Corruption and the human right to water and sanitation

Human right-based approach to tackling corruption in the water sector





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Acknowledgments

Authors

The author of this publication is Aline Baillat from WaterLex.

Aline Baillat is a researcher at WaterLex since January 2012. She holds a PhD in International Relations from the Graduate Institute of International and Development Studies, Geneva (2008). Her area of specialization is comparative and international water law and policy. At WaterLex Aline contributes to research, training and advisory activities, with specific expertise on the scope and contents of the human right to water and its consequences for various aspects of water governance.

Contributors

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WaterLex International Secretariat 83,

rue de Montbrillant 1202 Geneva Switzerland Web: www.waterlex.org Email: info@waterlex.org

And

Water Integrity Network

c/o Transparency International Alt Moabit 96, 10559 Berlin Web: www.waterintegritynetwork.org Email: info@win-s.org

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Foreword

ince I became the Minister of State for Water in the Ministry of Water and Environment of Uganda in June 2011, I have been giving priority to tackling corruption in this sector as it became clear that improvement in access to water and sanitation could not be realized without solving the corruption problem.

Although the Good Governance Working Group in the Ministry of Water and Environment existed before I joined the Ministry, it was underfunded and not visible. My legacy is that I made sure the Working Group is 'almost' adequately funded. We still need to inject more money so that the group is effective.

Secondly, the introduction of a joint sector review with development partners, civil society organizations, civil servants and elected leaders at the district level is very helpful in evaluating the Ministry's performance. Equally important is the work of the joint technical review again with development partners and other stakeholders in the water fraternity. This is an additional platform to check the Ministry's budget and technical performance. This is a candid and rigorous exercise that helps to identify weaknesses and strengths.

I am happy to report that my Ministry in the entire Uganda government is the Ministry that conducts joint reviews with other stakeholders; and many development partners told me that we are ahead of many countries in the initiatives described above.

And finally, now that the Ministry is partnering in this area with international organizations such as Water Integrity Network (WIN), and now Waterlex, I am sure, the Good Governance Working Group will be strengthened.

I was glad to participate in the first Water Integrity Forum in Delft in June 2013. It was like a dream come true. At this occasion, various experts gathered to share good practices, coordinate and upscale current efforts. WaterLex presented its joint research project on corruption and the human right to water and sanitation.

This directly appealed to me as I believe more work is needed to build synergies between anti-corruption and human rights approaches. This is precisely the objective of the present work.

This report develops first a framework to classify various corruption practices, according to the respect, protect and fulfill obligations of the human right to water and sanitation. This is a good contribution to the effort to study more systematically the linkage between corruption and violations of human rights. The report then analyses the core obligation of the human right to water and sanitation regarding access to information, participation and accountability.

This work will probably be useful for human rights experts as it lays down the basis for corruption monitoring through a human rights approach. I do believe anti-corruption

professionals and human rights advocates should work more closely and build synergies. As currently promoted by development partners, water transparency and water integrity, on the one hand, and the realization of the human right to water and sanitation, on the other hand, are pursued along parallel tracks. Combating corruption and realizing human rights are however mutually reinforcing. Eliminating corruption is essential for the full realization of human rights, while applying human rights principles to water and sanitation projects can drastically reduce the space in which opportunity for corrupt practices may occur.

This report offers a good start by making the connection between these different approaches. It also provides a framework for public authorities and civil society actors to develop integrated and sustainable solutions based on human rights to improve transparency for meaningful public participation and accountability in the water and sanitation sector.

Minister of State for Water Betty Bigombe Republic of Uganda

Introduction 1_

'Corruption is an enormous obstacle to the realization of all human rights civil, political, economic, social and cultural, as well as the right to development. Corruption violates the core human rights principles of transparency, accountability, non-discrimination and meaningful participation in every aspect of life of the community. Conversely, these principles, when upheld and implemented, are the most effective means to fight corruption', [...]

'There is an urgent need to increase synergy between efforts to implement the United Nations Convention against Corruption and international human rights conventions'.

Opening statement by Navi Pillay,

High Commissioner for Human Rights: Panel on 'the negative impact of corruption on human rights' 13 March 2013

The literature on corruption is enormous, efforts to address it have been significant but the challenge remains. Corruption, commonly defined as the abuse of public power for private gain, is everywhere, at all levels and in all countries. Is the fight against corruption illusory? Both a cause and a symptom of bad governance, some would argue that it is inherent to human nature and linked to human beings' greed. Aware of these huge challenges, we nevertheless argue here that 'fighting' against corruption is both possible and a human rights' obligation. We will demonstrate that defining and analyzing corruption from the perspective of human rights provide great advantages in operationalizing this task in the specific water and sanitation sector.

The issue of corruption has become an increasing concern among UN Human Rights mechanisms, such as the treaty bodies, special procedures and the Universal Periodic Review. A milestone in this evolution was the decision of the then Sub Commission on the Promotion and Protection of Human Rights to appoint a 'Special Rapporteur on corruption and its impact on the full enjoyment of human rights' in 2002¹. The Office

See documents of the Special Rapporteur on Corruption and its impact on human rights, Christy Mbonu, available at_http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/Documents.aspx

of the High Commissioner for Human Rights (OHCHR) also organized two important conferences in 2004 in Seoul on 'good governance practices that promotes human rights' and in 2006 in Warsaw on 'anti-corruption measures, good governance and human rights' (OHCHR 2007). More recently in 2012, the Human Right Council in its resolution A/HRC/RES/21/13, '[d]eeply concerned about the increasing negative impact of widespread corruption on the enjoyment of human rights', requested the OHCHR to organize a panel discussion on the 'negative impact of corruption on the enjoyment of human rights' and prepare a report on this topic.

The Panel took place in Geneva in March 2013. The panel discussion clearly put forward the 'need for more concrete examination of specific human rights violations due to corruption'2 and to move beyond the general language on the negative impacts of corruption on human rights. The discussions also stressed the important role of the Committee on Economic, Social and Cultural Rights, which 'could continue to apply systematic approaches to the relation between corruption and human rights and, within its mandate, should take a more proactive approach in initiating technical assistance for States parties'. At this occasion, Navy Pillay, High Commissioner for Human Rights, stressed the urgent need to 'increase synergy between efforts to implement the UNCAC and international human rights conventions'.

Building upon an emerging literature on the general linkages between corruption and human rights (UNDP 2004; OHCHR 2007; ICHRP and Transparency International 2009), this research paper will specifically focus on the impacts of corruption on the realization of the human right to water and sanitation. At issue here is the central question: Is there a human right obligation to combat corruption?

Among the large number of initiatives undertaken to fight against corruption, many of them are relevant to the water sector. The idea here is rather to show how the human right to water and sanitation can help to fight against corruption, make recommendation on specific programs, and identify particular actors for that purpose. The objective is to design a framework to monitor corruption from the human right to water perspective and to guide the development of human right-based anti-corruption policies in the water sector.

After considering some important background elements of the debate on human rights and corruption, the paper will analyze to what extend specific corrupt acts can be qualified as a violation of the human right to water and sanitation. The rest of the paper will then focus on the key principles of transparency, accountability and participation as integral part of the human right to water and sanitation and will identify opportunities and difficulties in their implementation. The final part of the paper provides some recommendations for further research and operational programs.

see para 19, Summary Report of the Human Rights Council panel discussion on the negative impact of corruption on the enjoyment of human rights A/HRC/23/26 available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.26_EN.pdf

Linking corruption and human rights: 2. promises and pitfalls

Corruption is present in various forms in every country of the world in the South as well as in the North. But the way corruption has been addressed over the last decades significantly evolved and took a particular dimension in North/South relationship. In the 1970s and 1980s it was essentially understood as a cultural phenomenon. Some authors even argued that it had a positive effect on the economy, demonstrating its 'grease' effect on the economy. In a general manner, States were not willing to denounce corrupt practices and 'accepted' to pay this 'necessary' cost for doing business in the South. With the end of the Cold War, corruption in the South ceased to be seen as a taboo in North/South relationships and various theories about corruption were developed.

Corruption became the primary obstacle to development, a 'cancer' to fight in the words of James Wolfensohn, the then President of the World Bank (1996). Corruption has been a central preoccupation of international agencies since the mid-1990 with the emergence of the 'good governance' agenda. The Bretton Woods Institutions have been the leaders in developing these good governance policy recommendations. Corruption was identified as the main obstacle to development, economic growth and foreign investments (WB, World Development Report 1997). The fight against corruption was developed hand in hand with structural reform policies and neoliberal reforms (Paulo Mauro, 1995; Abed and Davoodi, 2000). Economist extensively studied the correlation of corruption with levels of regulations, foreign investment, taxes, public spending etc.

Economic approaches used corruption to justify economic reforms while social scientist approaches tended to focus on patron-client relationship in third world countries and to identify third world politicians as main culprits (Theobald 1999).

The US was the first country to adopt a law to prohibit US companies from bribing foreign officials (1977 Foreign Corrupt Practices Act- FCPA). Addressing increasing criticisms about anti-competitiveness impacts of the FCPA on US firms, the Congress requested that the President negotiate an international treaty with members of the Organization for Economic Cooperation and Development (OECD)- that is US's major trading partners- to prohibit bribery in international business transactions. For most OECD countries, indeed, bribing foreign officials was not only not considered illegal but also tax-deductible (Tanzi 1998). With the development of the good governance agenda, it appeared necessary to coordinate anti-corruption strategies. Regional and international efforts resulted in the adoption of a series of international conventions such as the 1996 Inter-American Convention Against Corruption; the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the 1997 European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of the Member States of the European Union; the 1999 Council of Europe Criminal Law Convention on Corruption; the 2003 African Union Convention on Preventing and Combating Corruption; and the 2005 United Nations Convention Against Corruption.

Although the emergence of anti-corruption movement is certainly not limited to these economic agendas, mainstream economists played an important role in the development of anti-corruption programs. Moreover the impact of isolated anti-corruption measures on external trade is part of the understanding of the emergence of a coordinated international effort against corruption.

In more recent years, efforts to establish the relationship between corruption and human rights emerged as a main area of research (ICHRP 2009, Julio Bacio Terracino 2010, Gathii, 2010, Boersma 2010, De Beco, 2011). The new perspectives they bring to corruption issues have the potential to bring significant changes into the way corruption has been understood and tackled so far.

Some argued however that this discourse might just be 'another stick with which to beat developing countries' (Goodwin & Rose-Sender 2010) and 'linking human rights language to anti-corruption is an unwelcomed addition' that contributes to obscure the fact that neoliberal policies – not corruption – are responsible for development failures. A first risk of qualifying corruption acts as human rights violations is to assimilate corruption problems with developing countries context only. Indeed, as they suggested, corruption in developed countries will never be qualified as a human right violation. The second danger of linking corruption and human rights in such a way is to oversimplify the complexities surrounding 'corruption' realities. What if - what is described as 'corruption' – does actually improve access to water and sanitation of the poorest?

It is hoped here, on the contrary, that linking corruption with human rights issues might bring new light to understand corruption and bring a human face to corruption issues. The true advantage of linking corruption with human rights is precisely to give a human face to what is described as corruption. A human right-based approach to corruption in the water and sanitation sector offers new ways of understanding 'corruption'.

If the limitations of linking human rights and anti-corruption brought forward by Morag Goodwin & Kate Rose-Sender (2010) are relevant in these regards, they failed to acknowledge the true positive contribution of human rights instruments in the fight against corruption, that is the empowerment of people with regard to their rights to access information, to participation and accountability in water and sanitation issues.

Building synergies between anti-corruption conventions and human rights' instruments: the challenges of petty corruption

Corruption is commonly defined as the 'abuse of public power for personal gains'. This definition has the advantage to be short, simple and start a process of delimitation of such a complex phenomenon. A part of the literature on corruption devoted attention to cultural perceptions of corruption and provided a linguistic analysis of the concept. They show that what is perceived as corruption is not necessarily perceived as such in other context. This makes the work of defining corruption even more complex. Nevertheless an international, consensual legal framework has recently emerged to address

the problem of corruption.

The UN Convention Against Corruption (UNCAC), adopted in 2003 and entered into force in 2005, does not provide a definition of 'corruption' in general but rather focuses on specific acts of corruption: Bribery of national public officials, bribery of foreign public officials and officials of public international organizations, embezzlement, misappropriation or other diversion of property by a public official, trading in influence, abuse of functions, illicit enrichment, laundering of proceeds of crime, concealment, and obstruction of justice (article 15 to 25). Dealing with 'corruption' in general is indeed usually not useful.

The Convention condemns both sides of the corrupt act, as usually corrupt practices involve collaboration between two or more agents. It is not focused on 'public power' only; various articles deal with private sector sanctions as well. In addition to 'personal gains', the convention includes various types of gains such as gains for political parties, families, clans, etc. It addresses therefore the various forms of corruption: economic, political and public administration corruption. In other words, the Convention provides an interesting starting point to define corrupt acts.

However, the UNCAC is not well equipped to tackle systemic petty corruption that is small-scale and low-level corruption (but includes complex realities). Generally speaking, criminalization as provided in the UNCAC will not help to resolve petty corruption problems. Petty and grand corruptions represent two very different realities and one could even challenge the use of the some language to define so different realities. In the case of criminal corruption, corruption acts should indeed be the main focus of anti-corruption policies. However, in the case of petty corruption, corrupt acts are a symptom of a larger problem, usually - poverty- and if petty corruption is to be addressed, one needs to look for other solutions than criminalization.

The UNCAC is an international instrument that has to be tailored to the specific corruption challenges of each country. To address these contextual challenges, the design and implementation of specific national anti-corruption laws and policies remains State responsibility. In the UNCAC, as in some contexts, criminalization is only a part of the strategy, the rest of the efforts are devoted to preventive measures and the strengthening of transparency, accountability and participation frameworks. It is especially in this regard that the synergies between anti-corruption and human rights make sense.

The UNCAC devotes a lot of attention to right holders and their roles in the prevention of and fight against corruption. Article 5 mentions that preventive anti-corruption policies shall 'promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability'. Article 9 on 'public procurement and management of public finance' and Article 10 on 'public reporting' refer to the establishment of transparent procedures and access to information for the general public. Article 13 is entirely devoted to the 'participation of society':

'1. Each State Party shall take appropriate measures, [...] to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:

- (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;
- (b) Ensuring that the public has effective access to information;
- (c) Undertaking public information activities that contribute to non- tolerance of corruption, as well as public education programmes, including school and university curricula;
- (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption'.

The link between human rights and the anti-corruption legal framework is even more explicit in the African Union Convention on Preventing and Combatting Corruption. The African Union Convention clearly states that its objective is to 'promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights' (article 2.4) and 'establish the necessary conditions to foster transparency and accountability in the management of public affairs' (article 2.5). The UNCAC briefly mentioned the right to due process but the African Union Convention has a full article on 'minimum guarantees for a fair trial³' (article 14) and the article 3 recalls the main principles of the Convention including 'Respect for human and peoples' rights in accordance with the African Charter on Human and Peoples Rights and other relevant human rights instruments.' The African Union Convention develops the aspects of access to information (article 9) and participation of civil society and media⁴ (article 12).

Article 14: 'Subject to domestic law, any person alleged to have committed acts of corruption and related offences shall receive a fair trial in criminal proceedings in accordance with the minimum guarantees contained in the African Charter on Human and Peoples' Rights and any other relevant international human rights instrument recognized by the concerned States Parties'.

Article 12 : 'Create an enabling environment that will enable civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs'.

Corruption and the realization of the human 3. right to water and sanitation

The Human Right to safe drinking water and sanitation has been recognized by the international community in Resolution 64/292 of the General Assembly in July 2010. Appointed member States at the Human Rights Council underlined this international commitment two months later in September 2010 in a resolution affirming that 'the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity' (HRC 15/9). Reinforcing the interpretation of the Committee on Economic, Social, and Cultural Rights (CESCR 2002), this resolution recognizes that the human right to safe drinking water and sanitation is implicit in both, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). As of 2013, 167 States are party to the first Covenant and 160 to the second⁵.

One should first make clear that although there is no international convention specifically designed for the human right to water, access to safe drinking water is explicitly mentioned in various international human rights conventions. The Convention on the Elimination of All Forms of Discrimination Against Women (into force since 1981, Art 14 (2)(h)), the Convention on the Rights of the Child (into force since 1990, Art 24(2) (c)), and the Convention on the Rights of Persons with Disabilities (into force since 2008 (Art 28(2)(a)) explicitly refer to the right.

For a long time the scope and implications of the human right to safe drinking water and sanitation has been subject to debates. It was settled around the core following components: the human right to safe drinking water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.' (CESCR General Comment 15, §2, 2002). The recognition of safe drinking water as a human right means that States have to respect a number of principles inherent in all human rights, specifically: non-discrimination6, access to information, participation, accountability and sustainability that we will develop further.

Corruption is usually closely associated with discrimination although this could be documented more closely. In his 2010 report, the International Council on Human Rights Policy righty mentions 'At all these levels, corruption reinforces exclusion and discrimination and tends to magnify and exacerbate pre-existing human rights problems' (ICHRP, 2010, p8). De Beco suggested that 'because human right focus on non-discrimination, bringing a human rights perspective to corruption monitoring would result in more attention being paid to the way in which corruption affects vulnerable groups

http://treaties.un.org

Article 2.2 of the International Covenant on Economic, Social and Cultural Rights: 2.2. 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'(ICESCR, art. 2.2)

differently' (De Beco, 2010, p4).

As with other economic, social and cultural rights, the human right to safe drinking water and sanitation entails three types (or levels) of obligations, i.e 'respect', 'protect' and 'fulfill': The obligation to respect basically requires States not to take any measures that would result in preventing individuals from enjoying their right to safe drinking water and sanitation; the obligation to protect requires measures by the State to ensure that third parties do not interfere with the enjoyment of the right to safe drinking water and sanitation; the obligation to fulfill essentially requires States to adopt the necessary measures directed towards the full realization of the human right to safe drinking water and sanitation (CESCR, General Comment 15).

Corruption and the obligation to devote the 'maximum' available resources' to realizing the human right to water and sanitation

The human right to water and sanitation as well as other economic, social and cultural rights requires state parties to comply with article 2 of the International Covenant on Economic Social and Cultural Rights which mentions that:

'1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' (ICESCR art 2.1. emphasis added).

In an expert paper prepared for the OHCHR for the 2006 Conference, Nihal Jayawickrama mentions:

§10. 'When substantial national resources are diverted from public use into private benefit, or development aid is mismanaged, misused or misappropriated, the development process is aborted. The government is no longer in a position to fulfill its minimum human rights obligation, namely, 'to take steps', individually and through international assistance and cooperation, 'to the maximum of its available resources', to achieve progressively the full realization of the social, economic, and cultural rights of its citizens' (Jayawickrama. Nihal 2006)(referring to article 2 of the International Covenant on Economic Social and Cultural Rights).

On his side, the Committee on Economic, Social and Cultural Rights in General Comment 15 on the human right to water explicitly mentions as examples of violations of the obligations to fulfill:

44.(ii) 'Insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to water by individuals or groups, particularly the vulnerable or marginalized'.

Acts defined under article 17 of the UNCAC: 'Embezzlement, misappropriation or oth-

er diversion of property by a public official' can therefore in some circumstances be qualified as violations of the obligation to fulfill the human right to water (acts of commission). To the risks of oversimplifying the issues here, one could schematize this type of corruption as the kind of corruption that usually happens in public/public interactions (according to the typology by Plummer and Cross 2006).

When corruption acts lead to the violation of the obligation to 3.2 respect

The Committee on Economic, Social and Cultural Rights in General Comment 15 on the human right to water explicitly mentions that violations of the obligation to respect includes '(i) arbitrary or unjustified disconnection or exclusion from water services or facilities; (ii) discriminatory or unaffordable increases in the price of water'.

Abuse of functions by water and sanitation service officials usually involves violation of the obligation to respect the human right to water. Article 19 of the UNCAC explains that 'abuse of functions refers to a public employee or public office holder that is doing something which is illegal or something that the official has no legal authority to do, in order to obtain a personal economic benefit or cause an illegal damage to others'.

This obligation is usually violated in the case of petty corruption where low level officials abuse their functions to extract small bribes and favors from water users. These situations are particularly frequent when public officials meet the public directly. In India, Kaushik Basu, then Chief Economic Adviser of the Finance Ministry defined 'harassment bribes' as a bribe that people often have to give to get what they are legally entitled to.

Petty corruption is probably the most difficult types of corruption to address. Although it involves small amount of money in comparison to grand corruption, this sums often represent an unaffordable price for individuals. It has been documented in many places that this form of corruption disproportionately hurts the poorest members of society.

Following the typology proposed by Plummer and Cross (2006), this type of corruption usually concerns public officials/consumers interactions.

3.3 When corruption leads to a violation of the obligation to protect

General Comment 15 mentions 'Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to water by third parties. This includes, inter alia: (i) failure to enact or enforce laws to prevent the contamination and inequitable extraction of water; (ii) failure to effectively regulate and control water services providers; (iv) failure to protect water distribution systems (e.g., piped networks and wells) from interference, damage and destruction' (44.b, emphasis added).

In this regard, the case on the Milan aqueduct, Costa Rica, which was presented at the first global Water Integrity Forum in June 2013, highlights how scarce coordination and accountability of state authorities can hamper and neutralize this obligation, and ultimately prevent the enjoyment of the human right to water. Following many years of disputes around water contamination caused by intensive pineapple industry, the highest Court of Costa Rica finally ruled in 2009 that specific authorities and ministries had the obligation to clean the area and restore safe drinking water in the area. Despite this, communities are still deprived of their right as relevant authorities have failed to solve the situation.

Corruption acts such as trading in influence (article 18) often results in the non-enforcement of laws designed to protect the right to water. A 2012 report by Human Rights Watch on the mining industry in the Indian States of Karnataka and Goa illustrated how various forms of corruption including trading in influence is regularly used to get around regulations. Illegal mining results in unsustainable water extraction and contamination of groundwater and surface waters used by local communities as sources of drinking water. Corruption is present all along the decision making process from the authorization to dig below water tables to the conduct of environmental impact assessments and public hearing. The report for example points out how companies can influence the results of Environmental Impact Assessment as they are financing them (p37). The report also shows how public hearing results are usually left aside by corrupt public authorities.

Finally, one should underline that State's obligation to protect has an extraterritorial dimension meaning that States should 'take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction' (CESCR 2011). In General Comment 15, the Committee mentions that 'steps should be taken by States Parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries' (§33). Synergies with the international anti-corruption legal framework are possible in this regard as well. The UN Convention against Corruption has indeed a specific article on the criminalization of bribery of foreign officials (art 16). OECD Members also adopted in 1997 a specific convention on Combating Bribery of Foreign Public Officials in International **Business Transactions.**

Corruption acts that lead to a violation of the obligation to protect can usually be classified under the interaction public/private suggested by Plummer and Cross.

To take appropriate legislative measures against corruption and the obligation to fulfill?

In developing countries, corruption, in general, is estimated to, according to Transpar-

ency International 2008 report, 'raise the price for connecting a household to a water network by as much as 30 per cent'. Given this general negative impact of corruption on the right to water and sanitation, State have a legal obligation under article 2.1 of the International Covenant on Economic, Socials and Cultural Rights to adopt and implement strategies to tackle corruption in the water sector. The obligation to adopt measures to prevent and combat corruption clearly falls under the obligation to fulfill - understood as the obligation to take appropriate legislative and other measures for the realization of the human right to water. General comment 15 mentions: 'The obligation to fulfill requires States parties to adopt the necessary measures directed towards the full realization of the right to water' (§26).

Beyond criminalization: dealing with complex realities 3.5

3.5.1 Understanding Bribes: bringing a human face to corruption.

We mentioned earlier that in some context bribes required by public officials in exchange of water and sanitation services could lead to a violation of the obligation to respect the human right to water and sanitation of individuals. In other contexts, however, petty corruption may have a short-term benefit for the poor: when bribes are offered to the service provider official to lower water bills or get an illegal connection. In these cases, corruption reveals the failure of the state to implement the human right to water and sanitation. Indeed, if basic water were affordable to all (which means free in some circumstances), users would be less tempted to get around the rules. Systemic corruption reveals a larger problem for which criminalization can only be part of the solution.

In the words of M. Sohail & S. Cavill: '....the best way of addressing corruption is to understand it, not just as a series of one-off actions, but as part of the system where corruption is so institutionalized that it allows for (or even encourages) individuals to be corrupt; that is, corruption is perceived to be the modus operandi. Therefore, the whole system would be in dire need of institutional reform rather than merely 'catching' and punishing individuals.' (Sohail and Cavill, 2007). Human rights approaches could help to understand these complex systems by bringing a human face to the issue.

In any case, it is important to measure and anticipate the impact on the poorest population of anti-corruption measures. For that matter, Plummer and Cross, in their report on corruption in the water sector in Africa proposes to distinguish between short-term and long-term impacts of anti-corruption measures (Plummer and Cross, 2006).

3.5.2 Political corruption and other forms

In many places, corruption in water and sanitation decision-making is strongly inter-

twined with political processes. When water service provision is used for vote buying and clientelism, this leads to a distortion of the principles of universality and non-discrimination of the human right to water and sanitation. The 2008 Transparency International report on corruption in the water sector mentions how in Malawi, water collection points constructed between 1988 and 2002 were mostly placed in areas where such facilities already existed, as a reasons of 'political patronage'. Moussa Diop in his doctoral thesis on water and sanitation services in Senegal provided some examples of how water and sanitation by-laws and programs are designed in such a way as to enhance discretionary power of local authorities. He mentioned for example the formal priority given to criteria such as 'gros village' whose large definition opens the door to arbitrary interpretation (Diop, 2008).

These actions lead to a general mistrust in public authorities in charge of water and sanitation services, which results in civil disobedience and payment refusal, worsening the state of water and sanitation services.

The term 'corruption' encompasses very different realities whose impacts on access to water and sanitation of most vulnerable populations should be carefully assessed. For that matter, it is important to 'unpack' corruption into specific types of interactions. We used the typology of Plummer and Cross: public/public; private/public; providers/ consumers and tried to show some possible ways to combine it with human rights' general obligations framework Respect, Protect and Fulfill⁷. Beyond the weaknesses due to the simplification of a complex topic, such a system offers the advantage of 'unpacking' corruption into specific corrupt acts and realities. It is hoped that this framework will contribute to human rights monitoring mechanisms' work regarding corruption issues.

We also tried to show that corruption in the water and sanitation sector goes well beyond specific acts as defined in the UNCAC. Clientelism and other forms of political corruption but also scientific data manipulation are challenges for equitable, sustainable and efficient water and sanitation services. To address these challenges and the general lack of trust that sometimes exist in water and sanitation services, it is important to strengthen the procedural components of the human right to water and sanitation. The next section will focus on prevention strategies resting on increased transparency, accountability and participation as defined in the legal framework of the human right to water and sanitation. We will try to address the various opportunities and challenges concerning the implementation of these principles in the different types of interaction presented above: public/public; private/public; provider/user.

Even though Plummer and Cross's framework could be completed somehow by including another type of interaction: a private/private category as a way to take into account cases of corruption between a principal private provider and subcontractors for example or even more radically where organized crime controls the territory and its resources (like in Sicily or in Guatemala).

A legal framework to TAP-transparency, accountability and participation

The human right to water and sanitation encompasses procedural rights such as the right to access information (transparency), the right to participate in decision-making procedure and the right to ask for remedy (accountability). These aspects are clearly related to the common framework of preventive measures and to promote water integrity in anti-corruption language: 'TAP': 'Transparency, Accountability and Participation'. These concepts emerged as an extension of the Klitgaard formula synthetizing corruption risks and prevention strategies (Klitgaard 1998). According to this formula:

C=R+D-A,

C (corruption) equals to R (economic rent) plus D (discretionary power) minus A (accountability). Accountability resulting from transparency and participation is presented as part of the solution to reduce discretionary power and hence corruption. For human rights' advocates, access to information (transparency), participation and accountability are human rights' obligations and may trigger human rights protection mechanisms. The human right to water and sanitation therefore leads to the empowerment of right-holders and has the potential to transform the balance of the power between rights-holders and duty-bearers - which is fundamental for effective access to information, participation and accountability.

The Committee on Economic, Social and Cultural rights specifies in General Comment 15 on the right to water:

'The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties' (§48).

Moreover, General Comment 15 on the human right to water listed 'information accessibility' under the various dimension of the 'accessibility' criteria included in the human right to water.

'Information accessibility: accessibility includes the right to seek, receive and impart information concerning water issues'. (§12(c)iv, GC15, see also §48)

In Resolution 15/9, the Human Right Council calls upon States to

'To ensure full transparency of the planning and implementation process in the provision of safe drinking water and sanitation and the active, free and meaningful participation of the concerned local communities and relevant stakeholders therein' (§8 (b), HRC 15/9, 2010).

Of course, the rights to access information, to participate and to justice are not specific to the water sector. These 'procedural' rights are linked to fundamental civil and political rights included in the International Covenant on Civil and Political Rights. As demonstrated elsewhere, the realization of these fundamental civil and political rights are central elements of a general human right-based anti-corruption strategy (ICHRP 2010). In this regard, all efforts toward the strengthening of the capacities of parliamentarians and democratic institutions, political parties financing, independent media, independent judiciary or the protection of whistleblowers are important to recall. The post-2015 sustainable development agenda is likely to have a goal on 'Good governance an effective institutions' including targets on public participation, access to information, accountability and reduction of bribery and corruption (goal 10).

Having underlined these general linkages, our objective here is rather to analyze the various challenges linked to these 'procedural' rights in the water and sanitation sector. To fulfill this task, one needs to distinguish between various public services delivery models and various levels of decision-makings.

4.1 Transparent recruitment processes in the water and sanitation sector

First, one would like to stress an often-overlooked form of participation in public life: the right 'to have access on general terms of equality to public service positions' (HRC general comment 25). Appointment of public officials in water and sanitation services has often been reported as acts of corruption including selling and buying public positions and requiring, offering bribes for promotion. To recall the right to equal opportunity to access public service positions is therefore a key instrument to prevent corruption. The Human Rights Committee interpreting article 25 of the ICCPR mentions:

'To ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable. Affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens. Basing access to public service on equal opportunity and general principles of merit, and providing secured tenure, ensures that persons holding public service positions are free from political interference or pressures. It is of particular importance to ensure that persons do not suffer discrimination in the exercise of their rights under article 25, subparagraph (c), on any of the grounds set out in article 2, para.1'.(§23, GC25, 1996)(emphasis added)

This authoritative interpretation by the Human Rights Committee of article 25 of the ICCPR is clearly echoed by the provision included in article 7 of the UN Convention Against Corruption concerning preventive measures in the public sector. Article 7 stresses the importance for State party to adopt systems of recruitment that are 'based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude'.

4.2 Transparency in international aid flows

The global financial crisis that struck in 2008 revealed the necessity to reform many financial institutions at the national, regional and international levels. The call for 'transparency' received an increased attention. In December 2012, the States at the UN General Assembly adopted an important resolution on 'Promoting transparency, participation and accountability in fiscal policies' endorsing the Global Initiative for Financial Transparency (GIFT) High Level Principles and encouraging Member States to intensify efforts to enhance transparency, participation and accountability in fiscal policies (A/RES/67/218). Leading international financial institutions such as the World Bank and the International Monetary Fund (IMF) are at the origin of this new global initiative along with Brazil, the Philippines, and International Budget Partnership (IBP). In 2011, the World Bank decided to make its funding more transparent. The new World Bank Finance Portal discloses information about specific funds, the disbursement and repayment status of thousands of projects around the world.

Moreover, in 2012, the World Bank took another important step toward more transparency by publishing decisions taken by the Sanction Board. In 1999, in order to address cases of corruption, collusion or fraud in relation to its activities, the Bank established the World Bank Group's Sanctions Board, an administrative tribunal sanctioning companies for misconduct. Until 2012, these decisions were not made public.

In 2013, the IMF drafted a new and strengthened fiscal transparency code of good practices (a first version was released in 1998). The OECD had also released a report on good practices in budget transparency in 2002.

Launched at the High Level Forum on Aid Effectiveness in Accra in 2008, the International Aid Transparency Initiative (IATI) provides information on projects that development agencies are funding or implementing. Many UN agencies are IATI signatories as well as the following governments: Australia, Belgium, Canada, Denmark, Germany, Ireland, the Netherlands, New Zealand, Norway, Spain, Switzerland and UK.

These recent initiatives are good news and should be encouraged, so that more organizations and countries join them. But to bring concrete results for anti-corruption purposes, it is now critical to work on the development of specific monitoring tools for civil society that would help people to understand, track and systematize analysis of aid flows.

Making transparency, participation and accountability in budgeting and planning a reality: national and sub-national levels

In her 2011 report on human right to water national planning, the UN Special rapporteur on the human right to water and sanitation provides insights on the right to participate and access to information in the context of water and sanitation national planning:

'Systematic participation is crucial in every phase of the planning cycle, from diagnosis

through target setting and the formulation of responses and implementation to monitoring and evaluation.' (§68, 2011 report).

She adds:

'Participation must be active, free and meaningful. It must go beyond mere information-sharing and superficial consultation, and involve people in decision-making, providing real opportunities to influence the planning process. The organization of a truly participatory process is challenging. Different mechanisms and approaches will be required, including consultations with various stakeholders, public meetings and hearings as well as the opportunity to submit written comments and feedback' (§69, 2011 report).

These principles also apply for the budgetary aspects of the national water and sanitation planning.

International Budget Partnership (IBP) is a civil society initiative devoted 'to promoting public access to budget information and the adoption of accountable budget systems'. They publish every two years a report 'Open Budget Survey' offering analysis and measurement of the level of transparency of national budgets (Open Budget Index).

In a recent IBP book, the authors show that fiscal transparency does not necessarily lead to increased participation and accountability (Sanjeev Khagram, Archon Fung, Paolo de Renzio, 2013). They mention:

'Simply placing information in the public domain or opening up spaces for public participation does not ensure that these will be used or used wisely. Peoples' responses to information are inseparable from their interests, desires, resources, cognitive capacities, and social contexts'. (Sanjeev Khagram, Archon Fung, Paolo de Renzio, 2013, p9)

They further explain:

'Transparency, therefore, is achieved more easily than participation. Both are necessary, but far from sufficient for bringing about more accountability in public finances and other hoped-for outcomes, including improved service delivery, reduced corruption, and sustainable human development more broadly. According to the evidence we gathered, the links between fiscal transparency, participation, and accountability are often weak, interrupted, incomplete, or, in the best of cases, difficult to unearth and explain and dependent on idiosyncratic factors and conditions.' (Sanjeev Khagram, Archon Fung, Paolo de Renzio, 2013, p39).

Moreover, according to the context, states disclose fiscal information for different reasons: to respond to international donor requirements, to face increasing political competition, or to restore fiscal credibility domestically and on international financial markets. Budget information disclosure is rarely designed for anti-corruption goals. This study underlines the need for further research to better understand the factors that lead to increased participation and accountability in public finance.

Many factors should be taken into account in the analysis of the degree and quality of participation in public finance and planning. First of all, the level of decision- making is key. Public participation strengthening was a key objective of decentralization reforms

that have been introduced in many countries. Moreover, public participation in the preparation, adoption and monitoring of local budgets has been increasingly advocated as an anti-corruption preventive measure. Participatory budget were first experimented in Porto Alegre in Brazil in the late 1980s. Strongly supported by the World Bank and United Nations agencies, it is estimated today that the model is practiced in over 300 cities around the world (International Budget Partnership). Various studies tried to evaluate these initiatives and factors of success were identified such as political will of public authorities, availability of technical and financial support and communities organization and structure. A recent study on participatory budgeting in Peru specifically focused on the water and sanitation sector (Miguel Jaramillo and Lorena Alcázar, 2013). The authors found that there were no direct relationships between participatory budget and improvement in water coverage and services quality. To bring equitable results, participatory budgeting should carefully be accompanied by a set of other measures such as right-holder empowerment and awareness raising, financial and technical support, or auditing and monitoring capacity building. In addition, this study shows that 'water and sanitation projects that come from the participatory budgeting process are in most cases very small (a few blocks) and basically of replacement type' (p35). In other words, participatory budgeting at the district or municipal level should be connected and coordinated with other budgets at higher levels where 'big' projects' are decided.

In another report on Latin America, the author argues that the successes of participatory budgeting depend on the way participatory mechanisms were introduced (Goldfrank, 2006). He shows that they were much more successful when they resulted from a local government initiative than when they were imposed on local government by national law (as was done in Bolivia, Nicaragua, and Peru in the 1990s). Detailing the implementation of the Popular Participation Law in Bolivia, the study mentions:

'The political manipulation of the new ostensibly participatory institutions has had clearly negative effects on the actual practices of citizen participation in municipal budgeting. Scholars generally agree that in many municipalities, the OTBs [territorial base organizations] and CVs [Oversight Committee] either do not function at all or are not effective at transmitting community demands into budgets or monitoring budget implementation so as to reduce corruption (Altman 2003: 83-85; Bartholdson 2002: 29, 47; Krekeler, et al. 2003: 25-26)' (Goldfrank, 2006, p25).

This study highlights the difficulties surrounding the introduction of new participatory mechanisms that might results –sometimes – in a sort of parallel mechanism to those already in place. Before introducing any of these reforms, there is a need to better understand how communities are organized, their social and political institutions (be they formal or informal) and power and interest structures in place.

This leads us to another issue: the institutionalization and formalization of existing -informal - participatory and social accountability structures. One would like here to present some opportunities and challenges surrounding community water supply boards in rural and peri-urban areas in Latin America. These community organizations OCSA (Organizaciones Comunitarias de Servicio de Agua) are central institutions for the distribution of water and sanitation services and integrated water resources management. There are 80 000 OCSAs in Latin America which serve roughly 40 million people (World Bank 2008). These usually small structures demonstrated high level of transparency, participation and accountability throughout the cycle of the community project from planning, budgeting, to construction, maintenance and monitoring. Indeed, transparency and accountability are the pillars of their legitimacy8. Initiated to fill a gap in state neglected areas, these self-organized and not-for-profit structures generated a strong sense of common ownership of their shared water infrastructures. Moreover, it is widely reported that transparency, participation and accountability are the fundamental elements of users' trust in these organizations resulting in high level of compliance with water tariff collection notably.

Of course challenges exist. Major weaknesses of these systems are the lack of financial and technical capacity but also difficulties related to unclear legal status of these organizations, land rights and assets. In fact, their relationship with the state varies greatly across countries. In Nicaragua, in 2010, after years of debates, a law recognized these 'Comités de Agua Potable y Saneamiento' CAPS (Ley 722). In Guatemala however, OCSAS have no specific regulation or recognition. Legalization is a difficult topic for these organizations. On the one hand, this could provide them with state's financial and technical support but on the other hand, they fear to lose ownership and independence in the management of their structure. Above all, these resistances reveal a lack of trust in formal state structures and institutions as well as water and sanitation agencies. Increasing transparency, participation and accountability in the relationship among the various institutions at the various levels of decision-making is fundamental for better water and sanitation services.

Moreover, for financial transparency to bring outcomes in terms of corruption prevention, there is a need to better articulate the budgets at the various levels of decision-making. Indeed, it is fundamental to trace the various financial transfers occurring among ministries or among the various level of administration to the local level.

Kenya introduced an interesting system to strengthen public participation and community-level decision making. In 2004, Kenya adopted the 'Constituency Development Fund Act' that created a new type of Funds (Constituency Development Fund – CDF) specifically devoted to enhance decentralization and community-driven development. 'Constituency Development Fund is an annual budgetary allocation of not more than 2.5% of the annual budget that is directly disbursed to constituencies for their own development based on their own priorities as derived from people's felt needs stated in proposals developed within the constituencies' (UNDP/SIWI, 2007, p60). However, it is unlikely that these funds deal with large investments as required in the water and sanitation sector.

In India, the right-to-information legislation or simply called the RTI Act has been very well utilized by water consumers, whether at an individual, community or organization level to demand information from authorities both in the rural and urban context. Communities have been trained to use the RTI act. In many cases, shared information helped in changing course of projects in water and sanitation. For instance, village wa-

As documented in interviews with various Presidents of OCSAS from El Salvador (Mr. Carlos Alberto Beltrán), Guatemala (Ms. Maria del Rosario Perez and Mr. Francisco Alberto Urizas Fernandez) and Costa Rica (Ms. Xinia Briseño and Ms. Maria de los Angeles Bolaño)

ter and sanitation committees, elected collectives at village level have been using the RTI effectively asking information on project plans and making informed recommendations to modify those plans resulting in many improvements for the people. In many instances like in the state of Andhra Pradesh, based on information received under RTI, social audits have been undertaken. These revealed a mismatch between numbers quoted in official records on installed pipes and actual ground situation, where in reality, half the pipes were missing⁹.

Transparency in Public Procurement Processes and Public Private Partnerships: challenges ahead

The issue of transparency, participation and accountability in public/private interactions bring additional challenges.

Catarina de Albuquerque in her report on non-state service providers underlined the right of individuals to participate in decision-making processes concerning the choice to delegate or not the services to a private operator.

63.(c) 'Regardless of its modalities, the decision of the State to delegate or not delegate service provision must be taken in a democratic and participatory process. All those concerned must be enabled to participate throughout the process and to monitor, evaluate and report on possible human rights abuses. Participation has to be active, free and meaningful and allow for a genuine opportunity to influence decisionmaking;'

She underlines also:

36. 'When deciding to delegate service provision, and once that fundamental decision has been taken, the subsequent process of tendering, bidding and contract negotiation also must be transparent. The terms of reference and the final contract should be made available for public scrutiny and commenting. Commercial confidentiality must not jeopardize the transparency requirements provided for under the human rights framework'. (§36. 2010 report on non-state service providers).

Given 'the complexity of striking the right balance between commercial confidentiality and public interest' during public procurement processes in the water and sanitation service sector, Mova Al Afghani argued in his thesis that access to information legislation needs to be specified to the sector including clear procurement rules. In other words he stresses the importance of 'integrating access to information laws into public procurement processes' (Al Afghani 2012).

Launched by the World Bank Institute in Johannesburg in October 2012, the Open Contracting initiative-linked to the Open Government initiative – seeks to foster information disclosure and participation in public contracting. Open contracting principles cover the whole contracting chain from planning to finalization of contract obligations, including tendering and performance. Traditional public procurement and public-pri-

Based on interview with Fresh Water Action Network South Asia (FANSA), 2013

vate partnership should get specific attention. Further work should focus on developing specific guidelines for open contracting in the water and sanitation sector.

Beyond transparency issues in these public procurement processes, the participation of private sector in water and sanitation services raises questions regarding their obligations to disclose information under the human right to water and sanitation.

Over the last decades, many countries have adopted right-to-information legislation. In some cases such as Indonesia and India freedom of information laws were adopted as part of anti-corruption measures. In any case, right to information legislation depend on the nature of information to be disclosed (i.e. how 'public documents' are defined) and also on the level of proactivity of information disclosure (i.e. upon citizen demands or as routine procedure). The status of private operators delivering a public service such as water and sanitation services raises significance challenge to most national right to information legislation. The 1998 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, or Aarhus convention, offers however a somewhat large definition of 'environmental information' and 'public authorities'. In a currently pending communication before the Aarhus Convention Compliance Committee (ACCC/C/2010/55 submitted by the NGO Fish Legal), the question is raised on the nature of private water and sewage companies and water only companies in England and Wales and on how environmental information – including information relating to water – held by such companies may be treated 10. Access to the requested information had been denied on the motivation that according to jurisprudence in England and Wales (Upper Tribunal case no. GI/2458/2010 Smart Source v. the Information Commissioner) these companies were not 'public authorities' for the purposes of the Environmental Information Regulations 2004 and therefore the Aarhus Convention. In the light of the text of the Aarhus Convention, it is rather unlikely that these companies are excluded from scrutiny and access to information, since they provide public services. The Compliance Committee has currently suspended consideration of the case, because of pending domestic remedies (at the UK and EU level).

Right to access information legislation has the potential to bring public scrutiny into the management of water resources and therefore prevent corruption. However, as pointed out by this case and as developed by Mova Al Afghani in his thesis, right to access information legislations are usually inefficient to tackle the specific challenges of the water and sanitation sector, especially when they involve private operators. In this regard, he suggests to reform freedom of information laws so that they contain both 'definitional system' (which defines what 'public bodies' are) and 'designation system' (which specifically list down public bodies) (Al Afghani 2012).

Finally, another obstacles to accountability in the water and sanitation sector, is the confusion of the identity of duty-bearers. For that reasons as well, there is a need for

Specifically, in 2009, Fish Legal sought to determine the conditions on what was previously known as 'deemed consents' for thousands of combined sewages overflows in England and Wales. Fish Legal argued that the deemed consents were little more than carte blanche to pollute at will because no proper conditions had been applied to the consents since the privatization of the water industry in 1989. Consequently the outflows of untreated sewage caused significant environmental harm.

more transparency. As stated by Catarina de Albuquerque in her report on non-state actors:

'To ensure accountability, roles and responsibilities have to be clearly designated and made transparent. Also, the coordination between different entities involved – public and private - has to be ensured. Water and sanitation users must be able to identify who is responsible in order to hold the relevant actor to account'. (2010 report on non-state providers, §57)

4.5 Transparency, Participation and Accountability: the central role of Service Providers (operational levels)

In order to prevent corruption in the interaction between users and providers, and more generally to foster accountability in the operations of services, social accountability mechanisms have been introduced in various countries. First introduced in India by an NGO based in Bangalore, the Public Affairs Center, social audit through 'Citizen report cards' have been replicated in a number of countries such as the Philippines, Tanzania, Ukraine, Viet Nam and Kenya. Municipal authorities including the Bangalore Water Supply and Sewerage Board were made accountable through the introduction of these public meetings and questionnaires (citizen report cards). In Bangalore, what was first a civil society initiative became in a second phase a formal consultation process launched in collaboration with the state government and municipal agencies. Resulting from these consultations, reforms such as new grievance mechanisms and procedures to report corrupt acts were introduced. Reporting on this successful initiative, the UNDP notes: 'By 2003 the social audit was registering real improvements, with poor households reporting a sharp reduction in bribes for connections and improvements in efficiency' (UNDP 2006, p101).

Civil society has been influential is many places to push for the introduction of complaint mechanisms within the enterprise or agency in charge of delivering water and sanitation services. In some places, water and sanitation service providers have introduced internal corruption reporting procedure. In Cochabamba, for example, in the context that followed the 'guerra del agua' and the re-municipalisation of the water and sanitation services, SEMAPA (Servicio Municipal de Agua Potable y Alcantarillado), the municipal agency established a 'transparency and coordination unit'. The main objective of this unit is 'to create mechanisms for processing, following up on reports of possible acts of corruption committed by SEMAPA public servants in the exercise of their functions, as well as private individuals and companies with a service contract' (SEMAPA website).

In Cambodia, the Phnom Penh Water Supply Authority undertook extensive reforms for to improve transparency and accountability. Every department is responsible for its own accountability and inspection of the works and departments are carried out by the water utility board. The utility has a policy of transparency. It produces and distributes progress reports and performance indicators on a regular basis and every three months, the administrative council reviews results and priorities. Internally, a set of indicators are used to understand the overall performance and department level performance on a monthly basis and a total of 148 indicators are used for evaluation.

Externally, data is shared with benchmarking organizations like Southeast Asian Water Utility Network (Binayak Das et al. (eds) 2010).

In collaboration with UNDP, KWAHO (Kenya Water for Health Organization), a Kenyan NGO working in the water and sanitation sector, launched the 'Water Dialogue Forum', a local community level platform where water and sanitation issues are discussed. Most importantly, it 'serves as feedbacks and complaint redress mechanisms between right-holders (consumers) and duty-bearers (formal and informal water service providers)'. This program resulted in a greater confidence of consumers vis-à-vis service providers and this was expressed by an increase of revenue collection and of the number of connections. Also KWAHO noticed more interest from right-holders in local water and sanitation issues and a higher number of reporting of 'unlawful behaviors' 11.

As documented by Plummer and Cross, transparency, participation and accountability can also be a central strategy of informal service providers (Plummer and Cross 2006). They give the example of the difficult position of small water providers in Nairobi visà-vis the formal water utility that provided bulk water supply in exchange of big bribes. They mentioned: 'the small scale private providers are increasingly organized, have formed an association and developed a code of ethics to ensure they all follow a set of agreed rules, and to create a platform with the capacity and weight to interact effectively with the utility. They see this as being a critical vehicle to counter the regular petty corruption of Nairobi Water Utility officials in meter reading, billing and collection'.

This kind of complicated situations illustrates the need for developing multi-stakeholders forums involving all duty-bearers and right-holders in a specific water and sanitation sector. Such platforms would help to clearly identify roles and responsibilities and thus improve levels of accountability.

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email exchange with Irene Gai, Programme coordinator at KWAHO, may 2013

5. Conclusions and recommendations

5.1 Significance of the research

The main objective of this paper was to lay down the conceptual and theoretical bases for a human right-based approach to the fight against corruption. This work consisted in two main stages. First we developed a framework to qualify some corruption acts as violation of the human right to water and sanitation. This framework rests on the three main types of obligations: respect, protect and fulfill. While doing that, we established linkages with the international legal framework against corruption codified in the UN Convention Against Corruption. This framework thus builds the synergies between the human right to water obligations and the UN Convention Against Corruption.

The second main stage of this research consisted in identifying the synergies between current preventive corruption measures and especially the TAP framework as expressed in the UNCAC and procedural rights included in the human right to water and sanitation. We presented opportunities as well as challenges regarding transparency, accountability and participation in the water and sanitation sector.

Developing synergies between anti-corruption legal frameworks, and the human rights framework is fundamental for an effective fight against corruption. As we saw human rights give 'teeth' to the concepts of transparency, accountability and participation. They are fundamental 'rights' not just charitable gestures. Moreover, both the realization of human rights and the fight against corruption share the same 'good governance' agenda. Without the bases of a good governance environment, that is mainly democracy, separation of powers, independence of the judiciary, anti-corruption programs are likely to remain dead letter. Without this good governance environment, human rights are also unlikely to be realized. Human rights are both a mean and an end to this good governance environment. Anti-corruption goals and human rights goals are inseparable. If human rights give 'teeth' to TAP measures, a human right's approach to transparency, accountability and participation is insufficient to combat corruption. Anti-corruption measures and policies defined in the UN Convention Against Corruption are essential such as criminalization of corrupt acts, creation of specialized independent anti-corruption agencies and ombudsman, or the protection of whistleblowers. The UN Convention against corruption offers a strong and coherent framework that human rights advocates should endorse in their activities.

However, various challenges in the water and sanitation sector underlined above illustrate the necessity to complement this general framework by specific anti-corruption policies and strategies for the realization of the human right to water and sanitation. Moreover, the previous analysis shed light on the complex challenges raised by 'systemic corruption'. Petty corruption should be understood in a larger context of poverty and is sometimes a symptom of deficiencies in public services delivery revealing a need for sectorial institutional reforms. It is in the understanding of these systems and the design of sectorial institutional reform that the human right to water and sanitation can bring a significant contribution.

5.2 Measuring and Understanding corruption

This research did not directly deal with the issue of corruption measurement, a controversial and complex issue. The approach adopted in this paper put emphasis instead on qualitative data to establish a typology of corrupt acts in human right terms. One of the main contributions of a human right-based approach in the diagnostic of corruption is essentially to unpack 'corruption' into specific corrupt acts, identify key actors and mechanisms. The impact of corruption on the human right to water depends on the type and level of corruption. It is difficult to provide a clear answer as to the kind of corruption having the greatest impacts on the human right to water and sanitation. On the day to day situation, petty corruption in the interaction between lower-level officials and users has probably the most direct incidence on right-holders however, as we saw, significant distinctions need to be made according to the specific context (e.g. harassment bribes vs. 'speed' money bribes). Moreover, corruption at a higher level, such as embezzlement by a minister might actually impact more profoundly and durably the enjoyment of the human right to water than petty corruption. It is therefore difficult to give a general answer to the issue of prioritization.

Efforts should therefore focus on a specific form of corruption at a particular point of the service supply chain such as for example public procurement processes or projects selection by high-level officials and international donors (see 'corruption hotspots in the water supply chain' in Plummer and Cross, 2006). A human right-based approach to such a situation would consist in identifying with accuracy duty-bearers and rights-holders taking into account their specific institutional and regulatory environment. A human right-based approach to corruption essentially means to put a human face to such as problem, meaning trying to understand the cause of a specific type of corruption taking into account the social, political and economic context. Such a diagnostic would help identify entry points for anti-corruption programming.

In any case, when designing anti-corruption programs, it is important to anticipate and measure the potential impact on right-holders of anti-corruption measures. In some situation, anti-corruption policies such as automatic criminalization of illegal behaviors might have significant negative short-term impacts on poor right-holders. Indeed, in some cases, petty corruption emerges in order to address utilities, local government's or state's failures to realize the human right to water and sanitation.

5.3 Further research and next steps

The role of water and sanitation regulatory bodies in corruption monitoring has to be further investigated. To what extent and how this corruption monitoring is currently undertaken has not been addressed here and deserves further research.

Further research should document successful cases of anti-corruption policies and programs in the water and sanitation sector including a diagnostic of corruption practices in their socio-economic context, the sequencing of the reforms introduced as well as their articulation with the general anti-corruption and good governance efforts, and the role of civil society- especially how its activities were integrated/formalized in the legal frameworks of participation, access to information and accountability.

Recent findings showed that transparency improvements did not lead to increased participation and that the path toward accountability was even more complex. Further research therefore should focus on understanding the factors that contribute to move from transparency to participation and to accountability (Sanjeev Khagram, Archon Fung, Paolo de Renzio, 2013).

We identified however promising initiatives resulting from the good use of access to information laws and civil society training in this regard. In some cases like in India, Andhra Pradesh, right-holders empowerment lead them to ask for changes, beneficially influencing water and sanitation planning processes. Other successful initiatives consisted in the creation of social accountability mechanisms offering a space for right-holders and duty-bearers to dialogue, for water users to file complaints and report corruption acts. These initiatives also contribute to restore confidence in service providers and public authorities. To be successful such programs should establish a range of accompanying measures. An important effort should therefore consist first in explaining the gains that result from the introduction of such public participation and accountability processes to donors, governments and service providers. Allocating resources for these programs and prioritizing the establishment and strengthening of such mechanisms can bring important positive outcomes for users as well as for providers (as shown by the Kenyan example).

More efforts should focus on civil society awareness raising and capacity building. For anti-corruption and social audit programs to work, 'people need to have individual incentives to engage, they cannot feel intimidated, and they have to believe that systems can change' (Johnsøn, 2012, p28). For this reason, he suggests that awareness raising programs should include 'positive stories that demonstrate that systems can be changed'. These programs should also seek to explain the content of the right to water and sanitation and how it contributes to address corruption. Journalists could be trained along with civil society organizations to present the consequences of corrupt acts on the human right to water and sanitation.

Finally, one should keep an eye on corruption scandals in the media, to make sure that we take such opportunities to push for changes and institutional reforms. Indeed, in many places, important reforms and anti-corruption programs were introduced following to corruption scandals. They are opportunities one cannot miss.

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WaterLex International Secretariat

83 rue de Montbrillant 1202 Geneva Switzerland Web: www.waterlex.org Email: info@waterlex.org