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**ASSUNTO: Requerimento n.º 63/XIII/3.^a, 26 de janeiro de 2018, PSD
Relatório da Missão a Portugal do Relator Especial das Nações Unidas para o Direito à Água
Potável e Saneamento**

Na sequência do ofício acima identificado e em resposta ao requerimento n.º 63/XIII/3.^a, de 26 de janeiro de 2018, formulada pelas Senhoras Deputadas Berta Cabral e Emília Cerqueira e pelos Senhores Deputados Manuel Frexes e Jorge Paulo Oliveira, do Grupo Parlamentar do Partido Social Democrata (PSD), encarregame o Senhor Ministro do Ambiente de informar o seguinte:

O Relator Especial das Nações Unidas para o Direito à Água Potável e Saneamento, Léo Heller, visitou Portugal em dezembro de 2016, em conjunto com a Relatora das Nações Unidas para o Direito a uma Habitação Adequada, Leilani Fraha. Esta visita foi coordenada pelo Ministério dos Negócios Estrangeiros e do programa constou, no dia 6 de dezembro, uma reunião com o Ministro do Ambiente e com o Secretário de Estado Adjunto e do Ambiente.

Na sequência da sua vinda a Portugal, o Relator Especial para o Direito à Água Potável e Saneamento elaborou um projeto de Relatório sobre a referida missão (em anexo). Este relatório foi remetido ao Ministério do Ambiente, por intermédio Ministério dos Negócios Estrangeiros, com um pedido de comentários, em língua inglesa, devendo os mesmos comentários circunscrever-se à menção de eventuais incorreções factuais ou de direito existentes no referido projeto de relatório.

Neste contexto, e consultados os organismos intervenientes na preparação e decurso da visita, remeteu este Ministério ao Ministério dos Negócios Estrangeiros, no dia 02 de junho de 2017, os comentários que constam em anexo. A ERSAR, entidade reguladora dos serviços de água e saneamento, foi a única entidade a apresentar propostas de correção factuais e de direito constante do projeto de relatório em análise, tendo estas propostas sido objeto de validação por parte do Gabinete do Ministro do Ambiente antes do seu envio ao Ministério dos Negócios Estrangeiros.

A 26 de janeiro do presente ano, o Relator Léo Heller visitou novamente Portugal, com o intuito de aferir o progresso das medidas implementadas, resultantes das suas recomendações. Para o efeito, reuniu com as principais entidades envolvidas na visita de dezembro, tendo o Ministério do Ambiente sido representado pela Secretaria-Geral, Gabinete do Secretário de Estado do Ambiente (SEAMB), Águas de Portugal (AdP) e Entidade Reguladora dos Serviços de Águas e Resíduos (ERSAR).

Nesta reunião foi debatido o acompanhamento por parte das autoridades portuguesas no que diz respeito às medidas tomadas após a visita de dezembro de 2016. Foram definidos alguns aspetos sobre os direitos humanos e o acesso à água e ao saneamento, nomeadamente os relativos à aplicação de medidas de carácter social no setor da água. O Relator considerou que Portugal tem encetado vários esforços para suprimir as lacunas identificadas.

Com os melhores cumprimentos, *também pessoais*

A Chefe do Gabinete



Ana Cisa

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Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

Report by the Special Rapporteur on the human rights to safe drinking water and sanitation on his mission to Portugal

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the human rights to safe drinking water and sanitation, Léo Heller, on his mission to Portugal from 5 to 13 December 2016 pursuant to the Human Rights Council resolution 31/10.

Report of the Special Rapporteur on the human rights to safe drinking water and sanitation on his mission to Portugal

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I. Introduction

1. The Special Rapporteur on the human rights to safe drinking water and sanitation, Léo Heller, undertook a joint official visit to Portugal from 5 to 13 December 2016 together with the Special Rapporteur on the right to adequate housing, at the invitation of the Government.¹ The purpose of the visit was to examine the progress made and identify remaining challenges in ensuring the full realization of the human rights to water and sanitation in the country.
2. During his mission he had the opportunity to meet with representatives of the Ministry of Foreign Affairs, the Ministry of Environment, the Ministry of Education, the Ministry of Health, the Ministry of Labor, Solidarity and Social Security, the Ministry of Finance, the Ministry of Economy, the Parliament, Ombudsman, Portuguese Court of Audits (Tribunal de Contas), Municipality of Cabeceiras de Basto, Municipality of Celorico de Basto, Portuguese Environmental Agency (APA), Empresa Portuguesa de Águas Livres (EPAL); Águas de Portugal, Portuguese Water Partnership, The Water and Waste Services Regulation Authority (ERSAR); Inter-municipal Association of Water in the Setúbal region. He visited communities in Loures, Amadora, Bairro da Cova da Moura, Vidigueira, Cabeceiras de Basto and Celorico de Basto and talked to residents.
3. The Special Rapporteur expresses his appreciation to the Government of Portugal for its cooperation before, during and after the visit. He thanks all those who took the time to meet with him and to help him better understand the situation regarding access to drinking water and sanitation in the country.

II. Overview

4. Portugal joined the European Economic Community in 1986, which was incorporated into the European Union in 1993. After joining the European Union, Portugal experienced increase in economic growth. However, since 2007 Portugal has faced an unprecedented economic crisis. As a result, in April 2011, Portugal requested financial assistance and subsequently, an Economic Adjustment Programme was adopted in May 2011 between Portugal and the European Commission, the European Central Bank and the IMF (the troika). The Memorandum of Understanding (MoU) and the Loan Agreement covering the period 2011 to mid-2014 were signed thereafter. In June 2014, Portugal exited its three-year Economic Adjustment Programme and is now under post-Programme surveillance until at least 75 per cent of the financial assistance received has been repaid. Among the conditions attached to the loan of 78 billion euros received by Portugal were a series of austerity measures, which have reportedly resulted in lower social protection and consequently in increased poverty. Social and human rights impact assessments were not conducted prior to the adoption of austerity measures (A/HRC/34/51/Add.2). The MoU does not include human rights principles and standards.
5. In general, reforms leading to greater involvement of the private sector have been imposed by the European troika through loan or aid conditionality, debt reprogramming or loan forgiveness, without the proper protection for people living in vulnerable situations. In Portugal, while the MoU did not explicitly impose privatization of water services, it does

¹ The report by the Special Rapporteur on the right to adequate housing on the visit to Portugal has been presented at the thirty-third session of the Human Rights Council (A/HRC/34/51/Add.2).

mention the explicit will of the Government to “accelerate its privatization programme”.² The Special Rapporteur views that the economic environment resulting from the reform has also reinforced the national agencies to implement a more rigorous policy of full cost-recovery in the water and sanitation sector in Portugal, potentially harming affordable access to water and sanitation services by the most disadvantaged populations.

6. The economic crisis and fiscal adjustment response have led to the emergence of the so-called ‘new poor’ and have resulted in increased poverty, homelessness, dramatically increased youth unemployment, lower social welfare benefits and pensions, more unaffordable access to public services and to housing.³ While the country is currently in the process of economic recovery, the population in Portugal still face serious long term challenges. Public funds were reduced for combating social exclusion and poverty and in 2014, 27.5 per cent of the Portuguese population were identified to be at social risk or socially excluded.⁴ The poverty rate in Portugal was one of the highest in the European Union with the national poverty rate in 2015 at 19.5 per cent while more than 11 per cent of the total population was at risk of poverty.⁵ The economic crisis has also led to high unemployment rates (A/HRC/34/51/Add.2, paras. 8-9). While slight decrease of unemployment rates has been observed in the past two years, unemployment still remains high with 11.1 per cent in 2016.⁶ These social consequences from economic measures have impact on the access to water and sanitation services.

7. Portugal is a centralized State composed of the central Government, 308 municipalities, and two autonomous Governments: Azores (Região Autónoma dos Açores) and Madeira (Região Autónoma da Madeira). The autonomous Governments of Azores and Madeira each have a system of self-government, with democratically elected bodies and several powers and duties, which include legislative and executive powers (art. 6 of the Constitution).⁷ However, the regional political and administrative autonomy must be exercised within the overall framework of the Portuguese Constitution (art. 255(3)) and the international commitments made by Portugal as a unity State. Accordingly, the autonomous Governments as part of the Portuguese State also have obligations under international human rights treaties. Additionally, these autonomous Governments have monitoring obligations under international human rights treaties incorporated through the national legislation. The two autonomous Governments abide by the legislation that is applicable in mainland Portugal including the legal framework on access to water and sanitation.

8. During and after the visit, the Special Rapporteur has experienced the difficulty of obtaining information on the basic data, coverage, water quality, affordability, and quality of drinking water in the autonomous regions. Furthermore, he observed the lack of dialogue between the autonomous regions of Azores and Madeira and the central government of Portugal in the field of water and sanitation.

² Paragraph 3.31 of MoU available from:

http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf

³ CESCR, 22 July 2016. Statement on public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights, para 3. E/C.12/2016/1.

⁴ Eurostat dataset available from: http://ec.europa.eu/eurostat/statistics-explained/index.php/People_at_risk_of_poverty_or_social_exclusion

⁵ Eurostat data 2015, see also A/HRC/34/51/Add.2, para. 9.

⁶ Instituto Nacional de Estatística – Statistics Portugal (INE), Monthly Employment and Unemployment Estimates, 4th Quarter of 2009, Destaque press release, 7 February 2010.

⁷ In Portugal, aside from the issues of defence, homeland security and justice, the autonomous government of Azores and Madeira enjoys exercising autonomous authority in its respective regions.

III. Legal and policy frameworks

A. Legal framework

1. International human rights law

9. At the international level, Portugal has ratified most of the core international human rights treaties including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD) which stipulate the right to an adequate standard of living including the human rights to water and sanitation.⁸ These rights were explicitly recognized by several international instruments, in particular, the General Assembly resolutions 64/292 and the Human Rights Council resolution 33/10.⁹ Portugal has voted in favour of and supported these resolutions and continues to express its international commitments related to human rights to water and sanitation. Portugal thereby affirmed that the right to an adequate standard of living includes the human rights to safe drinking water and sanitation.

10. At the regional level, Portugal ratified the European Social Charter (in 1991) and the Revised European Social Charter (in 2002). Additionally, Portugal has ratified international treaties related to water and sanitation including the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (in 1994) and the Protocol on Water and Health (in 2006). As a State Party to the Protocol on Water and Health, Portugal has the obligation to ensure access to water and sanitation to all and to promote equitable access to water and sanitation for all members of the population, especially those who suffer from a disadvantage or social exclusion.

11. According to the Portuguese Constitution, the rules and principles of international law form an integral part of Portuguese law. The provisions set out in ratified international agreements shall come into force in Portuguese domestic law (art. 8) and the provisions of the Constitution and of laws concerning fundamental rights shall be interpreted and construed in accordance with the Universal Declaration of Human Rights (art. 16).

2. Constitutional and national law

12. Portugal does not explicitly recognize the rights to water and to sanitation in its Constitution. However, the rights to water and sanitation are protected through other rights and principles, such as the principle of equality (art. 13), the principle of universality (art. 12), the right to housing which stipulates for hygienic and comfortable conditions and to preserve personal and family privacy (art. 65), and the right to a healthy and ecologically balanced human living environment (art. 66). Furthermore, article 81 stipulates the State's primary duty "to adopt a national water policy, with rational use, planning and management of water resources".

⁸ Portugal has not yet ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

⁹ Portugal co-sponsored Human Rights Council resolution 15/9 of September 2010, resolution 16/2 of March 2011, resolution 18/1 of September 2011, resolution 21/2 of September 2012, resolution 24/18 of September 2013 and resolution 27/7 of September 2014. Portugal also co-sponsored General Assembly resolution 68/157 of December 2013, adopted without a vote.

13. Additionally, Portugal has in place legislation that transposes certain aspects of the human rights to safe drinking water and sanitation. The Basic Law of the Environment (Law 19/2014, of April 14) recognizes water as the object of a fundamental right and notes that “the protection and management of water resources also aims to safeguard the human right to safe drinking water established by the United Nations as well as universal access to sanitation, which is fundamental to human dignity.” Another legislation is the 2005 Water Law (Law 58/2005, of December 29) which transposes the European Directive 2000/60/EC and affirms two principles significant for setting water tariffs. On the one hand, water has social value and must be universally accessible for all basic human needs, should be socially affordable and not discriminatory. On the other hand, water has economic value, and must be used in an economically sustainable way, implying the recovery of costs for water services and adopting the principle of polluter pays and the principle of user pays.

14. In relation to sanitation, the Law on urban wastewater (1997) aims to provide adequate technical solutions for drainage and urban wastewater collection, treatment and disposal pursuant to the European Directive 91/271/EEC concerning urban waste-water treatment.

15. During the visit, the Special Rapporteur was informed of several pending draft bills related to water proposed by the Parliament. He wishes to emphasize the draft law no. 335/XII/2nd(BE) on the protection of individual and common rights to water (Lei «Protecção dos direitos individuais e comuns à água») which establishes the fundamental rights to water and to sanitation, and also aims to reorient water policy with a view to the equitable enjoyment of the services.¹⁰ This draft was the result of initiatives by the civil society, in particular, the “Water for all” project. The Special Rapporteur welcomes that the draft bill explicitly stipulates sanitation as a human right in addition to right to water. The Special Rapporteur reiterates that the right to sanitation should equally be proclaimed in the legislation. In this regard, the Special Rapporteur highlights the United Nations General Assembly resolution 70/169 of 2015 which recognized that “the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living”.

16. The Special Rapporteur underscores the importance of explicit legal recognition of the human rights to water and sanitation at the national level. Such recognition will allow for a comprehensive legal protection of these rights as a whole and complements the à la carte approach where only certain principles of human rights are enshrined in existing Portuguese legislation. Furthermore, having a national law is a key to ensuring the justiciability of the human rights to water and sanitation. In other words, it is crucial that the national legislation provides a clear guarantee to individuals and groups who are alleged victims of violation of their rights to water and sanitation, so that they are able to file complaint before a judicial body, to request legal remedies and to have those remedies enforced. The Special Rapporteur emphasizes Portugal’s international commitment to access to remedy as highlighted in the Optional Protocol to ICESCR (ratified by Portugal in 2013) and under article 20 of its Constitution.

¹⁰ <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=40745>

B. Policy framework

17. In addition to legislative measures, the Government is obliged to adopt administrative, educative, social and other measures to realize the human rights to water and sanitation. Continental Portugal has a master plan on water and sanitation services starting with the first plan covering the period from 2000 to 2006, called 'Plano Estratégico de Abastecimento de Água e de Saneamento de Águas Residuais' (PEAASAR I), and then the second plan covering 2007 to 2013 (PEAASAR II). Building on the results of the first plan, PEAASAR II set goals to ensure that in 2013, 95 per cent of the population had access to public systems of water provision and 90 per cent to sanitation. On the services management, PEAASAR II set goals for full cost recovery and the enhancement of the private companies' participation in the sector.

18. The most recent strategic plan is the Strategic Plan for Water Supply and Sanitation Services (PENSAAR 2020). The Special Rapporteur welcomes that PENSAAR 2020 highlights the recognition of the human rights to water and sanitation by the United Nations General Assembly in 2010.¹¹ PENSAAR 2020 focuses on efficient management of water resources and on issues such as the restructuring of the sector and the financial resources. The Special Rapporteur looks forward to the progress that Portugal aims to achieve in implementing PENSAAR 2020, in particular, to guide public policy on quality services at a sustainable price. Furthermore, the Special Rapporteur welcomes that the PENSAAR 2020 involves a monitoring group composed of various stakeholders including the local government, Águas de Portugal (state-owned holding company providing water and sanitation services), civil society and other monitoring groups to facilitate the right to participation for stakeholders and to disseminate information related to policy formulation.

19. The Special Rapporteur notes that no information on the policy framework of the two autonomous Governments has been made available to him.

IV. Institutional framework

A. Institutional transformation

20. After joining the European Economic Community in 1980's, Portugal faced the need to develop standards on drinking water and sanitation services provision. The Portuguese water and sanitation sector reform started in 1993, which resulted in a complex institutional architecture within which multiple actors have different roles.

21. In 1993, Portugal had an underdeveloped infrastructure of water and sanitation with only 81 per cent of the households in Portugal having access to public water supply systems and 68 per cent to wastewater management services. Portugal experienced an institutional fragmentation where several public bodies had scattered but overlapping responsibilities in relation to access to water and sanitation. Hundreds of small-scale municipalities that carried out the role of water service provider were unable to obtain funding or implement the required investment to improve their services. Furthermore, there was a lack of comprehensive, reliable information to support strategic development, policy-making and decision-making both at the central and local level. This subsequently led to a gap in national strategy to address the issue of access to water and sanitation. In response to these

¹¹ PENSAAR 2020, 2.

challenges, Portugal has implemented reform in its water sector which resulted in institutional and legislative changes.

1. Service management models and service providers

22. The water sector in Portugal is organized into two main levels. The first level, 'em Alta' or 'bulk level', represents the activities of water abstraction, treatment and storage, as well as wastewater treatment and disposal, and the second level, 'em Baixa' or 'retail level', represents the activities of water distribution and provision to individual users, and the collection of wastewater from users.

23. Based on the two levels, the responsibility for water supply and sanitation services is shared between the central government and the local governments (municipalities). At the 'Alta level', there are 11 water service providers and 9 sanitation service providers. The service provisions at the bulk level are under the jurisdiction of the State through the multi-municipal systems by decree-law.¹² At the retail level, there are 301 water service providers and 257 sanitation service providers whose activities fall under the jurisdiction of municipalities.¹³

24. In addition to the level at which the water and sanitation service providers engage, the providers are distinguished according to different management models. At the retail level (Baixa), under Decree 194/2009, water provision can assume four models: 1) direct management, which can be provided by municipal or inter-municipal utilities; 2) delegated management where a public company in partnership with the state; 3) delegated management by a municipal company (with public or mixed capital); and 4) management through concession to private companies. Direct management is the most pronounced, covering approximately 70 per cent of all municipalities and approximately 52 per cent of the total population of continental Portugal. The rest of remaining models are predominantly located along Portugal's coast or in its large urban centres.¹⁴ Similar to water supply, sanitation service is assumed in models including direct management, delegated management and management through concession. Direct municipal management is also the most common, providing service to 75 per cent of municipalities and almost 59 per cent of the population of continental Portugal.¹⁵

25. At the bulk level, multi-municipal systems (regional monopolies) were created, transferring the powers and responsibilities from local authorities and their respective management bodies to State-owned public companies, in which municipalities own 49 per cent and the national State owns a stake of 51 per cent through the state-owned holding company, Águas de Portugal (AdP). AdP was set up in 1993 in order to overcome the problems faced by the water and sanitation sector at the time, namely, the fragmented system with lack of capacity to share expertise and know-how. Through its subsidiary companies, AdP designs, builds, operates and manages water supply and sanitation systems in liaison with partner municipalities. In addition to its commercial activity of provision of bulk water, which covers 80 per cent of bulk water in Portugal, the work of AdP also concerns public policy aspects of water services. In this regard, the Special Rapporteur reiterates guiding principle 4 of the United Nations Guiding Principles on Business and Human Rights, which requires that "States should take additional steps to protect against

¹² Decree-Law no. 72/2016, of 4 November.

¹³ Decree 90/2009 Decreto-Lei n. 90/2009, April 9. See ERSAR (2016), Vol. 1, 45.

¹⁴ ERSAR, 2016, 49.

¹⁵ ERSAR, 2016, 55.

human rights abuses by business enterprises that are owned or controlled by the State, [...] including, where appropriate, by requiring human rights due diligence".¹⁶

26. Another model is where bulk and retail level services are directly managed at the municipal level. In the Setúbal Region, the Intermunicipal Water Association of Setúbal Region, a regional association with 8 municipalities as members,¹⁷ coordinates and promotes projects related to water abstraction, transportation, and distribution of bulk water in the Setúbal peninsula. One of its central objectives is to create the Intermunicipal Bulk Water System for the region. The situation of this region is emblematic of the relationship between the various institutional actors in the water sector in Portugal. For instance, the Setúbal Region, through the Intermunicipal Water Association, has refused to join the model where AdP is in charge of the water provision at bulk level. The Special Rapporteur observed that the municipalities of the region were not comfortable with the decision-making process of the bulk level management, the lack of transparency in some decisions of the national government and also the share of revenues in the bulk level companies. At the same time, the Special Rapporteur expresses concern that those municipalities that opt out from the above-mentioned model are discriminated in receiving funds from the central government and the European Union. The Special Rapporteur notes that only one case of obtaining funds from the European Union took place in the Region, that of the municipality of Almada.

27. There is an additional model where both bulk and retail level water service provisions are operated under the delegated management model. For instance, Empresa Portuguesa das Águas Livres (EPAL) – a State-owned service provider – operates both at the bulk and retail levels in the greater Lisbon area and only retail level services in the city of Lisbon.¹⁸

2. Regulation

28. In continental Portugal, the Water and Waste Services Regulation Authority (ERSAR) was established in 2009 to provide recommendations and advice to water service providers on matters pertaining to interpretation of rules guiding the sector and the definition of tariffs.¹⁹ The regulatory responsibilities of ERSAR were further expanded to include defining the principles of tariff regulation, notably demanding economic and financial cost recovery, maintain affordability of services including through social tariffs, promotion of equity in tariff structures, and promotion of transparent tariff setting procedures.²⁰

29. In Azores, the Water and Waste Services Regulator for Azores (ERSARA) is operational and is in charge of drinking water quality surveillance, as well other activities related to water, sanitation and solid wastes management.

30. Throughout the visit, the Special Rapporteur learned about the work of ERSAR in relation to standard-setting, periodical monitoring of quality of water and sanitation services, and recommendations for water and sanitation providers. The Special Rapporteur acknowledges the work of ERSAR as a good practice and a reference model for regulation within and outside of Europe. However, the Special Rapporteur finds that there is room for

¹⁶ See also GA report of WG on business and human rights A/HRC/32/45

¹⁷ Alcochete, Almada, Barreiro, Moita, Palmela, Seixal, Sesimbra and Setúbal.

¹⁸ See ERSAR (2016), Vol. 1, 45.

¹⁹ Article 5. of Decree-Law n.º 362/98, of 18 November.

²⁰ Decree 277/200917, replaced by Lei n.º 10/2014, of 6 March.

improvement in introducing some elements of the human rights to water and sanitation in regulation in a more appropriate way. In particular, affordability is a normative content that requires more attention from ERSAR. On the one hand, it is necessary to establish an adequate indicator for monitoring and reporting the actual status of affordability in the access of services. The current indicator, which considers the average income in the municipalities, is far from capturing the economic burden on the poorest population and those in vulnerable situations. On the other hand, with a view to protecting those with economic inability to pay for water and sanitation services, guidance for the water and sanitation service providers should be issued and mechanisms for protection of those groups should be implemented. Furthermore, the Special Rapporteur finds that a closer look at policies concerning disconnection of water and sanitation services is necessary.

31. Regulators as part of the public authority must act in accordance with the provisions of the international human rights treaties to which Portugal is a party. Their role also includes ensuring human rights compliance on the part of the municipalities and other entities which they regulate. The Special Rapporteur urges the national regulator to ensure that their own policies, procedures and activities comply with Portugal's international human rights obligations.

3. Complexity in the Portuguese water sector

32. During the visit, the Special Rapporteur observed several layers of tensions within the Portuguese water and sanitation sector. The Special Rapporteur observed that the institutional reform in the water sector that has been implemented in Portugal during the last two decades is facing challenges due to those tensions especially in decision-making process involving different institutional actors. All actors that are part of the institutional framework of water and sanitation sectors are tasked with key roles and responsibilities in respecting, protecting and fulfilling the human rights to water and sanitation. Therefore, tensions among those actors may negatively impact how they carry out their operations and the success in reaching their goal to provide water and sanitation services to the population. This in turn may impact or otherwise harm the enjoyment of the human rights to water and sanitation. The Special Rapporteur highlights that such tensions could become the root cause of situations that require attention under the human rights framework. Particularly, the Special Rapporteur notes that affordability of water and sanitation for the most vulnerable populations, including the "new poor", is a relevant representation of such situation.

33. First, the Special Rapporteur observed that the tensions between the roles of the bulk providers and of those responsible for retail provision had been present since the implementation of the reform and that they still remain strong. The resistance of a number of municipalities to integrate into the bulk provision system has resulted in the coexistence of different models for the provision of water supply services. The Special Rapporteur finds that this diversity is not necessarily problematic, but views that it seems to create institutional asymmetries, different rights for different providers and, most importantly, different conditions of access to the services by the population. The Special Rapporteur notes that the differentiated treatment of providers impacted municipalities to access funds from the central government and the European Union, negatively affecting the expansion of the infrastructure of water and sanitation network. Another complaint that the Special Rapporteur came across is that some municipal authorities felt they did not possess a free and independent voice in decision-making processes regarding the bulk provision of water and sanitation even when they are shareholders in the bulk provider corporation.

34. One aspect of those tensions was the resistances of municipalities, mainly in joining the bulk level providers. In addition to the situation identified in the Setúbal Region, the Special Rapporteur visited the region of Porto and observed how, at times, small

municipalities negatively viewed the model of splitting the provision in bulk and retail. In one of the sites visited, local authorities explained that the municipality refused to join the bulk level service provider and were proud of managing a municipal service for water and sanitation, both in bulk and in retail level. In another municipality, the Special Rapporteur observed the discontent of the local authorities after joining the bulk level provider in the previous year, as the agreed investment were not implemented and there was an increase in tariffs which was not stipulated in the contract.

35. A second layer of tension was observed between local authorities and the central government, in particular, the degree of centralization or decentralization of water provisions, as well as the roles of government at both central and local levels. The Special Rapporteur emphasizes that institutionalized and constructive cooperation on human rights between the central and local governments can have a positive impact on the level of implementation of the international human rights obligations of the State (A/HRC/30/49, para. 21). The primary role to respect, protect and fulfil human rights lies with the State: that is to say, the central government, local authorities and the autonomous regions of Azores and Madeira. The Special Rapporteur notes the need for the Portuguese Government to stipulate explicit legal provisions, which oblige local authorities and the autonomous governments to realize human rights to water and sanitation. Improved communication and collaboration between all levels of government will lead to improved human rights results.

36. Another dimension of tension was observed around the independence of the national regulator (ERSAR) whose role was at times challenged by the central government and some local authorities. While the central government wishes to play a larger role in key decisions, which may be essential for reconciling the water policy with social and public policy, local authorities argued that their autonomy in providing essential water and sanitation services was sometimes undermined. In meetings with the central government, the Special Rapporteur heard the view that the pricing system should be changed in order to ensure a more equitable payment between people living in smaller communities – paying more due to higher retail tariffs – and people living in larger cities that potentially pay less for water and sanitation services. He also heard the view that the Ministry of the Environment should play a role in tariff setting, together with the National Regulator (ERSAR).

37. Given the above-mentioned tensions observed, the Special Rapporteur urges the Portuguese Government to develop a comprehensive assessment of the institutional arrangement through a human rights perspective and with the active, free and meaningful participation of all stakeholders involved. The institutional framework of the Portuguese water sector and possible reforms – for instance, the 2016 National Commitment for the Sustainability of Public Water Services – need to take into account equality and non-discrimination in the enjoyment of the human rights to safe drinking water and sanitation, ensuring sustainability of the services.

B. Private sector participation

38. Until the 1990s, the Portuguese legislation limited the participation of private companies in the water sector. Subsequently, the Portuguese water sector has been reshaped by a legal framework that affirmed privatization as a guiding principle of water provision in Portugal (Decree 372/939). During the 1990s, the features of the 'first generation of concessions' included long concession periods and the burden of investment in infrastructure was mainly placed on the conceding entity. The participation of private companies grew during the 2000s, which led to the 'second generation concessions';

contracts were for shorter concession periods and the investments in infrastructure was under the responsibility of the concessionary company.

39. In 2013, 19 private-public partnership municipal water concessions out of 27 in total were audited by the Portuguese Court of Audits (Tribunal de Contas), a high court that is responsible for external oversight and auditing of the use and management of public expenditure. The focus of review was on the regulation and management of concessions for water supply services at the retail level (Baixa). The Court's assessment aimed to: examine ERSAR's activity as regulator of such concession, identify the processes of contract revision, identify public spending involved in each concession and to examine the effectiveness of concessions in terms of the quality of services.

40. Among its several conclusions, the Court, in its first report of March 2014, concluded that the majority of concessions consistently benefited the private sector to the detriment of municipal budgets and individual consumers. This was due to a lack of contractual provisions that would pass on the risks of financial non-sustainability (e.g. related to the market, tendering, finances, construction, exploitation) to the private parties and hence, such risks would be assumed by the public partner.²¹ Furthermore, some contracts included clauses that guaranteed the private partner coverage from financial risks or even from operational risks resulting from increasing maintenance costs.

41. Certain contractual clauses and legal requirements favoured private companies, in particular, for termination or amendment of concession contracts.²² For instance, the Decree 194/2009 of 20 August establishing the judicial regime of municipal services for water supply, sanitation and solid waste management (art. 54) stipulates that the sole condition for the concessionaire to demand the revision of the concession contract is limited to when the internal rate of return (IRR) to the private stakeholders reaches twice the amount established as a base profit in the concession contract. It was also brought to the Special Rapporteur's attention that municipalities often lacked technical and negotiation skills required to defend their financial interests, including those of individual users. The Special Rapporteur expresses concern about the unbalanced bargaining power between the private companies and municipalities and the negative impact it raises on the affordability dimension of the human rights to water and sanitation.

V. The human rights to water and sanitation in Portugal

A. Accessibility

1. Access to water and sanitation

42. In the beginning of the 1990s, 89 per cent of the population had access to piped water supply services.²³ Since then, the coverage increased to 95 per cent in 2011, reaching the goal identified in Portugal's former master water plan.²⁴ According to the 2011 Census, 3,565,990 housing units had access to water supply from a public network and 405,843 units from individual solutions. It was reported that 22,294 housing units did not have any water supply. A more recent survey by ERSAR, in 2015, showed that 96 per cent of

²¹ Tribunal de Contas, 2014, 8.

²² Tribunal de Contas, 2014, paras. 36 and 44.

²³ JMP, 2015.

²⁴ PEAASAR II 2007-2013.

housing units in continental Portugal had access to services from the public water supply system with most of the remaining situations solved through individual solutions such as a private well or borehole.

43. The Special Rapporteur notes that in addition to connections to piped-network and communal or shared facilities, individual on-site solutions may be acceptable (A/70/203). At the same time, he emphasizes that the State has the obligation to ensure that these individual solutions meet all the normative contents of the human rights to water and sanitation. For instance, the water from these individual solutions needs to be accessible continuously and the quality of water from wells or boreholes must meet the official standards, being protected from animals and other sources of contamination.

44. Similarly in the area of sanitation, Portugal showed improvement: an increase in access to public sewerage systems was observed from 60 per cent in 1993 to 83 per cent in 2015. The majority of the remaining situations were solved through individual solutions such as septic tanks. More specifically, according to the 2011 Census, 3,931,508 housing units in Portugal have flushed toilets while 26,609 housing units did not have toilet in their houses. The census also showed that 3,080,452 households had access to sewerage system from public network while as 20,257 households did not have access to any sewerage system.

45. The Special Rapporteur underscores that those individual solutions for sanitation may be acceptable (A/70/203), if well constructed and maintained. The State should ensure the proper protection of human health and the environment, as well as affordable costs for latrines and tanks maintenance.

46. The Special Rapporteur acknowledges the impressive progress made by Portugal, often referred to as "the Portuguese miracle" in the water and sanitation sector. He congratulates Portugal on this achievement but at the same time, highlights that there still remains challenges for the Portuguese miracle to be complete. For instance, despite the reported wide coverage of sanitation services, the Special Rapporteur learned that there still exists population that do not have access to those services. In the case of the population living in *Ilhas*,²⁵ in Porto, the Special Rapporteur reiterates the concern of the Special Rapporteur on the right to adequate housing regarding their inadequate living conditions, in particular, ad hoc sanitation facilities that are sometimes outside the homes or without doors for privacy or a place to wash (see A/HRC/34/51/Add.2, paras. 45-48). Similar concerns relate to the situation of Roma population, such as what he observed in Amadora. The Special Rapporteur advocates that support for the construction and maintenance of individual solutions for sanitation by municipalities is required for those that are in vulnerable situation, including people living in informal settlements and the homeless.

47. Furthermore, for both water and sanitation, the disparity between urban and rural areas is still high. According to the 2011 Census, while there were one housing unit in an urban area that did not have access to water supply, sewage system and a toilet, there were three such households in a rural area without access to these services.

²⁵ *Ilhas* are a unique form of housing found only in Porto. Established in the nineteenth century for workers, these miniature homes, measuring on average 16 m², house some of the poorest families in Porto. Hidden from view, the *ilhas* are located down narrow lane ways. There are 957 of these housing arrangements scattered throughout Porto.

2. Situation in education and public institutions

48. Water and sanitation services should be also accessible in public institutions such as health and educational institutions and workplaces. Portuguese law (Decree no. 243/86 of 20 August) requires that access to water and sanitation services are provided in schools, health, prison facilities and, in general, to all public buildings. It specifically requires that sanitary facilities possess at least one fixed toilet (or Turkish squat style for men) per floor or per 25 male workers and 15 female workers. It further requires that sanitary facilities must have running water and be connected to a sewerage or adequate septic tank and be equipped with non-irritant soap and, ideally, automatic hand-dryers or paper towels.

49. The Special Rapporteur notes the assessment of the Ombudsman's office regarding the improved sanitary facilities in prisons and juvenile detention centres. Over the last decades, prisons in Portugal have undergone a positive evolution in regard to the conditions of water supply and sanitation, both in cells and in other places of confinement, with the complete eradication of the use of the "toilet bucket".

B. Quality

50. The normative content of the human right to water requires water to be of quality and safe, so that its consumption and use do not adversely impact human health. Sanitation services must be hygienic and prevent contact of faeces with humans, animals and insects.

51. In 1993, the drinking water quality levels in the country were low, with only 50 per cent of the households with access to controlled drinking water with good quality. Following the reform in the water sector, a significant improvement was observed in the quality of drinking water with 99 per cent of water complying with the national standards in 2015.²⁶

52. The regulatory system for drinking water quality in Portugal is established according to law (Decreto-Lei n.º 306/2007, of August 27)²⁷ which transposes the European Drinking Water Directive 98/83/EC. The law is intended to protect human health from the effects of possible contamination and establishes the criteria for managing a public drinking water supply system. Furthermore, it defines competence of various actors in relation to water quality surveillance including water service providers, ERSAR and health authorities. ERSAR implements the mechanisms and tools to ensure compliance with the legal requirements by enforcing all drinking water suppliers to develop a Drinking Water Quality Control Plan (DWQCP). The role of the health authorities is to make the sanitary surveillance as a complement of the drinking water operators in performing monitoring and official quality control. The health authorities are also in charge of conducting the risk analysis of the non-compliances, namely, to define any risks associated with the protection of the human health and the procedures to minimize or eliminate those risks.

53. In relation to the possible health risks related to consumption of tap water, Portuguese law requires that every provider has 24 hours to communicate any non-compliance using the ERSAR Portal tool, allowing ERSAR and health authorities to proceed with immediate evaluation. Besides registering non-compliant cases, the provider

²⁶ ERSAR, 2016.

²⁷ Decreto-Lei n.º 306/2007, de 27 de agosto.
<https://dre.pt/application/dir/pdf/ndip/2007/08/16400/0574705765.pdf>

has to register the causes, the remedial actions and the results of verification analyses to evaluate the efficacy of remedial actions.

54. Furthermore, the Ministry of Health manages epidemiological surveillance based on electronic online software for national notifiable infectious diseases (SINAVE) in 85 per cent of Portuguese health care centres and hospitals.²⁸ The SINAVE facilitates investigation procedure related to water-related disease and the identification of causalities. Following a notification from SINAVE, local health authorities conduct epidemiological investigation for every case of water related disease and register related information in SINAVE.

55. While the Special Rapporteur recognizes the progress made in quality of drinking water and the monitoring processes, nonetheless, the Special Rapporteur wishes to highlight that there is still a gap to be filled. During the visit, the Special Rapporteur encountered the pride of certain officials in relation to the recent progress of water quality control, asserting that Portugal “has currently no more water-related diseases”. This statement, however, contradicts data from the epidemiologic surveillance, which shows a number of remaining cases of diseases that can be related to drinking water supply. Furthermore, the statement is not compatible with the situation of almost all countries of the world, where cases of water-borne disease, in particular, diarrhoea are identified from time to time. The Special Rapporteur notes that the assessment of a good performance of the service providers in ensuring safe drinking water quality should not be a reason for the Portuguese government to neglect the rigorous and attentive water quality and epidemiological surveillance. This refers both to areas supplied by networked systems that risk facing occasional outbreaks and to individual solutions that are usually not monitored nor supported by the State.

56. In addition, the Special Rapporteur observed that Portugal lacks a proper mechanism for providing access to information on drinking water quality for users. Although information is available on websites, it would be desirable that a more proactive system is set up, for instance, including regular information on water bills.

C. Affordability

57. Affordability, as a human rights criterion, requires that the use of water, sanitation and hygiene facilities and services is accessible at a price that is affordable to all people. Paying for these services must not limit people’s capacity to acquire other basic goods and services guaranteed by human rights, such as food, housing, health, clothing and education. Affordability standards must be considered together with standards of an adequate quantity and quality of water and sanitation to ensure that human rights standards are met (A/HRC/30/39, para. 25).

58. The most recent annual report of ERSAR notes that on average drinking water service charges represent 0.4 per cent of the average disposable income of the households, whereas sanitation services charges represent 0.3 per cent. The Special Rapporteur reiterates that it is not appropriate to set a generally applicable affordability standard at the global or national levels and let alone by one stakeholder in the water and sanitation institutional framework. Any such standard would be arbitrary and cannot reflect the challenges people face in practice and the context in which they live, including how much they need to spend on housing, food and the realization of other human rights. The

²⁸ <https://www.dgs.pt/servicos-on-line/sinave-sistema-nacional-de-vigilancia-epidemiologica.aspx>

affordability of water and sanitation services is highly contextual, and Portugal should therefore determine affordability criteria at the national and/or local level adhering to the human rights principles, in particular in terms of participation (A/HRC/30/39, para. 28). The Special Rapporteur emphasizes that States and water and sanitation providers should set policies to reconcile affordability and financial sustainability as part of their financial management. In Portugal, the Special Rapporteur observed that financial sustainability in relation to affordability is by far a priority concern of the several governmental actors in the water sector. In 2016, the Minister of the Environment presented the National Commitment for the Sustainability of Public Water Services, which envisages the strengthening and harmonization of the mechanisms relevant to ensuring affordable water services by setting, for instance, a minimum threshold for access to water services, and special tariffs.

59. The normative content of affordability should be a priority in the agenda of the Portuguese water and sanitation sector and mechanisms should be established to capture the specific needs of the several groups that live in vulnerable situations, including rural populations, homeless, Roma population and the so-called "new poor".

1. Tariff-setting

60. Setting tariffs for retail water and sanitation services remains a municipal decision in Portugal. However, such decision is not entirely discretionary and has to comply with applicable legal and regulatory provisions. Non-binding tariff regulations regarding the water tariff in Portugal are defined by the regulator – ERSAR in continental Portugal and ERSARA for Azores. In continental Portugal, ERSAR issued a recommendation in 2009 related to price regulations, asking water utilities to continue to reflect, in tariff structures, the "principle of economic accessibility, according to which the tariffs should consider the financial capacity of users, contributing to the progressive universal access to water services". ERSARA submitted a recommendation for a tariff regime in this region, which contained recommendations that would facilitate the implementation of social tariffs for disadvantaged or numerous families.²⁹

61. Furthermore, these non-binding recommendations have emerged in parallel to legislation which reinforced the cost recovery principle in the water and sanitation sector. For instance, the Water Law (Law n.º 58/2005 of 29 December) and the Economic and Financial Framework of Water Resources (Decree-Law n.º 97/2008 of 11 June) determines that the tariff scheme for water services ensures the gradual recovery of the initial investment and new investments in expansion, modernization and maintenance of the infrastructure.

62. This leads to the situation where investment is necessary but often affects the capacity of the water providers to ensure and/or maintain social responses to situations of social and economic need. The Special Rapporteur heard testimonies that the cost recovery principle adds pressure for an adjustment in tariffs by water utilities, which leads to potentially negative effect on economic accessibility on the part of the consumers.

2. Special tariffs

63. Measures that allow low-income users to access water services exist in Portugal. The 2017 State Budget Law, approved after the visit of the Special Rapporteur to Portugal (Law

²⁹ Recomendação ERSARA n. 01/2015, available at: <http://www.azores.gov.pt/NR/rdonlyres/AC7FEBE0-8F1F-4B35-B8DF-4EDC8D2C2AE7/907603/Recomenda%C3%A7%C3%A3oTarif%C3%A1ria2.pdf>

42/2016 of December 28), authorizes the Government to establish a legal regime for the automatic attribution of social tariff for the provision of water services to lower income consumers, namely to persons benefiting from old-age social pension, solidarity supplement for the elderly, social integration income, unemployment social benefit, family allowance and disability social pension. Consumers with an annual income under EUR 5,808 are also eligible to benefit from social tariff. The Special Rapporteur welcomes the inclusion of this provision on the annual budget. It is in line with upholding the dignity of those people who otherwise would have to request their inclusion in the system and will increase the number of people who will benefit from the social tariff.

64. However, the Special Rapporteur notes that the automatic attribution of social tariff should be complemented by implementation measures at central and local government level. The Special Rapporteur urges ERSAR, the Ministry of the Environment and other related institutions to strongly advocate for the implementation of this measure. Furthermore, he notes that the implementation of this measure depends heavily on the flow of personal data such as income of individuals between the social security services, the tax and customs authority, the general department of local municipalities. The Special Rapporteur looks forward to receiving information regarding the coverage and application of the social tariff and how this mechanism is developed in consideration of balancing on the one hand, using personal data for purpose of automatic application of social tariff and on the other hand, the right of privacy of individuals regarding their personal data. Additionally, the Special Rapporteur stresses the importance of disseminating information regarding existing practices, policies and resources which promote economic access to water and sanitation.

65. Another type of special tariff is family tariff. The purpose of this tariff is to ensure that the higher consumption of water resulting from the size of the household is not billed at higher levels. The application of family tariff varies from provider to provider. EPAL's family water tariff recognizes family unit with five or more people.³⁰ In order to benefit from family tariff, consumers are required to present their annual income tax declaration showing proof of household size or Large Family Card. The Portuguese Large Family Associations (Associação Portuguesa de Famílias Numerosas) defines it as families with three children.³¹ The Special Rapporteur recommends flexibility in interpreting and applying the size of family as in some cases, due to the financial vulnerability, one household may be occupied by five or more adults.

66. While as the majority of the Portuguese population enjoys affordable water and sanitation service, the Special Rapporteur was informed that the so-called "new poor" population pay high water tariff in comparison to their income. For instance, some population suddenly experienced salary cuts, lost jobs or experienced drop in pensions. These sudden changes in the financial status of the "new poor" led to situations where they were not able to pay for their water services yet, they did not qualify for social tariff for water services which are based on the tax return of the previous year. The Special Rapporteur heard testimonies that during the financial crisis, some adult individuals were not able to sustain their own housing unit and moved into their parents' houses. In this case, where family tariffs only applied for family with kids, they were not qualified to benefit from family tariffs. The Special Rapporteur emphasizes that social tariff for water and sanitation services should be flexible to adapt to unforeseen situations.

³⁰ <http://www.epal.pt/EPAL/en/menu/customers/tariff>

³¹ <http://www.apfn.com.pt/faqs.php>

3. Disconnection in case of incapacity to pay

67. The affordability of water and sanitation services and disconnections are inextricably linked. In many instances the failure to pay for services leads to disconnection. Disconnection of services on the grounds of economic incapacity is a retrogressive measure and constitutes a violation of the human rights to water and sanitation.³² Disconnections are only permissible if it can be shown that households are able to pay but are not paying.

68. In Portugal, disconnections of water services are legal if adequate procedures are followed. In the case of disconnection of water due to late payment, the service provider must inform the user by written notice, at least 20 days prior to the date the disconnection is scheduled.³³ The prior written notice, in addition to justifying the reason for the suspension of services, the provider must inform the user of the means at his/her disposal in order to avoid disconnection of the service (art. 5 of Law 23/96). After the service is suspended due to non-payment, several water providers provide options for debt settlements including payment by instalments.

69. According to the analysis of ERSAR, the great majority of disconnections are not due to the unaffordable bills but rather due to other factors which are legally suitable for disconnections such as users who move to other address and do not cancel the service or who forget to pay. A pilot study was developed by ERSAR in 2015, involving three municipalities (Loures, Odivelas and Mafra) which aimed at understanding more about disconnections and the reasons for late payments, with the consideration of specific legal, economic, social and technical conditions in each context. According to the study, the main reasons for cut-offs were not related with unaffordable water bills, but other reasons not related to affordability.

70. At the same time, the Special Rapporteur notes that in several areas, in particular, in informal settlements of Roma population, disconnections of water services were observed in the past. Given the lack of clarity in ascertaining the proper reasons of the disconnection, the Special Rapporteur recommends the Portugal Government to conduct official studies and surveys on the reasons behind non-payment with a view to identifying those households that do not possess financial capacity to pay for their water and sanitation services. Furthermore, the Special Rapporteur urges Portugal to establish legal procedures to prohibit disconnection of water and sanitation services due to economic inability to pay.

D. Maximum availability of resources

71. The human rights to water and sanitation must be realized progressively, using the maximum available resources. This means that Portugal needs to allocate budgets specifically for water, sanitation and hygiene, including menstrual hygiene management. Often forgotten in the human rights to water and sanitation is the cost of construction and maintenance of onsite sanitation and hygiene promotion, including menstrual hygiene management in schools and other public institutions.

72. According to the information received from the Portuguese government, in 2015 approximately 25.9 million USD was available for water abstraction and distribution and

³² Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) (E/C.12/2002/11), para. 44a.

³³ The mandatory number of days between user written notification and service interruption increased from 10 days in 2008 (Law 12/2008) to 20 days in 2013 (Law 10/2013).

33.9 million USD for collection and treatment of sanitation. However, the Special Rapporteur was not able to find information on how Portugal deals with the problem of aging infrastructure.

73. In a decentralized structure such as in Portugal's water and sanitation sector, it is critical that the budget allocation to local authorities allows them to provide the support necessary to sustain the maintenance of water and sanitation infrastructure and to help those who cannot afford water and sanitation services. The Special Rapporteur recommends Portugal to conduct a study to analyse its own situation, in particular, to assess whether Portugal is or is not investing its maximum available resources to progressively realize the human rights to water and sanitation without discrimination.

VI. Population groups in vulnerable situation

74. During the visit, the Special Rapporteur observed the situation of the Roma (cigana) population and people living in informal settlements. While the majority of the Portuguese population enjoys near universal access to water and sanitation, the situation of access to water and sanitation for those groups is grave.

75. Roma population have been granted Portuguese citizenship through the Constitution of 1822. A significant percentage of the Roma population living in Portugal, whose size is estimated as 40,000 to 60,000 people, still has no access to basic goods and services.³⁴ The results of Roma Pilot Survey carried out by the European Union Agency for Fundamental Rights 2011 indicate that the Roma community suffers particularly from access to these improved services. In visiting a Roma population in Amadora and Vidigueira municipalities, the Special Rapporteur observed the unacceptable conditions of access to water and sanitation services of the population, violating the minimum principles of the human rights to safe drinking water and sanitation and resulting in a situation incompatible with the progresses experienced by the water sector in Portugal, the so-called "Portuguese miracle".

76. The Special Rapporteur emphasizes that the Government of Portugal must endeavour to close the gap between the share of Roma with access to water and sanitation that of the rest of the population. In this regard, the Special Rapporteur notes that the Portuguese National Roma Communities Integration Strategy (2013-2020) does not include references to drinking water and sanitation. The Special Rapporteur emphasizes that Portugal should acknowledge that its national Roma populations experience challenges in accessing drinking water and sanitation. The National Roma Communities Integration Strategy must include references to access to safe drinking water and sanitation and measures that need to be taken in order to ensure such access.

77. Human rights to safe drinking water and sanitation mean that all nationals have access to drinking water and sanitation. Water and sanitation services in Portugal are within the purview of municipal authorities. A decentralized system relying on the responsibility of municipal authorities to provide water and sanitation services may face the challenge of gathering information at the national level, for instance, disaggregated information according to wealth level, migratory status, ethnic groups and other grounds of discrimination. The lack of disaggregated information may impact on the formulation of national policies where individuals and communities in vulnerable situation are not

³⁴ National Roma Communities Strategy 2013-2020, 13.

included and monitored. In this context, the Special Rapporteur encourages further cooperation and exchanges of information between the central Government and the local Governments.

VII. International development cooperation

78. The Special Rapporteur wishes to highlight the work of AdP in the area of technical cooperation with developing countries. One of the missions of AdP International is to work with the developing countries, particularly, those Portuguese speaking African countries by transferring the know-how, methodology and practices. AdP International provides services at international level in the water supply and sanitation sectors, capitalizing the know-how and technological solutions of the AdP Group. These services include water supply and sanitation management and operation and maintenance of infrastructures.

79. Another entity that is involved in the area of cooperation is the Portuguese Water Partnership, a network of organizations that aim to develop synergies and maximize potential for the development of the water sector in the world, promoting the construction and consolidation of alliances and partnerships between national institutions and all nations engaged in sustainable water use and enhancement of water resources. The Partnership brings together various stakeholders from water service providers, research centres, civil society, professional associations to members of scientific societies.

80. Non-State actors such as AdP and the Portuguese Water Partnership play an important role in the area of technical cooperation in Portugal. In this connection, it is important to emphasize that even where non-State actors take active role in development cooperation, States have extra-territorial obligation to ensure that all standards and policy related to technical cooperation are in line with human rights standards and guide the activities of non-State actors (A/71/302).

VIII. Conclusion and recommendations

88. The Special Rapporteur finds that Portugal has undoubtedly achieved an outstanding progress in the water and sanitation sector over the last decades, which is largely recognized worldwide. Portugal now enjoys almost near universal water coverage and the coverage of sanitation services, although at a lower rate than water services, has also shown signs of progress. The quality of drinking water and the wastewater treatment has also experienced an impressive improvement. The Special Rapporteur commends all the stakeholders for this success. However, the Special Rapporteur's assessment of the current situation through the human rights lens shows that the work is yet to be finished completely and the so-called "Portuguese miracle" to be completed. In this context, the Special Rapporteur notes that certain normative contents of the human rights to water and sanitation are reflected in legislative and policy frameworks and are observed in regulation and service provisions in Portugal. However, he underscores that human rights perspective includes all aspects of normative contents of human rights to water and sanitation as well as human rights principles. In this respect, he encourages Portugal's continued effort to implement its obligation on human rights to water and sanitation in a holistic manner. He further emphasizes that realizing the human rights to water and sanitation for all Portuguese, including those in vulnerable situation and residents of the autonomous regions, is a cross-cutting issue for realizing other relevant human rights.

89. In this connection, the Special Rapporteur offers the following recommendations to the Government of Portugal:

- (a) Improve coordination, dialogue and exchange of information between all levels of government in relation to access to water and sanitation;
- (b) Adopt legal provision that recognize the human rights to water and sanitation at the national level and in particular, recommend the Parliament of Portugal to approve the draft bill that bestows legal recognition of the human rights to water and sanitation at the national level;
- (c) Stipulate explicit legal provisions, which oblige local authorities and the autonomous Governments of Azores and Madeira to respect, protect and fulfil the human rights to water and sanitation;
- (d) Adopt legislative measures to prohibit disconnections of water and sanitation services for inability to pay;
- (e) Adopt legislative measures in relation to affordability in the access to water and sanitation services, stipulating that all individuals are provided with an affordable and reliable service that is adequate for basic human needs in the context of the national, local and autonomous government level, reflecting the challenge people face in practice and the context in which they live;
- (f) Develop and undertake a comprehensive assessment of the institutional arrangements in the water and sanitation sector through a human rights perspective and establish measures to ensure that current tensions in the sector do not jeopardize the realization of the humans rights to water and sanitation for all Portuguese population;
- (g) Incorporate the principle of equality and non-discrimination in the enjoyment of the human rights to safe drinking water and sanitation, ensuring sustainability of the services in the institutional framework of the Portuguese water sector and possible future reforms;
- (h) Carefully monitor the processes of concessions of water and sanitation services, in order to reduce the financial burden and risks on municipalities;
- (i) Develop and issue guidelines for the water and sanitation service providers concerning disconnection of water and sanitation services with a view to protecting those with economic inability to pay for water and sanitation services and establish mechanism for protection of those groups;
- (j) Develop a comprehensive method for disaggregation of data on water and sanitation access by wealth level, migratory status, ethnic groups and other grounds of discrimination, in order to allow focused policies for the proper protection of the populations most in need;
- (k) Include references to access to safe drinking water and sanitation and measures that need to be taken in order to ensure such access in the National Roma Communities Integration Strategy;
- (l) Ensure that individual solutions meet all the normative contents of the human rights to water and sanitation ensuring that individual water solutions are provided continuously and that the quality of water from wells or boreholes meet the official standards, being protected from animals and other sources of contamination;
- (m) Develop a more proactive system to make information on water quality, for instance, on water bills and information on existing practices, policies and resources which promote economic access to water and sanitation;
- (n) Provide further support to local governments in relation to the construction and maintenance of individual solutions for sanitation, particularly, for

those that are in vulnerable situation, including people living in informal settlement and the homeless;

(o) Conduct official studies and surveys on the reasons behind non-payment with a view to identifying those households that do not possess financial capacity to pay for their water and sanitation services;

(p) Recommend that the States and water and sanitation providers set policies to reconcile affordability and financial sustainability as part of their financial management;

(q) Recommend that social tariff for water and sanitation services should be flexible to adapt to unforeseen situation such as financial crisis and further recommend flexibility in interpreting and applying the size of family for application of family tariff;

(r) Urge ERSAR and ERSARA to ensure that their policies, procedures and activities comply with Portugal's international human rights obligation;

(s) Urge ERSAR, the Ministry of the Environment and other related institutions to implement and monitor the automatic application of social tariffs, and to conduct further studies on the criteria for eligibility and level of discounts to be provided by the social tariff with more careful evaluation;

(t) Conduct studies to assess whether Portugal is investing its maximum available resources to progressively realize the human rights to water and sanitation without discrimination; and

(u) Recommend AdP, EPAL and other service providers to adhere to the United Nations Guiding Principles on Business and Human Rights and to perform human rights due diligence in providing water and sanitation services.

General comment:

ERSAR welcomes the draft report. The results of the Portuguese water sector in the last 20+ years have shown a huge progress, which has allowed Portugal to be in the forefront of the implementation of the human rights to water and sanitation. Despite this significant evolution, Portugal (and ERSAR in particular) has aimed to constantly adapt practices and policies that can give further contribution to those efforts, mainly by observing the international best practices. This analysis and the recommendations presented in the report are, thus, valuable insights to improve regulation and increase the country's compliance with the human rights to water and sanitation.

ERSAR generically agrees with the facts outlined in the draft report. However, we find that some points are inaccurate and some other require clarification; we also suggest corrections to a couple of typos:

Paragraph 15

"(...) The Special Rapporteur reiterates that the right to sanitation should equally be proclaimed in the legislation. (...)"

It is worth mentioning that current legislation, namely the Framework Environmental Law, already refers that the protection and management of water resources have the goal of ensuring the human right to water, as recognized by the UN, and the universal access to sanitation¹.

Paragraph 23.

We suggest adding the following text in the end:

"23. (...) fall under the jurisdiction of municipalities. (...) The provision of water and sanitation services, including the ownership of assets, is by law a public responsibility. However, private operators can participate in drinking water supply and sanitation services through a concession

¹ Law no. 19/2014, of 14 April, article 10, b).

contract to manage the service for a given period of years or by participating in the share capital of municipal companies."

Paragraph 27

"27. There is an additional model where both bulk and retail level water service provisions are operated under the delegated management model. For instance, Empresa Portuguesa das Aguas Livres (EPAL) - a State-owned service provider - operates both at the bulk and retail levels in the greater Lisbon area and only retail level services in the city of Lisbon.(...)"

This statement is incorrect. We suggest replacing by:

"27. There is an additional model where both bulk and retail level water service provisions are operated under the delegated management model. For instance, Empresa Portuguesa das Aguas Livres (EPAL) - a State-owned service provider - operates at the bulk level in the greater Lisbon area and both at the bulk and retail levels in the city of Lisbon.(...)"

Paragraph 28

"28. In continental Portugal, the Water and Waste Services Regulation Authority (ERSAR) was established in 2009 to provide recommendations and advice to water service providers on matters pertaining to interpretation of rules guiding the sector and the definition of tariffs. The regulatory responsibilities of ERSAR were further expanded to include defining the principles of tariff regulation, notably demanding economic and financial cost recovery, maintain affordability of services including through social tariffs, promotion of equity in tariff structures, and promotion of transparent tariff setting procedures."

We suggest some corrections to the following text:

"28. In continental Portugal, regulation witnessed a period of progressive development since 2000², which led to the creation of the Water and Waste Services Regulation Authority (ERSAR) in 2009. ERSAR aims to contribute to the organisation, legislation and information of the water sector, provide contractual regulation, quality of service, economic and drinking water regulation, and analyse consumer complaints. The regulatory responsibilities of ERSAR were further

² Decree-Law 362/98, of 18 November.

expanded to include defining the principles of tariff regulation, notably demanding economic and financial cost recovery, maintain affordability of services including through social tariffs, promotion of equity in tariff structures, and promotion of transparent tariff setting procedures."

Paragraph 30

"(...) The current indicator, which considers the average income in the municipalities, is far from capturing the economic burden on the poorest population and those in vulnerable situations. On the other hand, with a view to protecting those with economic inability to pay for water, and sanitation, services, guidance for the water and sanitation service providers should be issued and mechanisms for protection of those groups should be implemented. (...)"

It is worth mentioning that ERSAR has provided guidance to water operators regarding affordability issues. Among other examples, ERSAR issued in 2009 a tariff recommendation that foresaw the application of social tariffs to vulnerable households and outlined the structure and criteria for these tariffs.

Paragraph 38.

In what regards the reference to the difference between the concession periods of the first and second generation concession contracts in Portugal, it should be noted that the longer periods refer to the second generation contracts. The reason for this is the fact that the concession period has to be long enough for the operator to recover the investment made.

Paragraph 41

The interpretation of article 54 of Decree no. 194/2009 does not seem correct. The cited rule means that, if the parties to the concession contract foresee that the IRR may reach twice the amount established in the contract, it is the (that is, to lower tariffs) municipality (and not the concessionaire) that has the right to review the contract, and such revision is to impose the sharing of benefits.

The existing concessionaires may demand the revision of the contract according to what is stipulated in their respective contracts. Most contracts include a clause that identifies the situations that allow the concessionaire to demand such revision and correspond to the risks

that they do not assume. These clauses also allow the municipality to demand revision of the contract to share benefits in some situations (if some events occur that are more favourable than foreseen, such as demand higher than a certain limit), even though that never happened.

This risk sharing is established in the moment of the award of the contract and represents an important premise of the bidding and, consequently, of the contract (and, therefore, cannot be changed, since contracts are awarded by public tendering).

It also important to consider that an excessive transfer risks to private operators may have an impact on tariffs and affordability.

Paragraph 42.

"42. In the beginning of the 1990s, 89 per cent of the population had access to piped water supply services. Since then, the coverage increased to 95 per cent in 2011, reaching the goal identified in Portugal's former master water plan. According to the 2011 Census, 3,565,990 housing units had access to water supply from a public network and 405,843 units from individual solutions. It was reported that 22,294 housing units did not have any water supply. A more recent survey by ERSAR, in 2015, showed that 96 per cent of housing units in continental Portugal had access to 'services from the public water supply system with most of the remaining situations solved through individual solutions such as a private well or borehole."

Comment:

This Point places information taken from the Census 2011, usually based on a national survey that includes the autonomous regions of the Azores and Madeira, on the same level of information provided by ERSAR, which is based on verified and audited data from water and sanitation services operators from mainland Portugal. We think that these differences are worth mentioning and data from census is not directly comparable with the one collected by ERSAR. For clarity and consistency, we suggest using only data from ERSAR when mentioning coverage of water services. The same applies to Point 44.

We suggest replacing by:

"42. In the beginning of the 1990s, piped water supply services coverage represented 89 per cent of the population. Since then, the coverage increased to 95 per cent of the households in 2011, reaching the goal identified in Portugal's former master water plan. The most recent data

provided by ERSAR in 2015, which is based on audited data from water and sanitation services operators shows that 96 per cent of housing units in continental Portugal had access to services from the public water supply system with most of the remaining situations solved through individual solutions such as a private well or borehole. More specifically, according to the 2011 Census, it was reported that 22,294 housing units did not have any water supply."

Paragraph 44.

"44. Similarly in the area of sanitation, Portugal showed improvement: an increase in access to public sewerage systems was observed from 60 per cent in 1993 to 83 per cent in 2015. The majority of the remaining situations were solved through individual solutions such as septic tanks. More specifically, according to the 2011 Census, 3,931,508 housing units in Portugal have flushed toilets while 26,609 housing units did not have toilet in their houses. The census also showed that 3,080,452 households had access to sewerage system from public network while as 20,257 households did not have access to any sewerage system."

Comment:

This Point places information taken from the Census 2011, usually based on a national survey that includes the autonomous regions of the Azores and Madeira, on the same level of information provided by ERSAR, which is based on verified and audited data from water and sanitation services operators from mainland Portugal. We think that these differences are worth mentioning and data from census is not directly comparable with the one collected by ERSAR. Furthermore, the Point mixes information about service coverage with information about toilets and sanitation equipment. For clarity and consistency, we suggest using only data from ERSAR when mentioning coverage of water services.

We suggest replacing by:

"44. Similarly in the area of sanitation, Portugal showed improvement: an increase in access to public sewerage systems was observed from 60 per cent in 1993 to 83 per cent in 2015. The majority of the remaining situations were solved through individual solutions such as septic tanks. More specifically, according to the 2011 Census, 26,609 households did not have toilet and 20,257 did not have access to any sewerage system."

Paragraph 47.

"47. Furthermore, for both water and sanitation, the disparity between urban and rural areas is still high. According to the 2011 Census, while there were one housing unit in an urban area that did not have access to water supply, sewage system and a toilet, there were three such households in a rural area without access to these services."

Comment:

As mentioned for Point 44, we believe that it is worth clarifying that this information refers to water and sanitation facilities and equipment.

We suggest replacing by:

"47. Furthermore, for both water and sanitation, the disparity between urban and rural areas is still high. According to the 2011 Census, while there were one housing unit in an urban area that did not have access to water supply, sewage system and a toilet, there were three such households in a rural area without access."

Paragraph 52.

It should be mentioned that Decreto-Lei 306/2007 is not the first one establishing the regulatory system for drinking water quality and transposing Directive 98/83/EC, since it replaced Decreto-Lei n.º 243/2001, de 5 de Setembro (the first to transpose such Directive)

Paragraph 56.

It is worth mentioning that ERSAR has recommended, at least since 2010 (see recommendation 1/2010), that water providers should include in their bills information regarding water quality.

Paragraph 72.

"72. According to the information received from the Portuguese government, in 2015 approximately 25.9 million USD was available for water abstraction and distribution and 33.9 million USD for collection and treatment of sanitation. However, the Special Rapporteur was not able to find information on how Portugal deals with the problem of aging infrastructure."

We find there is a lack of relevant information in the second part of this statement. In fact, Portugal has developed policy and regulatory measures to deal with the issue of ageing infrastructure. These include, for example:

- The obligation impending on every water services operator serving more than 30 000 inhabitants to maintain a programme for infrastructure asset management³.
- Targeting investment in water networks for efficiency gains. Access to public funding (namely, EU funding) now depends on a regulatory assessment based on the quality of service and economic indicators that include high priority to infrastructure rehabilitation⁴;
- The establishment by ERSAR of indexes to measure asset knowledge and the implementation of strategic asset management by water and wastewater services operators. These indexes were drawn to induce operators to better manage their assets⁵ and were recently adapted to better assess how operators are dealing with aging infrastructure⁶.

Correction of typos:

Paragraph 2.

- "*Municipality of Celorica de Basto*" replace by "Municipality of Celorico de Basto";
- "*Cabecceiras de Basto*" replace by "Cabeceiras de Basto.

Footnote no. 12.

- "*Decree-Law no. 72/2016. Of 4 November*" replace by "Decree-Law no. 92/2013, of 11 July".

Footnote no. 13.

³ Decree-Law nº 194/2009, of 20 August, article 8, no. 5, b).

⁴ PENSAAR 2020, Vol. 2, Objetivo Operacional 3.4 | Gestão eficiente de ativos e aumento da sua reabilitação, p. 37.

⁵ ERSAR 2012. Guia Técnico 19 - Guia de avaliação da qualidade dos serviços de águas e resíduos prestados aos utilizadores - 2.ª geração do sistema de avaliação. ERSAR. Lisboa.

⁶ ERSAR 2016. Guia Técnico 21 - Desenvolvimento e implementação de processos de gestão patrimonial de infraestruturas. ERSAR. Lisboa.

- *Decree-Law 90/2009, of 9 April replace by "Decree-Law no. 194/2009, of 20 August".*

Footnote no. 20.

- *"Decree 277/200917" replace by "Decree-Law no. 277/2009, of 2 October".*

Paragraph 38.

- *"Decree 372/939" replace by "Decree- Law no. 372/93, of 29 October".*

Paragraph 41.

- *"For instance, the Decree 194/2009 of 20 August establishing the judicial regime of municipal services (...)" replace by "For instance, the Decree-Law no. 194/2009, of 20 August establishing the **legal** regime of municipal services (...)"*.