water and sanitation'.
- 2 Article 9(2)(b).
- 3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security, adopted by the 35th Ordinary Session of the AU Assembly, held in Addis-Ababa (Ethiopia), on 6 February 2022. The Protocol requires 15 states to ensure its entry into force (art 33(1)).
- 4 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; J Dorthey 'Expansion of the private health sector in east and southern Africa' (2011) EQUINET Discussion Paper 87, 12; CL Shandra, JM Shandra & B London 'World Bank structural adjustment, water, and sanitation: a cross-national analysis of child mortality in Sub-Saharan Africa' (2011) 24 *Organization & Environment* 107–29.
- 5 See for example, DM Chirwa 'Water privatisation and socio-economic rights in South Africa' (2004) 8(2) *Law democracy and development* 181, 182-183.
- 6 The World Bank 'Benchmarking Infrastructure Development 2020' (2020), 27.
- 7 *Competition Commission of South Africa v Dis-Chem Pharmacies Limited* CR008Apr20 (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>.
- 8 UN 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, 74.
- 9 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/>.
- 10 O De Schutter *et al* 'Covid-19 has exposed the catastrophic impact of privatising vital services' 19 October 2020 *The Guardian* <https://www.theguardian.com/society/2020/oct/19/covid-19-exposed-catastrophic-impact-privatising-vital-services>.
- 11 African Commission on Human and Peoples' Rights 'Pretoria Declaration on Economic, Social and Cultural Rights' (2004).
- 12 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) (2011).
- 13 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' (2012).
- 14 African Commission on Human and Peoples' Rights Resolution 420: on States' Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services' ACHPR/Res. 420 (LXIV) 2019.
- 15 African Commission on Human and Peoples' Rights 'Guidelines on the Right to

- Water in Africa’.
- 16 African Commission on Human and Peoples’ Rights ‘Resolution 420: on States’ Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services’ ACHPR/Res. 420 (LXIV) 2019, preambular para 7.
 - 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’.
 - 18 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).
 - 19 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 Centre (SERAC) and Centre 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 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’ (2011), paras 83, 86(a), 86(g), 86(x).
 - 20 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.
 - 21 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’ (2011).
 - 22 African Commission on Human and Peoples’ Rights ‘Pretoria declaration on economic, social and cultural rights in Africa’ (2004), para 10.
 - 23 African Commission on Human and Peoples’ Rights ‘Guidelines on the right to water in Africa’, preambular para 19.
 - 24 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’).
 - 25 See for example, 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) (noting how “[t]he increase in the establishment of private schools, [...] allegedly raises the concern of the Government *gradually releasing itself* from the *obligation to provide quality public education*’) (emphasis added).
 - 26 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.
 - 27 UN Special Rapporteur on the Right to Education ‘Protecting the right to education against commercialization’ UN Doc A/HRC/29/30, para 97 (‘The Special Rapporteur would like to emphasize the need for States to [...] *uproot*

- commercialization in education*) (emphasis added).
- 28 UN Special Rapporteur on Extreme Poverty ‘Privatisation and human rights’ UN Doc A/73/396, para 83 ([privatization’s] consequences for human rights are overwhelmingly negative. Human rights standards are rarely included in privatization agreements. They are systematically absent from guidelines governing both processes and outcomes’) (emphasis added).
- 29 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’) (emphasis added).
- 30 UN Special Rapporteur on Adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context ‘Financialization of housing and the right to adequate housing’ 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’).
- 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.
- 32 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.
- 33 O De Schutter & T Dedeurwaerdere *Social innovation in the service of social and ecological transformation: The rise of the enabling state* (2021).
- 34 African Commission on Human and Peoples’ Rights ‘Guidelines on the right to water in africa’, para 8.7.
- 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.
- 37 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’ (2011), para 3(a).
- 38 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’ (2011), para 3(c).
- 39 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’ (2011), para 3(d).
- 40 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' (2011), para 10.
- 41 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' (2011), para 7.
- 42 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.
- 43 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; S Subramanian *et al* 'Financial barriers related to breast cancer screening and treatment: a cross-sectional survey of women in Kenya' (2019) 22 *Journal of Cancer Policy* 5.
- 44 Article 12(1), African Charter on Democracy, Elections and Governance.
- 45 Article 27(2), African Charter on Democracy, Elections and Governance. See also the African Charter on Popular Participation in Development and Transformation E/ ECA/ CM/ 16/ RES/ 691(XXV), para 7 (which defines popular participation as 'the empowerment of the people to effectively involve themselves in creating the structures and designing the policies and programmes that serve the interests of all as well as to effectively contribute to the development process and share equitably in its benefits').
- 46 Human Rights Committee 'General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service' UN Doc CCPR/C/21/Rev.1/Add.7, para 6.
- 47 African Commission on Human and Peoples' Rights 'Guidelines on the Right to Water in Africa', para 8.1; 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' (2011), para 92 (i); Article 5(1), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security.
- 48 *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.
- 49 UN Special Rapporteur on the rights of indigenous peoples 'Human rights impacts and consultation processes' UN Doc A/HRC/45/34, paras 59-63.
- 50 *SERAC* (n 18), para 5 ('The government has also ignored the concerns of Ogoni communities regarding oil development, and has responded to protests with massive violence and executions of Ogoni leaders').
- 51 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' (2011), para 48.
- 52 African Commission on Human and Peoples' Rights 'Cotonou Declaration on strengthening and expanding the protection of all human rights defenders in Africa', para 2.
- 53 UN Special Rapporteur on the Right to Health 'Effective and full implementation of the right to health framework, including justiciability of ESCR and the right to health; the progressive realisation of the right to health; the accountability deficit of transnational corporations; and the current system of international investment

- agreements and the investor-State dispute settlement' UN Doc A/69/299, para 33 ([...] access to health information, is not only an essential element of the right to health, but also a critical tool for monitoring implementation). CESCR Committee 'General Comment 19: The right to social security' E/C.12/GC/19, para 26:
- 54 UN Special Rapporteur on the Right to Health 'Corruption and the right to health' A/72/137, paras 25 & 34.
- 55 Principle 1(1), African Commission on Human and Peoples' Rights 'Declaration of Principles on Freedom of Expression and Access to Information in Africa'.
- 56 African Commission on Human and Peoples' Rights 'Model Law on Access to Information for Africa'.
- 57 Principles 26 & 28, African Commission on Human and Peoples' Rights 'Declaration of Principles on Freedom of Expression and Access to Information in Africa'.
- 58 Principles 26(1)(b), African Commission on Human and Peoples' Rights 'Declaration of Principles on Freedom of Expression and Access to Information in Africa'.
- 59 Principle 29(1) African Commission on Human and Peoples' Rights 'Declaration of Principles on Freedom of Expression and Access to Information in Africa'.
- 60 See for example M Langford & S Kahanovitz 'South Africa: Rethinking Enforcement Narratives' in M Langford, CA Rodríguez Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: making it stick* (2016), 315, 322-333.
- 61 CESCR Committee 'General Comment 3: The nature of States parties' obligations' UN Doc E/1991/23, para 9; 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; African Commission 'ESCR Guidelines' (n 12 above), paras 13-15.
- 62 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.
- 63 CESCR Committee 'General Comment 3: The nature of States parties' obligations' UN Doc E/1991/23, para 9.
- 64 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 57 ('A clear example of direct retrogression and a violation of human rights to water and sanitation is the disconnection of water services because of the inability to pay.').
- 65 CESCR Committee 'General Comment 19: The right to social security E/C.12/GC/19, para 42 ('There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant').
- 66 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 57.
- 67 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.
- 68 Principle 45(a), Abidjan Principles.
- 69 Principle 45(f), Abidjan Principles.
- 70 Communication 301/ 05, *Haregewoin Gebre-Sellaise & IHRDA (on behalf of former*

- Dergue officials*) v Ethiopia, 7 November 2011, para 130; see also Communication 292/ 04, *Institute for Human Rights and Development* ; Communication 74/92, *Commission nationale des droits de l'Homme et des libertés v Chad*, 11 October 1995, para 20.
- 71 ACHPR 'General Comment 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment', para 8; '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, paras 34.
- 72 CESCR Committee *IDG v Spain*, paras. 14 and 15; '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, paras 34.
- 73 '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 44.
- 74 Communication 355/07, *Hossam Ezzat & Rania Enayet (represented by Egyptian Initiative for Personal Rights & INTERIGHTS) v The Arab Republic of Egypt*, para 182; Principle 88, Abidjan Principles; CCPR Committee 'General Comment 31: Nature of the general legal obligation imposed on States Parties to the Covenant' UN Doc CCPR/C/21/Rev.1/Add.13, para 16.
- 75 UN Working Group on the issue of human rights and transnational corporations and other business enterprises 'Report on the First African Regional Forum on Business and Human Rights' UN Doc A/HRC/29/28/Add.2, para 32(b); OHCHR 'Improving accountability and access to remedy for victims of business-related human rights abuse' UN Doc A/HRC/32/19, para 24-25.
- 76 Principle 27, Maastricht Principles.
- 77 Article 13(3), African Charter; See also 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 Democratic Republic of Congo*, 4 April 1996, para 47 (the failure of the Government to *provide basic services* such as safe drinking water and electricity and the shortage of medicine [...] constitutes a violation of Article 16) (own emphasis added).
- 78 CESCR Committee 'General Comment 14: The right to the highest attainable standard of health' UN Doc E/C.12/2000/4, para 12(a) (Where the CESCR Committee addresses States' 'core obligation' to maintain 'functioning public health and health-care facilities').
- 79 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'). Further Section 22, Kenyan Health Act 21 of 2017 (requires Kenya to establish '*publicly owned health institutions*, including hospitals, health centers, pharmacies, clinics and laboratories, as are deemed necessary for the promotive, preventive and rehabilitative health services.') (emphasis added). Article 8, 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') (emphasis added).
- 80 See African Commission on Human and Peoples' Rights 'Concluding Observations: Uganda 5th Periodic Report', para 80: (noting with concern that privatisation could lead to 'the Government gradually *releasing itself from the*

- obligation to provide quality public education, which could result in discrimination against children from low-income households*) (emphasis added).
- 81 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*’) (emphasis added); ‘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’) (emphasis added); CESCR Committee ‘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 ‘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*’) (emphasis added); CESCR Committee ‘General Comment 19: The right to social security’ E/C.12/GC/19, para 46 (Where social security schemes [...] are operated or controlled by third parties, States parties retain the responsibility of administering the national social security system and ensuring that private actors do not compromise equal, adequate, affordable, and accessible social security’).
- 82 CESCR ‘Concluding observations on the initial report of Indonesia’ UN Doc E/C.12/IDN/CO/1, paras 11(b) & 12(a); CRC Committee ‘Concluding observations: Paraguay’ UN Doc CRC/C/PRY/CO/3, para 58(e).
- 83 CESCR ‘Concluding observations on the third periodic report of the Bolivarian Republic of Venezuela’ UN Doc E/C.12/VEN/CO/3, para 27.
- 84 CESCR ‘Concluding observations on the initial to third reports of the United Republic of Tanzania’ UN Doc E/C.12/TZA/CO/1-3; CESCR ‘Concluding observations: Ethiopia’ Doc E/C.12/ETH/CO/1-3, para 20; CESCR ‘Concluding observations on the initial and second periodic reports of Djibouti’ UN Doc E/C.12/DJI/CO/1-2, para 26.
- 85 African Commission ‘ESCR Guidelines’ (n 12 above), para 33 (‘States should ensure the provision of basic social services (such as water, electricity, education and health care)’), 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 Inter africaine des Droits de l’Homme, Les Témoins de Jehovah v DRC*, 4 April 1996, para 47.
- 86 CESCR Committee ‘Concluding Observations on the Periodic Report of Kenya’ UN Doc E/C.12/KEN/CO/2-5, paras 57-58 (‘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’).
- 87 CESCR Committee ‘General Comment 13: The right to education’ UN Doc E/C.12/1999/10, para 57.
- 88 CRC Committee in ‘General Comment 19: Public budgeting for the realisation of children’s rights’ UN Doc CRC/C/GC/19, para 11; A Nolan, R O’Connell & C Harvey *Human rights and public finance* (2013) 7-9.
- 89 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' (2011), para 2.
- 90 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* 695–697.
- 91 CRC Committee in 'General Comment 19: Public budgeting for the realisation of children's rights' UN Doc CRC/C/GC/19, para 21.
- 92 CRC Committee in 'General Comment 19: Public budgeting for the realisation of children's rights' UN Doc CRC/C/GC/19, paras 67 & 68.
- 93 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.
- 94 Principle 15, Abidjan Principles. Minor adjustments made to eliminate references to education.
- 95 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').
- 96 UN 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, para 83(d) (States should develop emergency education preparedness within national education systems globally and train educational planners at all levels. These plans should [guarantee] the right to education for all and the availability, accessibility, acceptability and adaptability framework'). 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 (The immediate and minimum core obligations imposed by children's rights shall not be compromised by any retrogressive measures, even in times of economic crisis').
- 97 See D Elson, R Balakrishnan & J Heintz 'Public finance, maximum available resources and human rights' in A Nolan, R O'Connell and C Harvey (eds) *Human Rights and Public Finance Budgets and the Promotion of Economic and Social Rights* (2013), 23.
- 98 D Elson, R Balakrishnan & J Heintz 'Public finance, maximum available resources and human rights' in A Nolan, R O'Connell & C Harvey (eds) *Human rights and public finance: budgets and the promotion of economic and social rights* (2013), 23.
- 99 The Office of the United Nations High Commissioner for Human Rights (OHCHR) in 'Realizing human rights through government budgets' UN Doc HR/PUB/17/3XX, 127.
- 100 CESCR Committee 'General Comment 15: The right to water' UN Doc E/C.12/2000/11, para. 24; Articles 13(3) & 4, International Covenant on Economic, Social and Cultural Rights; Article 29(2), Convention on the Rights of the Child; CESCR Committee 'General Comment 13: The right to education' UN Doc E/C.12/1999/10, para 60; CRC Committee 'General Comment 16: State obligations regarding the impact of the business sector on children's rights' UN Doc CRC/C/GC/16, para 53; UN Special Rapporteur on the Right to Education 'Privatization and the right to education' UN Doc A/69/402, paras

- 32, 85; SL Murthy ‘The human right(s) to water and sanitation: history, meaning and the controversy over privatization’ (2013) 31 *Berkeley Journal of International Law* 142.
- 101 African Commission on Human and Peoples’ Rights ‘Guidelines on the Right to Water in Africa’, para 32.5; 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’ (2011), para 7.
- 102 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.
- 103 CCPR Committee ‘General Comment 31: Nature of the general legal obligation imposed on States Parties to the Covenant’ UN Doc CCPR/C/21/Rev.1/Add.13, para 8 (where the Committee notes the obligation incumbent on States to ‘exercise due diligence to prevent, punish, investigate or redress the harm caused by [...] private persons or entities’); *Ximenes-Lopes v Brazil* IACTHR Series C 149 (2006), para 85 (‘the acts performed by any entity, either *public or private*, which is empowered to act in a State capacity, may be deemed to be acts for which the *State is directly liable*, as it happens when services are rendered on behalf of the State’).
- 104 See for example, services such as insurance in, Article 5(2), Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Citizens to Social Protection and Social Security.
- 105 UN Special Rapporteur on the right to water ‘Service regulation’ UN Doc A/HRC/36/45, para 41.
- 106 For example, in the context of the right to health, regulatory standards should meet the criteria outlined in CESCR Committee ‘General Comment 14: The right to the highest attainable standard of health’ UN Doc E/C.12/2000/4, read together with
- 107 CESCR Committee ‘General Comment 15: The right to water’ UN Doc E/C.12/2000/11, para 37(a).
- 108 141 Resolution on Access to Health and Needed Medicines in Africa - ACHPR/Res.141(XXXIV)08;
- 109 CESCR Committee ‘General Comment 19: The right to social security’ E/C.12/GC/19, para 29.
- 110 UN Special Rapporteur on Adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context ‘Guidelines for the Implementation of the Right to Adequate Housing’ UN Doc A/HRC/43/43, para 69(ii).
- 111 CRC Committee ‘General Comment 16: State obligations regarding the impact of the business sector on children’s rights’ UN Doc CRC/C/GC/16, para 53.
- 112 Abidjan Principles, Principle 55.
- 113 African Commission on Human and Peoples’ Rights ‘Guidelines on the Right to Water in Africa’, para 32.6.
- 114 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.’)
- 115 Principle 29(1), African Commission on Human and Peoples’ Rights ‘Declaration of Principles on Freedom of Expression and Access to Information in Africa’.
- 116 CESCR Committee ‘Concluding observations: Canada’ UN Doc E/C.12/CAN/

- C0/4, para 43 (Calling on Canada to ‘ensure that civil legal aid with regard to economic, social and cultural rights is provided to poor people’ under its jurisdiction).
- 117 UN Special Rapporteur on the right to water ‘Service regulation’ UN Doc A/HRC/36/45, para 55.
- 118 SA Shapiro ‘The complexity of regulatory capture: diagnosis, causality and remediation’ 17 *Roger Williams University Law Review*, 101, 117; GJ Stigler ‘The Theory of Economic Regulation’ (1971) *The Bell Journal of Economics and Management Science* 3.
- 119 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>
- 120 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.
- 121 Principle 65, Abidjan Principles & African Commission on Human and Peoples’ Rights ‘Guidelines on the Right to Water in Africa’, para 32.2.
- 122 Principle 66 of the Abidjan Principles.
- 123 Principle 67 of the Abidjan Principles.
- 124 Principle 73(f), Abidjan Principles.
- 125 Principle 73(a), Abidjan Principles.
- 126 Principle 73(b), Abidjan Principles.
- 127 Principle 73(c), Abidjan Principles.
- 128 Principle 73(d), Abidjan Principles.
- 129 Principle 73(e), Abidjan Principles.
- 130 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; 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.
- 131 Articles 27-29, African Charter on Human and Peoples’ Rights.
- 132 Article 29(6), African Charter on Human and Peoples’ Rights.
- 133 Article 27(2), African Charter on Human and Peoples’ Rights.
- 134 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 (“The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27.2, that is that the rights of the Charter “shall be exercised with due regard to the rights of others, collective security, morality and common interest.””). See also African Court on Human and Peoples’ Rights, *Lohé Issa Konaté v Burkina Faso*, App. No. 004/ 2013, Judgment on the Merits, 5 December 2014, para 134.
- 135 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).
- 136 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, 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.')
- 137 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.
- 138 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.
- 139 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.
- 140 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.
- 141 Article 29(6), African Charter.
- 142 Principle 76, Abidjan Principles.
- 143 Principle 22, Abidjan Principles.
- 144 Principle 76, Abidjan Principles.

