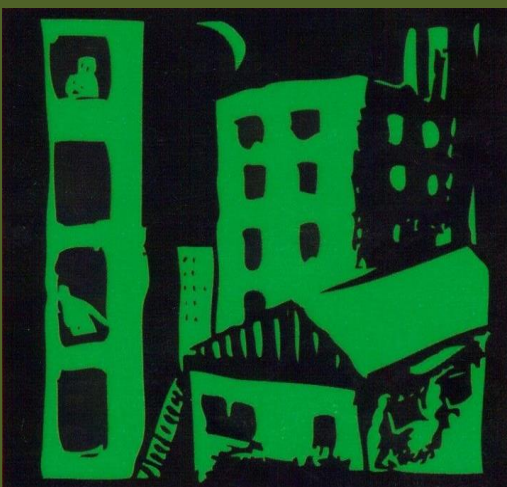


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## Does the exclusion of a right to basic sanitation in international law impede its legal enforcement?

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### ABSTRACT

*Despite expressly providing for a number of rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR) sadly omits the right to basic sanitation. This is a matter of concern as figures released by United Nations agencies and other international organisations paint a bleak picture of the levels of provision (or lack thereof) of basic sanitation around the world. They demonstrate huge and growing disparities in relation to the provision of basic sanitation facilities between urban and rural populations. International law has certainly not helped the situation by omitting this important right in key*

*human rights instruments such as the ICESCR. This is also manifested in the tendency by many governments to separate basic sanitation from the right to water. The article argues, however, that this fact alone should not hinder the legal enforcement of this right.*

**Keywords:** Basic sanitation, global picture, international law, human rights, legal enforcement

## 1 INTRODUCTION

The lack of adequate sanitation facilities in rural and disadvantaged communities is a global phenomenon. Demonstrating the importance of sanitation for human dignity and as part of the adequate standard of living, in the latest joint study the World Health Organisations (WHO) and the United Nations Children’s Fund (UNICEF) track the progress achieved in realising the right to sanitation as part of the Sustainable Development Goals 2030 target (SDG 6). The report shows that around the world the number of people without access to improved (basic) sanitation facilities is approximately 2 billion.<sup>1</sup> This is so despite the fact that 673 million people have gained access to basic sanitation between 2000 and 2017.<sup>2</sup> The figures depict disparities in the lack of basic sanitation between urban and rural settings. It is said that four out of ten people without improved sanitation live in rural areas.<sup>3</sup> In addition, while the period 2000 – 2017 had seen a rapid increase in access to improved sanitation from 22 per cent to 43 per cent in rural areas, the 57 per cent still without acceptable sanitation remained a large number.<sup>4</sup>

It has been persuasively argued that the lack of basic sanitation, which is more than double the level of absence of access to drinkable water,<sup>5</sup> may arguably be attributed to the tendency of a number of countries to decouple sanitation from water,<sup>6</sup> with water being generally recognised by most States as imposing a binding legal obligation on

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\* I would like to thank the two anonymous blind reviewers for their very helpful suggestions on an earlier draft of this article. I take full responsibility for all errors herein.

<sup>1</sup> See WHO/UNICEF ‘Progress on household drinking water, sanitation and hygiene 2000 – 2017: Special Focus on Inequalities’ (2019) available at <https://data.unicef.org/resources/progress-drinking-water-sanitation-hygiene-2019/> (accessed 20 August 2019).

<sup>2</sup> WHO/UNICEF (2019) at 8.

<sup>3</sup> WHO/UNICEF (2019) at 8.

<sup>4</sup> WHO/UNICEF (2019) at 8.

<sup>5</sup> Calaguas B “The right to water, sanitation and hygiene and the Human Rights-Based approach to development” (1999) 1 *WaterAid* available at [www.righttowater.info/wp-content/uploads/humanrights.pdf](http://www.righttowater.info/wp-content/uploads/humanrights.pdf) (accessed 20 August 2019). There are some, however, who see value in separating sanitation from water, such as Winker I “The human right to sanitation” (2016) 37 (4) *University of Pennsylvania Journal of International Law* 1331 at 1332.

<sup>6</sup> For example, countries that have recognised the right to water but not the right to sanitation include Albania, Austria, Belize, Czech Republic, Malta, Sweden, Trinidad and Tobago, Turkey, Turkmenistan, and the United Kingdom. See UN General Assembly Resolution GA/10967 (2010) available at [https://www.who.int/water\\_sanitation\\_health/ga10967.pdf?ua=1](https://www.who.int/water_sanitation_health/ga10967.pdf?ua=1) (accessed on 12 November 2019).

them despite its apparent omission from major human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR). This article has two objectives: first, to illustrate how the right to basic sanitation has been marginalised in international law, and secondly, to seek to demonstrate that despite the omission of this important right from key international instruments, its lack of recognition does not hinder its legal enforcement (does not affect its justiciability).

The article identifies, apart from a lack of political will to budget for basic sanitation, and a lack of appreciation of the health benefits of basic sanitation, the tendency in international law to separate the right to basic sanitation from the right to water as the main reason for the absence of provision for basic sanitation. Furthermore, despite its indisputable importance for the health of millions across the globe, this issue does not receive the attention it should command among scholars, apart from human rights activists in the field. This trend is a matter of concern as basic sanitation is indispensable not only for a dignified existence but to life itself. This article thus contributes to the very limited existing body of scholarly work on this important issue. What follows is a brief conceptual discussion of “basic sanitation”. This is done by looking at the various sanitation levels. Then follows a discussion of the general significance of international human rights law on the alleviation of socio-economic deprivation, of which that of water and basic sanitation are examples. The author deems it to be necessary to understand how international law plays a role in the realisation of human rights, not just between States but also within States. This is then followed by a section dedicated to answering the question whether the exclusion of a right to basic sanitation in relevant international law instruments affects its justiciability. The article concludes by stating that this marginalisation and separation of the right to basic sanitation from the right to water however does not, and should not, impede its legal enforcement.

## 2 THE SANITATION LADDER

In order to appreciate whether sanitation is adequate one must understand the sanitation ladder,<sup>7</sup> that is, the various sanitation practices or levels. These sanitation practices vary from the most basic and undignified, to the improved and hygienic. The lowest level on the sanitation ladder is open defecation. This occurs when human faeces are disposed of in fields, forests, bushes, open bodies of water, beaches, or other open spaces; or disposed of with solid waste. While world-wide open defecation rates were reduced by 50 per cent between 2000 and 2017, representing a reduction of this practice by 673 million people during this period, the number of people (673 million) continuing to practise open defecation is still too high.<sup>8</sup> Next on the ladder are unimproved sanitation facilities, which refers to facilities which “do not ensure hygienic separation of human excreta from human contact. These include pit-latrines without a

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<sup>7</sup> WHO/UNICEF (2019) at 8.

<sup>8</sup> WHO/UNICEF (2019) at 8.

slab or platform, hanging latrines and bucket latrines”.<sup>9</sup> Furthermore, these sanitation facilities are unsatisfactory in terms of public health, but may be upgraded in various ways to prevent human contact with excreta.<sup>10</sup> It is estimated that about 701 million people across the globe still use unimproved facilities of this kind for sanitation.<sup>11</sup> Then on the sanitation ladder are shared sanitation facilities. These refer to facilities of “... an otherwise acceptable type, shared between two or more households”.<sup>12</sup> Because they are shared and public, these facilities are not considered improved.<sup>13</sup> This sanitation practice is most prevalent in densely populated areas in the urban areas of cities. This results from the lack of adequate space to construct a private sanitation facility for each household. According to the WHO/UNICEF, about 51 per cent of the world’s population uses shared sanitation facilities.<sup>14</sup>

In addition, while 249 million people in 1990 shared sanitation facilities in urban areas, compared to 149 million of their rural counterparts, the numbers have grown to 497 million in urban areas and 292 million in rural areas, in 2017. This represents a 14 per cent increase in shared sanitation facilities during the period 2000 - 2017.<sup>15</sup> On the highest rung of the sanitation ladder are improved sanitation facilities. Such a sanitation facility is “one that hygienically separates human excreta from human contact”.<sup>16</sup> The WHO/UNICEF 2019 report shows that seven out of ten people without improved sanitation live in rural areas. This translates to 45 per cent of the rural population having access to improved sanitation facilities compared to 76 per cent of their urban counterparts.<sup>17</sup>

### 3 INTERNATIONAL LAW AND BASIC SANITATION

Before surveying international and regional instruments and conference declarations for pronouncements on sanitation it is perhaps useful to first briefly sketch the development of international human rights law and its significance for the realisation of

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<sup>9</sup> WHO/UNICEF (2019) at 62.

<sup>10</sup> WHO/UNICEF (2019) at 62.

<sup>11</sup> WHO/UNICEF (2019) at 140.

<sup>12</sup> WHO/UNICEF (2019) at 32.

<sup>13</sup> WHO/UNICEF (2019) at 32.

<sup>14</sup> WHO/UNICEF (2019) at 67.

<sup>15</sup> WHO/UNICEF (2019) at 71.

<sup>16</sup> WHO/UNICEF (2019) at 62. Improved sanitation results from the use of these facilities:

1. Flush or pour flush to:
  - (a) Piped water system
  - (b) Septic tank
  - (c) Pit latrine ;
2. Ventilated improved pit (VIP) latrine ;
3. Pit latrine with slab ; and
4. Composting toilet .

<sup>17</sup> WHO/UNICEF (2019) at 140.

rights, including the right to basic sanitation (a social right). The rights contained in the instruments discussed below would be of little use unless they engendered some kind of obligation or duty on States Parties. Thus, immediately after sketching the role of international law in the realisation of rights, the obligations imposed on States Parties are briefly considered.

### 3.1 The development and role of international law in rights realisation

International law owes much for its development to the ravages of the Second World War.<sup>18</sup> Prior to the War, international law was generally not concerned with how a State treated its individuals within its borders.<sup>19</sup> At the centre of international law was the principle of State sovereignty, and how a State treated its own citizens “was its own affair and beyond the reach of international law or legal intervention by other States”.<sup>20</sup>

The aftermath of the Second World War saw a shift in this attitude. Humphrey argues that the “ordeals of the war triggered a re-awakening of the critical importance of fundamental moral principles, including the principle that human beings possess basic fundamental and inalienable rights”.<sup>21</sup> A new era of human rights discourse was ushered in by the Charter of the United Nations (UN Charter) in 1945. The UN Charter stated in its preamble that one of its objectives was to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small”. Articles 1, 55 and 56 of the UN Charter provided, among other things, for the promotion and protection of human rights. Kapindu recalls the remarks made by the then UN Secretary-General when opening the 1993 World Conference on Human Rights, in which the Secretary-General captured the prevailing attitude towards human rights.<sup>22</sup> The Secretary-General stated:

“The human rights we are about to discuss here at Vienna are not the lowest common denominator among all nations, but rather what I should like to describe as the ‘irreducible human element’, in other words, the quintessential values through which we affirm together that we are a single human community. As an absolute yardstick, human rights constitute the common language of humanity.”<sup>23</sup>

<sup>18</sup> Kapindu R *From the global to the local: The role of international law in the enforcement of socio-economic rights in South Africa* Bellville: Community Law Centre, University of the Western Cape (2009) at 1.

<sup>19</sup> Matthew C *The International Covenant on Economic, Social and Cultural Rights* London: Clarendon Press (1995) at 6.

<sup>20</sup> Humphrey J “The international law of human rights in the middle of the twentieth century” in International Law Association *The present state of international law and other essays* London: International Law Association (1973). See also Kapindu (2009) at 11.

<sup>21</sup> See Kapindu (2009) at 11. See also Church J, Schulze C & Strydom H *Human rights from a comparative and international law perspective* Pretoria: UNISA Press (2007) at 226.

<sup>22</sup> See Kapindu (2009) at 2.

<sup>23</sup> United Nations General Assembly Resolution 157/22 (14 June 1993) UN Doc A/Res/157/22.

Human rights law is seen today as the epicentre of international law.<sup>24</sup> This view is endorsed by Kapindu who argues that although Article 2(7) of the UN Charter somewhat constrains the UN or any of its Member States from intervening in matters falling within the domestic jurisdiction of any other State, consistent international law jurisprudence and scholarship, as well as norms arising out of international agreements, clearly demonstrate that issues of human rights are not matters that are essentially within the domestic jurisdiction of any State, and that, on the contrary, they are the concern of the international community at large.<sup>25</sup>

This approach accords with the view expressed by the International Court of Justice in *Barcelona Traction, Light and Power Company, (Belgium v Spain)*.<sup>26</sup> In this case the ICJ stated that human rights obligations are by their very nature “the concern of all States”, and that in view of their importance “all States can be held to have a legal interest in their protection”.<sup>27</sup> This characteristic of human rights law, which allows for the possibility to intervene in domestic affairs of States, such as intervening to curb human rights abuses within a State, is seen as a “central innovation of human rights law within international law [and] a basic value of the international community”.<sup>28</sup>

Having demonstrated the importance of international law for the realisation of human rights generally, it is appropriate to ask: Does the right to water and basic sanitation assume any special significance in the human rights family? Following the adoption of the UN Charter, numerous human rights treaties have been adopted at the international (United Nations) as well as at regional levels.<sup>29</sup> Human rights scholars hold the view that social and economic rights (of which the right to water and basic sanitation forms part) have “formed an integral part of the internationally recognised catalogue of human rights that has subsequently developed”.<sup>30</sup> It is argued that international law norms and principles “have had a profound effect in fashioning the development of domestic human rights norms and principles around the world”.<sup>31</sup> The

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<sup>24</sup> Slaughter A & Alvarez JE “A liberal theory of international law” (2000) 94 *American Society of International Law* 240 at 246.

<sup>25</sup> See Kapindu (2009) at 2.

<sup>26</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (1970) ICJ 32 (*Belgium case*).

<sup>27</sup> *Belgium case* (1970) at para33.

<sup>28</sup> Carozza PG “Subsidiarity as a structural principle of international law” (2003) 97 (1) *The American Journal of International Law* 38 at 58.

<sup>29</sup> For example, the Universal Declaration of Human Rights (1948), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), the International Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989), the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (1990), the International Convention for the Protection of all Persons from Enforced Disappearance (2006), and the Convention on the Rights of People with Disabilities (2006).

<sup>30</sup> See Kapindu (2009) at 3.

<sup>31</sup> Maluwa T *International law in post-colonial Africa* Belgium: Kluwer Law International (1999) at 27, who argues that “The International Bill of Rights” as well as regional human rights conventions have

influence of these norms and principles is especially visible in the area of social and economic rights. Porter argues that

“[w]hether in litigation, public advocacy or academic discourse, those working in the area of social and economic rights have relied extensively on international human rights law, and particularly on the International Covenant on Economic, Social and Cultural Rights (ICESCR) to elucidate the content and meaning of rights”.<sup>32</sup>

Furthermore, the increasing domestication of social and economic rights has not reduced the significance, nor diminished the influence, of international law. Porter contends that even where social and economic rights achieve explicit protection in domestic law, “the paucity of domestic jurisprudence and judicial unfamiliarity with social and economic rights has meant that courts, NGOs, academics and politicians have and will continue to run to international human rights law for guidance”.<sup>33</sup> Langford echoes this view and observes that discussions of domestic adjudication of economic, social and cultural rights should not ignore international law as international and regional mechanisms have been used in this field and the “jurisprudence of these bodies has shaped domestic interpretation of ESC rights”.<sup>34</sup> In fact, the role of international law is to enhance the functioning of domestic institutions.<sup>35</sup> Scheinin predicts that

“as the international implementation mechanisms of socio-economic rights are improved through, among other things, the introduction of complaint procedures, and as these developments and the operation of already existing procedures lead to institutionalised practices of interpretation, the possibilities for direct domestic applicability of treaties on social rights grow”.<sup>36</sup>

Furthermore, Piovesan avers that by focusing on the individual, international law “interacts with the domestic protection system in order to provide the greatest possible effectiveness in protecting and promoting fundamental human rights”.<sup>37</sup> The invocation of international human rights law at a domestic level can also transform those societies embracing it. Eide and Rosas state:

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“influenced the drafting of some national bills of rights ... In some instances, even the phraseology employed in these instruments has been adopted almost verbatim in the relevant provisions of national constitutions”.

<sup>32</sup> Porter B “Socio-economic rights advocacy - using international law: Notes from Canada” (1999) 2 *Economic and Social Review* at 2.

<sup>33</sup> See Porter (1999) at 2.

<sup>34</sup> Langford M “Domestic adjudication and social, economic and cultural rights: A socio-legal review” (2009) *SUR International Journal on Human Rights* 91 at 93.

<sup>35</sup> See Slaughter & Alvarez (2000) at 246.

<sup>36</sup> Scheinin M “Economic and social rights as legal rights” in Eide A, Krause C & Rosas A (eds) *Economic, social and cultural rights* Netherlands : Martinus Nijhoff (1995) at 61.

<sup>37</sup> Piovesan F “Social, economic and cultural rights and civil and political rights” (2004) *SUR International Journal on Human Rights* 21 at 24.

“Taking economic, social and cultural rights seriously implies a simultaneous commitment to social integration, solidarity and equality, including the issue of income distribution. Economic, social and cultural rights include a major concern with the protection of vulnerable groups, such as the poor ... Fundamental needs should not be at the mercy of changing governmental policies and programmes, but should be defined as entitlements.”

It has been demonstrated above that international law plays an essential role in developing and realising human rights law generally and social and economic rights, such as the right to water and basic sanitation, in particular. Nowhere is the need for “social integration, solidarity and equality”, that Eide and Rosas call for, clearer than where segments of the human race lack basic sanitation and as a consequence are exposed to avoidable diseases and deaths. In the following part the content of the right to water and basic sanitation is discussed. However, this cannot be done without discussing the nature of the obligations imposed on States by social and economic rights generally as interpreted by the UN Committee on Economic, Social and Cultural Rights (CESCR).

### 3.2 State obligations under the ICESCR

One of the important and, arguably, unique features of the ICESCR is the nature of the obligations it imposes on the States Parties,<sup>38</sup> not only in relation to their subjects but also with regard to one another.<sup>39</sup> It is submitted that States cannot be expected to comply with the ICESCR unless they understand what the Covenant requires of them. Thus this part briefly looks at the nature and extent of the obligations imposed by the ICESCR on States. A key provision of the ICESCR on States Parties’ obligations is Article 2(1). This Article stipulates:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant, by all appropriate means, including particularly the adoption of legislative measures.”

But what exactly does Article 2(1) mean? The CESCR has offered a useful interpretation of the kind of obligations this provision imposes on States Parties. In its interpretation the CESCR has employed a “tripartite typology of obligations” approach.<sup>40</sup> According to this approach there are three types or levels of obligations imposed on States Parties by

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<sup>38</sup> See Kapindu (2009) at 13.

<sup>39</sup> Such as the obligation on Member States to offer “international assistance and co-operation” to each other.

<sup>40</sup> See General Comment No 3 by the CESCR, UN Doc E/C.12/1990/8.



the Covenant, namely, the obligations to “respect”, “protect”, and “fulfil”.<sup>41</sup> In the next part I briefly consider each of these obligations.

### 3.2.1 *The obligation to “respect”*

Of the three obligations, the obligation to “respect” is arguably the easiest to meet. In terms of this obligation, where there is an existing access to water and basic sanitation facilities, as a minimum, the State may not directly or indirectly interfere with the enjoyment of those amenities. That is to say, the State may not prevent people from using their own available resources to meet their sanitation needs. Importantly, the obligation to respect does not only apply between States and their subjects, it equally applies between individuals themselves. Where an individual threatens or violates another’s right to water and basic sanitation amenities, the State must step in and protect an individual’s right to access to water and basic sanitation facilities against threat or violation by another. In terms of the CESCR neither retrogression nor inaction is allowed by a State Party. According to the CESCR, the phrase should be interpreted as obliging a State to “move as expeditiously and effectively as possible towards a full realisation of a particular right”.<sup>42</sup>

A State, for example, will be violating its obligation to respect its citizens’ right of access to water and basic sanitation if its policy leads to a decline in access to water and basic sanitation by its citizens at the hands of the state. The CESCR has stated that any “deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified ... in the context of the full use of the maximum available resource”.<sup>43</sup> This qualification has been interpreted by the CESCR as referring to resources existing within a State as well as resources available from the international community through international assistance and co-operation.<sup>44</sup> In the context of the right of access to water, the CESCR has stated that the right to water contains freedoms and entitlements. The freedoms include the right to maintain “access to existing water supplies necessary for the right to life, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination

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<sup>41</sup> This approach has been endorsed by the CESCR in subsequent general comments, such as, General Comment No 13 on “Implementation of the Covenant on Economic, Social and Cultural Rights” (8 December 1999) UN Doc E/C.12/1999/10, para 46; General Comment No 14 on “Substantive issues arising from the implementation of the International Covenant on Economic, Social and Cultural Rights: The right to the highest attainable standard of health (art 12 of the [ICESCR])” (11 August 2000) UN Doc E/C.12/2000/4, para 33; General Comment No 15 on “Substantive issues arising from the implementation of the International Covenant on Economic, Social and Cultural Rights: The right to water (arts 11 and 12 of the [ICESCR])” (20 January 2003) UN Doc E/C.12/2002/11, paras 20-29; and General Comment No 16 on “Substantive issues arising from the implementation of the International Covenant on Economic, Social and Cultural Rights: The equal right of men and women to the enjoyment of economic, social and cultural rights (art 3 of the [ICESCR])”, paras 18-21, among others.

<sup>42</sup> General Comment No 3, para 9.

<sup>43</sup> General Comment No 3, para 9.

<sup>44</sup> General Comment No 3, para 13.

of water supplies”.<sup>45</sup> This would mean that the State must refrain from arbitrarily depriving people of their right of access to sufficient water, or denying or obstructing the right of access to sufficient water, or unfairly discriminating when allocating water resources.<sup>46</sup> It is submitted here that reference by the CESCR to the amount of water sufficient to maintain life must be interpreted to mean not just drinking water but also sufficient water to prevent diseases caused by lack of access to basic sanitation.

### 3.2.2 *The obligation to “protect”*

The duty to “protect” the rights in the ICESCR, on the other hand, requires the State to prevent violations of the right of access to basic sanitation by third parties. In an urban context, where sewerage is waterborne, if a property owner arbitrarily disconnects the water supply to a lawful tenant, the State must intervene and ensure that water is restored to the tenant. A component of the obligation to protect is a duty to regulate private provision of water services. In this regard the CESCR has stated that

“where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance”.<sup>47</sup>

Interpreting the obligation to protect human rights in a manner that gives it a long arm that reaches even into the private sphere – and thus potentially piercing the veil of the common law sanctity of contract principle – the CESCR gives the right to water the best chance of addressing the widespread deprivation of water and basic sanitation.

### 3.2.3 *The obligation to “fulfil”*

The obligation to “fulfil” the rights in the ICESCR requires of the State to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of the right.<sup>48</sup> Another important component of the duty to “fulfil” is that the State must facilitate and provide access to basic sanitation, for example. According to the CESCR, “States parties are also obliged to fulfill (provide) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal”.<sup>49</sup>

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<sup>45</sup> General Comment No 15, para 10. In contrast, “entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water”.

<sup>46</sup> Langford M & Kok A “The right to water” in Brand D & Heyns C (eds) *Socio-economic rights in South Africa* Pretoria : Pretoria University Law Press (2005) at 203.

<sup>47</sup> General Comment No 15, para 24.

<sup>48</sup> The Maastricht Guidelines (1998) *Human Rights Quarterly* at 691-701. For a fuller discussion of the Guidelines, see Langford & Kok (2005) at 204.

<sup>49</sup> General Comment No15, para 25.

In the context of waterborne sewerage, a domestic court reviewing the right of access to basic sanitation may draw inspiration from the CESCR's General Comment No 15 which marks a radical shift from earlier Comments regarding consideration of resource constraints. In this recent Comment the CESCR stated that with respect to the right to water, States Parties have a *special* obligation to provide those who do not have sufficient means with the necessary water and water facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.<sup>50</sup>

### 3.2.4 *The obligation to "promote"*

Another State obligation which is notably missing from the "tripartite typology of obligations",<sup>51</sup> but which is closely associated with the obligation to "fulfil", is the State's obligation to "promote" the rights in the ICESCR. The State's obligation to "promote" the right of access to basic sanitation, for example, would expect of the State to embark on an information dissemination exercise about this right. In the context of the right of access to water, the CESCR has commented that the "obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage".<sup>52</sup> The following part demonstrates the extent of the exclusion of the right to basic sanitation by briefly surveying States' commitments (or lack thereof) to the right to water and basic sanitation in the United Nations binding and non-binding human rights instruments.

## 4 THE EXTENT OF THE EXCLUSION OF THE RIGHT TO WATER AND BASIC SANITATION IN INTERNATIONAL LAW

### 4.1 The United Nations Human Rights Instruments

#### 4.1.1 *The ICESCR*

The most significant international instrument on economic, social and cultural rights, the ICESCR,<sup>53</sup> does not expressly provide for a right to basic sanitation. This should come as no surprise if one regards the right to water and sanitation as inseparable because the ICESCR also does not contain a right to water. Despite this omission by the ICESCR of the right to sanitation, the CESCR in General Comment No 4, and while giving

<sup>50</sup> General Comment No15, para 25.

<sup>51</sup> General Comment No15, para 25. For some of the latest on the nature of the States' obligations, see Ambrecht J *Accountability for the human rights to sanitation in South Africa's informal settlements: Strategies of civil society organisation* (unpublished LLM thesis, Columbia University, 2017) at 4.

<sup>52</sup> General Comment No15 at para 25, and "General Comment No 10" in "Substantive issues arising from the implementation of the International Covenant on Economic, Social and Cultural Rights: The role of national human rights institutions in the protection of economic, social and cultural rights" (10 December 1998) UN Doc E/C.12/1998/25, para 3(a).

<sup>53</sup> Adopted by the United Nations General Assembly in 1966.

content to the right to adequate housing,<sup>54</sup> demonstrated how interlinked all human rights are. The CESCR stated that a house is not complete unless it contains certain facilities essential for health, security, comfort and nutrition. The CESCR in particular commented as follows:

“All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, *sanitation* and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.”<sup>55</sup>

Not only does this interpretation by the CESCR commendably give the right of access to housing essential content, it also goes to show that very little weight, if any, should be attached to the exclusion of the right to basic sanitation in this instrument, as it can successfully be legally claimed as a component of other expressly recognised rights.

#### 4.1.2 *The Convention on the Elimination of Discrimination Against Women*<sup>56</sup> and the *Convention on the Rights of the Child*<sup>57</sup>

In contrast to the ICESCR, the Convention on the Elimination of Discrimination against Women (CEDAW) expressly mentions access to sanitation in its provisions. Article 14(2)(h) obliges States Parties to ensure that rural women have the right to “enjoy adequate living conditions, particularly in relation to housing, sanitation, water, electricity, water supply, transport and communications”. Article 24(2)(e) of the Convention on the Rights of the Child (CRC) places a duty on States Parties to take appropriate measures to ensure that “all segments of society, in particular parents and children ... [enjoy] the advantages of ... hygiene and environmental *sanitation* ...”. However, unlike its counterpart (the CESCR), the Committee on the Rights of the Child has until now not issued a General Comment on the content and scope of the provisions of Article 24(2)(e). There is, however, optimism that it is only a matter of time before they do so.<sup>58</sup>

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<sup>54</sup> Article 11(1) of the Covenant.

<sup>55</sup> CESCR “General Comment No 4” on “The right to adequate housing” (23 April 1992) (1991) UN Doc E/1992/23. Emphasis added.

<sup>56</sup> Adopted by the United Nations General Assembly in 1979.

<sup>57</sup> Adopted by the United Nations General Assembly in 1989.

<sup>58</sup> See Langford & Kok (2005) at 28. This information can be taken at face value as Langford has intimate knowledge of the internal processes of the United Nations treaty bodies, given his role as a human rights consultant to some of these treaty bodies. He has also assisted in drafting a number of the CESCR’s General Comments.

#### 4.1.3 *The International Covenant on Civil and Political Rights*<sup>59</sup>

A quick glance at the preamble to the International Covenant on Civil and Political Rights (ICCPR) reveals that it could be a useful reference for those denied access to adequate sanitation. In particular, the preamble states that the Covenant considers that “recognition of the inherent human *dignity* and of the *equal* and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. It further recognises that the rights in the Covenant “... derive from the inherent dignity of the human person”. In addition, the preamble states: “... the ideal of free human beings enjoying civic and political freedoms and freedom from fear and *want* can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.” It is important to note that the values of “dignity” and “equality” and the ideal for everyone to be free from “want” (deprivation) have permeated many of the General Comments of the CESCR and have informed judgments at the national level in the areas of economic and social rights.<sup>60</sup>

#### 4.1.4 *International humanitarian law*

International humanitarian law also makes provision for access to sanitation facilities during armed conflict. Articles 29 and 85 of Geneva Convention III<sup>61</sup> stipulate that prisoners of war and other detainees are to be provided with shower and bath facilities, and water, soap and other facilities for their daily personal toilet and washing requirements. It is quite clear that “personal toilet requirements” refers to the sanitation needs of prisoners of war and other detainees. Furthermore, in certain circumstances the non-provision of toilet facilities to those in captivity may constitute the war crimes of torture, inhumane treatment, cruel treatment, or wilfully causing great suffering or serious injury to body or health.<sup>62</sup> The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) found that the “creation and maintenance of an atmosphere of terror in the Celebici prison camp, by itself and *a fortiori*, together with the deprivation of adequate food, water, sleeping and *toilet* facilities and medical care” amounted to cruel treatment and great suffering or

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<sup>59</sup> Adopted by the United Nations General Assembly in 1966. It is a sister Covenant to the ICESCR. Emphasis added.

<sup>60</sup> South Africa, presently viewed as a leading jurisdiction for the domestic adjudication of socio-economic rights, has used these values – contained in its Constitution – as the basis for many legal decisions in the area of socio-economic rights.

<sup>61</sup> Adopted in 1949.

<sup>62</sup> These are violations of Art 3 of the Geneva Conventions II and III as well as Art 4(2)(a) of the Additional Protocol II.

serious injury to body or health.<sup>63</sup> What follows is a survey of governments' commitments to realising the right to water and basic sanitation at the regional level.

## 4.2 Regional Law

### 4.2.1 *The African human rights system*

Beginning with the African region, the African Charter on Human and Peoples' Rights (African Charter)<sup>64</sup> neither explicitly mentions the right to water nor the right to basic sanitation. It does however mention a right that is inter-related to basic sanitation. Article 16(2) obliges States Parties to the African Charter to take the necessary measures to protect the health of their people. As with the ICESCR, the right to basic sanitation must be inferred from the express provision of other rights, such as health, the realization of which cannot be achieved without providing water and basic sanitation services. In any event, the African Commission on Human and Peoples' Rights (African Commission) has in the past derived rights, such as to food and housing, from other rights, such as health, in the African Charter. In *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*,<sup>65</sup> the African Commission held that part of the States' obligations under the African Charter to realise all human rights, and not just the rights in the Charter, could consist in the direct provision of basic needs, such as, food or resources that can be used for food (direct food aid or social security).<sup>66</sup> The African Commission held:

“Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14 [right to property], 16 [right to health] and 18 [right to family] reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.”<sup>67</sup>

<sup>63</sup> *The Prosecutor v Zejnir Dalic, Zdravko Mucic aka “Pavo”, Hazim Delic, Esad Landzo aka “Zenga”* Case No IT-96-21-T at para 422, as discussed in Langford & Kok (2005) at 6. Emphasis added.

<sup>64</sup> Adopted in 1981.

<sup>65</sup> *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 of 2001 (*Nigeria case (2001)*).

<sup>66</sup> *Nigeria case (2001)* at para 47.

<sup>67</sup> *Nigeria case (2001)* at para 60. For a fuller analysis of this decision see, among others, Nwobike J “The African Commission on Human and Peoples' Rights and the demystification of the second and third generation rights under the African Charter: *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights . Nigeria*” (2005) *African Journal of Legal Studies* 129 at 146. See also Chirwa D “A fresh commitment to implementing economic, social and cultural rights in Africa: *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v. Nigeria*” (2002) *ESR Review* at 19.

More explicitly, the African Commission held that failure by the Nigerian government to guard against contamination of air, water and soil, amounted to violation of Articles 16 (right to health) and 24 (right to clean environment) of the affected community.<sup>68</sup> Furthermore, in *Free Legal Assistance Group v Zaire*,<sup>69</sup> the African Commission held that the “failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine as alleged in Communication 100/93 constitutes violation of [A]rticle 16 [right to health]”.<sup>70</sup> The African Commission has also developed guidelines and principles in which it seeks to guarantee the right to sanitation by linking<sup>71</sup> it to a number of rights expressly provided for in the African Charter.<sup>72</sup> According to the African Commission, the right to sanitation has the best chance of being realised if States Parties assumed these obligations, among others: (a) minimum core obligation requiring the State to provide basic levels of sanitation to ensure good health; (b) to adopt a national strategy or plan of action to realise the right to water and sanitation; (c) such national strategies and plans of action to ensure that water and sanitation are provided on a non-discriminatory basis; and (d) management of water and sanitation services to be centralised so as to ensure universal access to water and sanitation of sufficient quantity and quality and continuity at affordable and equitable price.<sup>73</sup>

The African Charter on the Rights and Welfare of the Child (Charter on the Welfare of the Child) explicitly includes the right to water but not sanitation. First, the Charter on the Welfare of the Child provides that every child has the right “to enjoy the best state of physical, mental and spiritual health”.<sup>74</sup> In more explicit terms, the Charter on the Welfare of the Child states that “States [P]arties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures to ensure the provision of adequate nutrition and safe drinking water”.<sup>75</sup> With respect to The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Protocol), the right to basic sanitation is to be inferred from the expressly mentioned right of access to water. The Protocol stipulates :

<sup>68</sup> *Nigeria case* (2001) at paras 50-54.

<sup>69</sup> *Free Legal Assistance Group v Zaire* (2000) AHRLR 74 (ACHPR 1995) (*Zaire case*). See also Langford & Kok (2005) at 196.

<sup>70</sup> *Zaire case* (2000) at para 47, English version of the decision.

<sup>71</sup> Such as the rights to life (Art 4), dignity (Art 5), best attainable state of physical and mental health (Art 16), development (Art 22) and good environment (Art 24).

<sup>72</sup> ACHPR African Commission on Human and Peoples’ Rights: Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (2011) available at <https://www.achpr.org/legalinstruments/detail?id=30> (accessed 25 August 2019). See also Kasongo T *The implementation of the socio-economic rights provisions of the Africa Charter on Human and Peoples’ Rights at the national level: A case study of Democratic Republic of Congo* (unpublished LLM thesis, University of the Western Cape, 2014).

<sup>73</sup> ACHPR (2011) at 51 – 52.

<sup>74</sup> Article 14(1).

<sup>75</sup> Article 14(2)(c).

## THE RIGHT TO BASIC SANITATION

“States [P]arties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to: (a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food; (b) establish adequate systems of supply and storage to ensure food security.”

It is submitted that decoupling the right to basic sanitation from the right to water would threaten the enjoyment of the right to enjoy the best state of physical, mental and spiritual health expressly recognized in the above-mentioned human rights instruments.

### 4.2.2 *The European human rights system*

The European Social Charter (Charter)<sup>76</sup> makes no explicit mention of the right to basic sanitation. Instead, as with the International Bill of Rights, the right to basic sanitation is implicit in other provisions of the Charter. Article 11 states that contracting parties to the Charter should, either directly or in co-operation with public or private organisations, *inter alia*, remove, as far as possible, the causes of ill-health and prevent, as far as possible, epidemic, endemic and other diseases. Clearly, the lack of basic sanitation would contribute to ill-health as well as to epidemic, endemic and other diseases that Article 11 seeks to prevent.

Similarly, the right to basic sanitation should be regarded as being included by implication in the Revised European Charter<sup>77</sup> by virtue of Article 31 which obliges States Parties to “promote access to housing of an adequate standard” to ensure the “effective exercise of the right to housing”. Furthermore, basic sanitation cannot be decoupled from the right of access to water mentioned in the Recommendations of the European Committee of Ministers of Member States of the Council of Europe (Committee of Ministers).<sup>78</sup> The Committee of Ministers stated that

“everyone has the right to a sufficient quantity of water for his or her basic needs. International human rights instruments recognize the fundamental right of all human beings to be free from hunger and to adequate standard of living for themselves and their families. It is quite clear that these requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene. Social measures should be put in place to prevent the supply of water to destitute persons from being cut off”.<sup>79</sup>

It is refreshing to note that in the European human rights system there is a clear realization that an adequate standard of living cannot be achieved without a minimum

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<sup>76</sup> Adopted in 1961.

<sup>77</sup> Adopted in 1996.

<sup>78</sup> Monitors compliance with the European Social Charter/Revised European Charter by Member States.

<sup>79</sup> Recommendation (2001) 14 on “Water Resources” para 5, as discussed in Langford & Kok (2005) at 196.



quality amount of water to maintain good health and hygiene. It is submitted that living standards would be anything but adequate where health and hygiene are threatened by the lack of provision of basic sanitation.

#### 4.2.3 *The Inter-American human rights system*

In the Inter-American human rights system, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Additional Protocol),<sup>80</sup> while not expressly providing for the right of access to basic sanitation, states that “everyone shall have the right to live in a healthy environment and to have access to basic public services”.<sup>81</sup> It is submitted that access to basic sanitation is a crucial component of the basic services necessary for a healthy environment.

### **5 DOES THE OMISSION OF THE RIGHT TO WATER AND BASIC SANITATION IMPEDE ITS LEGAL ENFORCEMENT?**

The question whether the omission of the right to basic sanitation in the key international instruments affects its justiciability has, to a large extent, already been answered in the preceding part. As seen above, the answer to the question posed is in the negative. This part simply seeks to drive the point home that basic sanitation, despite its exclusion, is justiciable because, as with the right to water, which is not expressly mentioned in important human rights instruments, such as the ICESCR,<sup>82</sup> the right to basic sanitation should be regarded as “one stick in the bundle of water rights”.<sup>83</sup> This view reinforces the notion that human rights are interdependent and indivisible. Writing in the context of the omission of an express right in the ICESCR, Daniel et al argue that “there is nothing ill-defined or fussy about being deprived of the basic human rights to food, clean water, clothing, housing, medical care, and some hope for security in old age”.<sup>84</sup> They go on to make the bold assertion that had the drafters of the ICESCR realised how big a mistake it would prove to be not to expressly include the right to water.

Of course, this by no means suggests that an opportunity to include, or the need for, a comprehensive treatment of the right of access to adequate sanitation no longer

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<sup>80</sup> Adopted in 1988.

<sup>81</sup> Article 11(1).

<sup>82</sup> See Gleick P “The human right to water” (1999) *Water Policy* at 487; Hardberger A “Life, liberty and the pursuit of water: Evaluating water as a human right and the duties and obligations it creates” (2005) 4(2) *Northwestern University Journal of Human Rights* at 331; Fitzmaurice M “The human right to water” (2007) 8(3) *Fordham Environmental Law Review* at 537 ; and Cahill A “The human right to water – a right of unique status: The legal status and the normative content of the right to water” (2005) 9(3) *The International Journal of Human Rights* at 389.

<sup>83</sup> Langford M & Kok A “The right to water” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* 2<sup>nd</sup> ed Cape Town : Juta (2009) at 28.

<sup>84</sup> Daniel Y, Stamatopoulou E & Diaz C *The Universal Declaration of Human Rights: Fifty years and beyond* United States: Baywood Publishing Company (1999) at 492.

## THE RIGHT TO BASIC SANITATION

exists. It was for this reason that in General Comment No 15 the CESCR expressly included sanitation within the scope of the right to water.<sup>85</sup> It was unfortunate, however, that the CESCR, in the initial stages of drafting General Comment No 15, still did not adequately treat with the matter of sanitation within the scope of the right to water.<sup>86</sup> Among those who spoke out against the superficial treatment of sanitation in the draft General Comment No 15 was Chapman, who observed :

“ The GC should be broadened to encompass the right to water including water for ... sanitation. The current draft does not address sanitation adequately. Safety is part of the normative content of the right to water but safety is not possible without [adequate] sanitation. There is a need to broaden the scope of the right to water and broaden the core of the right to water.”<sup>87</sup>

Langford, who also took part in the discussions on the draft , quoted Mahatma Gandhi who had remarked that “[s]anitation is more important than independence. Sanitation is fundamental to personal dignity and for personal and community health, to prevent contamination and disease”.<sup>88</sup> The former United Nations Special Rapporteur on the Right to Adequate Housing, Miloon Kothari, who was also present during the discussions on the draft , argued that sanitation needed to be addressed more comprehensively in the General Comment, and pointed out that the substance clause<sup>89</sup> of the ICESCR was often forgotten, and that the “continuous improvement in living conditions that it provides for cannot be realised without clean water and sanitation”.<sup>90</sup> Thus, in the final version General Comment No 15 the CESCR noted the significance of sanitation within the scope of the right to water, and that sanitation was an integral part of the rights to housing and health. In particular the CESCR stated :

“Ensuring that everyone has access to adequate sanitation is not fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of the drinking water supplies and resources. In accordance with the rights to health and adequate housing States [P]arties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.”<sup>91</sup>

In the CESCR’s General Comment No 20<sup>92</sup> , on non-discrimination in economic, social and cultural rights,<sup>93</sup> emphasis is placed on the importance of non-discriminating in

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<sup>85</sup> General Comment No 15.

<sup>86</sup> See Cahill (2005) at 402.

<sup>87</sup> See Cahill (2005) at 402.

<sup>88</sup> See Cahill (2005) at 402.

<sup>89</sup> Article 1(2) of the ICESCR.

<sup>90</sup> See Cahill (2005) at 402.

<sup>91</sup> General Comment No 15, para 29.

<sup>92</sup> CESCR General Comment No 20 on “Non-discrimination in economic, social and cultural rights (art 2, para 2 of the [ICESCR])” (2 July 2009) UN Doc E/C.12/GC/20.

<sup>93</sup> Article 2(2) of the ICESCR.

ensuring access to, among other services, adequate sanitation. There is a call for the protection of vulnerable groups in particular. Thus, the CESCR states in General Comment No 20 that “ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas”.<sup>94</sup> Apart from the General Comments, the CESCR has also emphasised the significance of sanitation in its engagements with the States Parties. The first signs of this attitude can be detected in the Reporting Guidelines the CESCR published in 2009 which required States to also report on sanitation when reporting on the right to health.<sup>95</sup>

In its 2010 statement recognising sanitation as a human right the CESCR claims that it regularly addresses the issue of sanitation in its dialogue with States Parties and in its Concluding Observations.<sup>96</sup> In the statement the CESCR makes it clear that neither the right to human dignity nor the right to an adequate standard of living (Article 11 of the ICESCR) can be enjoyed without adequate sanitation.<sup>97</sup> The statement is seen as going a long way to strengthening the normative content of sanitation.<sup>98</sup>

The Human Rights Committee on Civil and Political Rights (CCPR)<sup>99</sup> has also made a welcome contribution towards realising the right to basic sanitation in its recent General Comment No 36.<sup>100</sup> The CCPR correctly stated that the duty imposed by Article 6 to protect life implies that States Parties should take appropriate measures to address the general conditions in society that may pose a direct threat to life or prevent individuals from enjoying their life with dignity.<sup>101</sup> The CCPR has also sought to assist States Parties by providing examples of the sort of conditions that threaten the right to life, and what measures they need to put in place to address these conditions:

“These general conditions may include... the prevalence of life threatening diseases such as...malaria. The measures called for addressing adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food, water, healthcare [and] *sanitation*.”<sup>102</sup>

This contribution by the CCPR will certainly facilitate its realisation of sanitation as it not only assists States Parties in appreciating the conditions that may pose a threat to

<sup>94</sup> General Comment No20, para 8.

<sup>95</sup> United Nations Economic and Social Council Doc E/C.12/2008/224 (March 2009).

<sup>96</sup> United Nations Economic and Social Council Doc E/C.12/2010/1 (November 2010).

<sup>97</sup> General Comment No 20, paras 1 & 7.

<sup>98</sup> See Winkler I “The human right to sanitation” (2016) 37 *University of Pennsylvania Journal of International Law* 1331 at 1356.

<sup>99</sup> The Committee monitors implementation by the States Parties to the International Covenant on Civil and Political Rights (1966).

<sup>100</sup> The Human Rights Committee’s “General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights” UN Doc CCPR/C/GC/36 (October 2018).

<sup>101</sup> See CCPR (1966) para 26.

<sup>102</sup> See CCPR (1966) para 26. Emphasis added.

## THE RIGHT TO BASIC SANITATION

the right to life but also specifies what needs to be done to address such conditions. Importantly, the recognition by the CCPR that sanitation is crucial for the right to life can only strengthen the enforcement of sanitation as a human right.

Given the rapid momentum in the United Nations towards treating sanitation as a distinct human right, the Human Rights Council in 2014 appointed Leo Heller as the new Special Rapporteur, who was to focus primarily on the issue of human rights obligations related to access to safe drinking water and sanitation. Heller replaced Catarina de Albuquerque who had served as an Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, and later from 2011 – 2013 as the first Special Rapporteur when that office was renamed.<sup>103</sup> Albuquerque understood the role as requiring focus on issues that might negatively affect the recognition of the rights to water and sanitation, such as, the national strategies, private provision, local authorities, disconnection, prioritisation between various uses, and trade and investment.<sup>104</sup> At the top of the Special Rapporteur's agenda was attending to the development of the normative content of human rights obligations related to sanitation. Seeking to raise the profile of sanitation and to bring it to the same level as the right to water, Albuquerque's view was as follows:

"[There was] an ongoing discussion about sanitation as a distinct right. [The]...momentum behind this issue, and recent developments in human right law concerning sanitation suggests a trend towards recognising such a distinct right. Convinced that there are unique aspects to sanitation that evoke the inherent dignity of all human beings and which make it impossible to address satisfactorily through other human rights, [she] supporte[d] and encourage[d] developments in line with this trend."<sup>105</sup>

It has been observed that throughout her tenure the Special Rapporteur maintained a focus on sanitation, "integrating it in all her reports, and other activities, addressing sanitation issues during her country missions and devoting her report to the General Assembly in 2013 to adequate wastewater management, an issue that is clearly linked to sanitation"<sup>106</sup>. It is submitted that there can be no stronger voice advocating for a justiciable right to sanitation than that of the Special Rapporteur on Water and Sanitation. Finally, given the inter-relatedness of human rights, the Special Rapporteurs

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<sup>103</sup> See note on her background at UN Human Rights Office of the High Commissioner available at <https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/CatarinaDeAlbuquerque.aspx>, (accessed 09 September 2019).

<sup>104</sup> See UN Human Rights Office of the High Commissioner, Report on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation, UN Doc A/HRC/6/3 (August 2007) (HRC Report on Sanitation). See also Winker (2016) at 1358.

<sup>105</sup> See HRC Report on Sanitation (2007) at 59.

<sup>106</sup> See Winkler (2016) at 1358.

on Health and Housing have also linked the realisation of these rights to adequate provision of sanitation.<sup>107</sup>

## 6 CONCLUDING REMARKS

This article has sought to illustrate how basic sanitation as a component of the right to sufficient water has been marginalised by being excluded in international law. It further aimed to answer the question: Does the exclusion of the right to basic sanitation in key international human rights instruments impede its legal enforcement? The article answered this question positively by arguing that exclusion does not, and should not, impede its legal enforcement. It was contended that where basic sanitation cannot be claimed as an autonomous right, it can confidently be claimed as being implicit in the rights to health, clean environment, enjoyment of an adequate standard of living, and even life. It is submitted that it matters very little whether the goal of realising the right to sanitation is achieved by treating it as a stick in a bundle of related rights, such as those indicated above, or as stand-alone right derived from the right to the highest attainable standard of living as proposed by Winkler.<sup>108</sup> In the end these two approaches will achieve the same goal of ending the status of the right to sanitation as a side show and a by-product of the right to water. Of course the ultimate goal is to have the right explicitly guaranteed in countries' constitutions, especially in poorer continents, such as Africa.<sup>109</sup>

The article contributes to the field not merely by pointing out the oversight in existing international human rights law instruments, but by arguing that the right to basic sanitation can nevertheless be vindicated as a component of a number of the expressly mentioned rights. That said, further research is necessary to deal with issues around enforcing the right to basic sanitation as its enforcement will not be without challenges. The first difficulty pertains to what is, or should be, the exact content of this right. The few treaties that explicitly mention sanitation, together with the General Comments by some of the treaty bodies charged with interpreting the rights in the treaties, merely oblige States Parties to ensure access to adequate sanitation without stating what is "adequate". Only in a very limited number of contributions and in some domestic courts has an attempt been made to delineate the content of this right.

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<sup>107</sup> See, for example, report by the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Standard of Physical and Mental Health, with the same title, UN Doc. A/62/214 (August 2007), and a report by the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, on Economic, Social and Cultural Rights, UN Doc. E/CN.4/2002/59 (March 2002).

<sup>108</sup> See Winkler (2016) at 1358.

<sup>109</sup> See Kamga S "The right to basic sanitation: A human right in need of constitutional guarantee in Africa" (2013) 29(3) *SAJHR* at 615.

However, in international instruments, the literature, and domestic jurisprudence, there is also a notable bias in favour of waterborne sanitation where sanitation is derived, for instance, from the right of access to adequate water, to the exclusion of other sanitation practices discussed above. The CESCR's General Comment No 15 is a good example of this. Finally, we should all take heart from the recent resolution by the UN General Assembly, recognising and affirming the legal status of the right to water and basic sanitation. However, a binding instrument, such as, an optional protocol to the existing ICESCR, remains necessary.

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