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The Human Right to Sanitation

Inga Winkler

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THE HUMAN RIGHT TO SANITATION

INGA T. WINKLER*

ABSTRACT

Sanitation is a very personal and private matter, inextricably linked to human dignity. At the same time, sanitation has an important public health dimension. In this regard, sanitation is not only about an individual's right to have access to a toilet or latrine. Inadequate sanitation leads to contamination of the environment, of public spaces, and of water bodies through feces and wastewater. Therefore, contamination has a negative impact on public health and the life and wellbeing of everyone in the community, affecting their human rights to health, life, food, and a

* Inga T. Winkler is a lecturer at the Institute for the Study of Human Rights at Columbia University. This article draws on her experience as Legal Advisor to the first United Nations Special Rapporteur on the Human Rights to Water and Sanitation, Catarina de Albuquerque, and her work on the report on human rights obligations related to sanitation to the United Nations Human Rights Council issued by the Special Rapporteur in 2009. Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque, U.N. Doc. A/HRC/12/24 (July 1, 2009) [hereinafter HRC, Report on Sanitation, A/HRC/12/24]. The article also draws on the author's book on the human right to water. Inga T. Winkler, *The Human Right To Water: Significance, Legal Status and Implications For Water Allocation* (2012). The article reflects the author's personal opinions and not necessarily those of the Special Rapporteur. The author gratefully acknowledges useful feedback and comments on an earlier version of this article by Amanda Klasing, Hà Lê Phan, Virginia Roaf, Anna Zimmer, as well as Nikki Reisch and other participants at the Research Forum convened by the Center for Human Rights & Global Justice at NYU Law School on November 2, 2015 as well as helpful research assistance by Johanna Gusman, Angelika Paul, Lisa Anouk Müller-Dormann, Aishani Gupta and Danial Abbasi.

healthy environment. This multitude of rights concerned makes sanitation complex to understand and address through the lens of human rights.

This article provides background on the lack of access to sanitation faced by billions of people and highlights, in particular, inequalities in access to sanitation. It discusses how sanitation has long been, and continues to be, a neglected issue and how it is slowly gaining more and more attention, including in the context of human rights. The article traces the steps that led to the political recognition of the human right to sanitation, and then discusses the legal status of the right to sanitation: is sanitation a “new” human right? Or has it rather been an implicit component of existing human rights guarantees that has only recently started receiving increased attention? The article argues that sanitation has a legal basis in existing human rights law and is best understood as a distinct human right (also distinct from the human right to water) as a component of the human right to an adequate standard of living. It provides clarification on the definition and specification of the right to sanitation through the criteria of availability, accessibility, affordability, quality and hygiene, and acceptability.

Finally, the article discusses the complexity of realizing the right to sanitation and related human rights combining the aspects of individual dignity and public health. It acknowledges that sanitation is largely a matter of individual responsibility, but argues that states have a significant role to play in creating an environment that enables individuals to practice adequate sanitation as well as in ensuring public health.

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1. INTRODUCTION

Countless people do not have access to sanitation. In some areas of the world, women and girls often wait until dark and then go outside, sometimes squatting behind a bush to urinate and defecate.¹ Others living close to the sea go to the ocean to defecate because they do not have a toilet at home or in the community.² A woman in Tuvalu carries her old mother to the ocean every time she needs to relieve herself, as she has difficulties walking.³ In Egypt, an older woman lives with her family in a one-room hut, which has a water tap inside the room but no toilet. She usually uses the neighbor's toilet, but during the night or when she has diarrhea, she feels embarrassed and goes behind a bush.⁴ People living in informal settlements often have no choice but to squat in front of their family members.⁵ They are all concerned about their dignity, privacy, and safety, which may be threatened or compromised on their way to a bush or the ocean or when having to defecate in front of others. These stories highlight that sanitation is a very personal matter, inextricably linked to human dignity. Most people would prefer to defecate and urinate in privacy, but face difficulties in ensuring their safety and dignity.

In addition, the feces of people defecating near the ocean, in fields or in ditches in informal settlements end up in the environment causing contamination. This demonstrates that sanitation has an important public health dimension adding to the complexity of ensuring adequate sanitation for all. Inadequate sanitation leads to pollution of public spaces, water resources and the broader envi-

¹ HRC, *Report on Sanitation*, A/HRC/12/24, *supra* note *, ¶¶ 43, 55.

² Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Report, Mission to Kiribati*, ¶ 34, U.N. Doc. A/HRC/24/44/Add.1 (June 28, 2013).

³ Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Report, Mission to Tuvalu*, ¶ 29, U.N. Doc. A/HRC/24/44/Add.2 (July 1, 2013).

⁴ Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Report, Mission to Egypt*, ¶ 50, U.N. Doc. A/HRC/15/31/Add.3 (Jul. 5, 2010).

⁵ Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Report, Mission to Brazil*, ¶ 13, U.N. Doc. A/HRC/27/55/Add.1 (June 30, 2014).

ronment through feces and wastewater. Thus, inadequate sanitation has a negative impact on public health and the life and well-being not only of the individuals practicing inadequate sanitation, but everyone in the community. As such, inadequate sanitation affects the human rights to health, life, food, and a healthy environment of a large number of people.

This article provides background on the lack of access to sanitation faced by billions of people and highlights, in particular, inequalities in access. In Section 2, it discusses how sanitation has long been, and continues to be, a neglected issue and how it is slowly gaining more and more attention, including in the context of human rights. In Section 3, this article traces the steps that led to the political recognition of the human right to sanitation, and then discusses the legal status of the right to sanitation: is sanitation a “new” human right? Or has it rather been an implicit component of existing human rights guarantees that has only recently received increasing attention? In Section 4, this article argues that sanitation has a legal basis in existing human rights law and is best understood as a distinct human right (also distinct from the right to water) as a component of the human right to an adequate standard of living. Then, in Section 5, it provides clarification on the definition and specification of the right to sanitation through the criteria of availability, accessibility, affordability, quality and hygiene, and acceptability.

Finally, in Section 6, this article discusses the complexity of realizing the right to sanitation and related human rights combining the notions of individual dignity and public health. It acknowledges that sanitation is largely a matter of individual responsibility, but argues that states have a significant role to play in creating the environment that enables individuals to practice adequate sanitation as well as in ensuring public health.

2. SETTING THE SCENE

2.1. *Lack of Access to Sanitation: An Ongoing Crisis*

The stories mentioned above are not isolated incidences of

people experiencing particular hardships, but instead reflect widespread patterns of inadequate access to sanitation. According to data collected in the context of the Millennium Development Goals (“MDGs”), 2.4 billion people do not have access to what has been defined as “improved sanitation,”⁶ amounting to almost half of the population in the developing world.⁷

Due to the way the indicator for measuring progress towards the MDGs is defined, the actual situation is likely even bleaker. “Improved sanitation” does not take into account whether access to these facilities is actually affordable to people, implying that people may have facilities, but cannot afford to maintain them or to pay for excreta management.

The indicator is also silent on the question of whether excreta and wastewater are adequately collected, treated and disposed of or re-used. Where there is no proper management, human excreta are often discharged untreated into rivers and other water bodies, which may contaminate water that is used for water supply, with serious health consequences and disastrous environmental effects. It is estimated that in Delhi, less than 20 percent of wastewater is treated before being dumped into the Yamuna River,⁸ while in Latin America, less than 14 percent of human waste is processed.⁹ Even in the European Union, not all sewage is adequately treated.¹⁰ Where on-site solutions are used for sanitation, latrines or pits often overflow, effluents leak into groundwater and end up in the larger environment.¹¹ In particular, in densely populated urban

⁶ World Health Organization & United Nations Children’s Fund, *Progress on Sanitation and Drinking Water: 2015 Update and MDG Assessment 5 (2015)*, available at http://www.wssinfo.org/fileadmin/user_upload/resources/JMP-Update-report-2015_English.pdf [<https://perma.cc/PB8A-4XPF>] [hereinafter WHO and UNICEF, JMP Update 2015].

⁷ United Nations Development Programme, *Human Development Report 2006 Beyond Scarcity: Power, Poverty and the Global Water Crisis 12* (2006) [hereinafter UNDP, Human Development Report 2006].

⁸ *Id.* at 114.

⁹ *Id.* at 39.

¹⁰ See Günter Langergraber & Elke Muellegger, *Ecological Sanitation – A Way to Solve Global Sanitation Problems?*, 31 ENV’T INT’L 433, 435 (2005) (using case studies in Germany, Finland, and Denmark to compare sanitation issues in Europe with a community in Uganda).

¹¹ UNDP, HUMAN DEVELOPMENT REPORT 2006, *supra* note 7, at 1, 10.

areas, the necessary infrastructure for the removal and disposal of sludge and septage is often missing, unregulated, or unaffordable.¹² A recent study of twelve cities around the world found that, on average, only 22% of feces from households using on-site systems are properly managed.¹³

Among the people who do not have access to “improved sanitation,” almost 1 billion people practice open defecation.¹⁴ It is the polite term to describe that people have to defecate behind bushes, in ditches, on roadsides, or into plastic bags. The “flying toilets” of Kibera, the largest informal settlement in Nairobi, Kenya, refer to plastic bags that people use for defecation and then throw on the roadside.¹⁵ They have come to symbolize open defecation in informal settlements and its disastrous impacts.

Open defecation and inadequate disposal of wastes, consequently contaminating the environment and water resources result in people being exposed to human excreta containing highly pathogenic material, either directly through contaminated drinking water or through contaminants that have entered the food chain.¹⁶ The social and developmental impacts are vast. Diarrhea alone causes the death of 1.5 million children under five per year.¹⁷ In fact, it is the second most common cause of death for children un-

¹² See Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Report: Wastewater Management in the Realization of the Rights to Water and Sanitation*, U.N. Doc. A/68/264 (Aug. 5, 2013) (providing an overview on human rights impacts of the lack of adequate wastewater management) [hereinafter GA, *Report on Wastewater Management*].

¹³ Water and Sanitation Program, *The Missing Link in Sanitation Service Delivery: A Review of Fecal Sludge Management in 12 Cities* 4 (2014), available at www.wsp.org/sites/wsp.org/files/publications/WSP-Fecal-Sludge-12-City-Review-Research-Brief.pdf [https://perma.cc/C25L-3JZA].

¹⁴ WHO and UNICEF, *JMP Update 2015*, *supra* note 6, at 16.

¹⁵ UNDP, *Human Development Report 2006*, *supra* note 7, at 38; Maggie Black & Ben Fawcett, *The Last Taboo, Opening The Door On The Global Sanitation Crisis* 47 (2008).

¹⁶ See Anna Zimmer, Inga T. Winkler and Catarina de Albuquerque, *Governing Wastewater, Curbing Pollution, and Improving Water Quality for the Realization of Human Rights*, 33(4) *WATERLINES* 337, 340 (2014) (focusing on the wastewater governance as opposed to the more common focus on water quality and management).

¹⁷ BLACK AND FAWCETT, *supra* note 15, at 4.

der five years of age after pneumonia¹⁸ with more children dying from diarrhea than from tuberculosis, malaria and HIV/AIDS combined.¹⁹ The World Health Organization (“WHO”) and the United Nations Children’s Fund (“UNICEF”) estimate that 88 percent of diarrheal deaths can be attributed to unsafe water, inadequate sanitation and lack of hygiene.²⁰ Further, research suggests that the lack of adequate sanitation also contributes to other serious health conditions such as child malnutrition and respiratory infections.²¹ More recent studies demonstrate that inadequate sanitation and hygiene are associated with child stunting.²² All in all, it is estimated that 2.4 million deaths per year could be prevented if everyone had adequate access to water, sanitation and hygiene services.²³

These health consequences further impact people’s livelihoods and ability to work or attend school. Children often miss school due to illness. Others, in particular girls, cannot attend school because they have to care for relatives who are sick from sanitation-related diseases. It is estimated that each year, 443 million school days are lost due to sickness caused by poor water and sanitation.²⁴ Diseases caused by lack of access to sanitation and water also affect students’ ability to learn. Malnutrition and stunting have a long-term impact on children’s physical and mental development. Oth-

¹⁸ UNITED NATIONS CHILDREN’S FUND & WORLD HEALTH ORGANIZATION, DIARRHOEA: WHY CHILDREN ARE STILL DYING AND WHAT CAN BE DONE 1 (2009), available at http://whqlibdoc.who.int/publications/2009/9789241598415_eng.pdf?ua=1. [https://perma.cc/S87K-ZUGG].

¹⁹ *Id.* at 6.

²⁰ *Id.* at 2.

²¹ Centre on Housing Rights and Evictions, WaterAid, Swiss Agency For Development and Cooperation and UN-Habitat, Sanitation: A Human Rights Imperative 4 (2008) [hereinafter COHRE, WaterAid, SDC and U.N.-HABITAT].

²² Rah, Jee Hyun et al., Household Sanitation and Personal Hygiene Practices are Associated with Child Stunting in Rural India: A Cross-Sectional Analysis of Surveys, *BMJ Open*, available at <http://bmjopen.bmj.com/content/5/2/e005180.full> [https://perma.cc/25F6-KZJZ].

²³ Jamie Bartram and Sandy Cairncross, *Hygiene, Sanitation, and Water: Forgotten Foundations of Health*, 7 (11) PLOS MED. 1, (2010), available at www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1000367#pmed.1000367-Prsstn1. [https://perma.cc/6EPU-JV9T].

²⁴ UNDP, HUMAN DEVELOPMENT REPORT 2006, *supra* note 7, at 6.

er children are unable to attend school because of the lack of adequate sanitation facilities. Where there are no gender-specific facilities, girls, in particular, often drop out of school at the age of puberty since they lack privacy and cannot practice adequate menstrual hygiene.²⁵ Moreover, women and girls often face risks to their physical security and dignity, including abuse, attack, assault and rape, when having to defecate in the open or relying on shared facilities, especially at night.²⁶ Altogether, the consequences of the sanitation crisis for human dignity and safety as well as human and environmental health are enormous.

2.2. Inequalities in Access to Sanitation

Lack of access to adequate sanitation is deeply intertwined with discrimination and inequalities. Specific groups are excluded from access to sanitation in ways that reflect systemic and structural patterns of discrimination and marginalization.²⁷ Often, inequal-

²⁵ HRC, *Report on Sanitation*, A/HRC/12/24, *supra* note *, at ¶ 30; UNDP, *HUMAN DEVELOPMENT REPORT 2006*, *supra* note 7, at 47; BLACK AND FAWCETT, *supra* note 15, at 143. See also Inga T. Winkler and Virginia Roaf, *Taking the Bloody Linen out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality*, 21 CARDOZO J.L. & GENDER 1 (2015) (providing further analysis on menstrual hygiene) [hereinafter Winkler and Roaf, *Menstrual hygiene*].

²⁶ Amnesty International, *Insecurity and Indignity, Women's Experiences in the Slums of Nairobi* 21 (Kenya, 2010); Black and Fawcett, *supra* note 15, at 86.

²⁷ See *International Covenant on Economic, Social and Cultural Rights*, Art. 2(2), U.N. Doc. 2200A (XXI) (Dec. 16, 1966) (“[T]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”). The reference to “other status” among the prohibited grounds of discrimination indicates that it is not an exhaustive list. Other grounds of prohibited discrimination that are of a comparable nature may be incorporated in this category, allowing for the evolution of protections to match evolving discrimination. These implicit prohibited grounds of discrimination include, for example, disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation. See also U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights*, ¶¶ 15, 27-35, U.N. Doc. E/C.12/GC/20 (July 2, 2009) (exploring discrimination and inequality in economic, social, and cultural rights) [hereinafter CESCR, *General Comment No. 20*].

ities intersect.²⁸ Social, cultural, economic and political inequalities all have reinforcing effects that perpetuate exclusion. A focus on intersectional inequalities is indispensable to reflect and address the lived realities of people experiencing intersecting or multiple discrimination. The Committee on Economic, Social and Cultural Rights (“CESCR”) states that “cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.”²⁹ For instance, the experience of a girl with a disability living in an informal settlement will be different from the experiences of other persons with a disability or of other persons living in informal settlements, and requires targeted measures to ensure access to sanitation.

The Joint Monitoring Programme for Water Supply and Sanitation of WHO and UNICEF has increasingly drawn attention to vast inequalities in access to sanitation between the richest and the poorest quintiles of the population. In many countries, including Cambodia, India and Namibia, there is a significant gap in access to sanitation between the poorest quintile and the rest of the population, or between the poorest and richest quintiles.³⁰ In fact, while overall progress has been made in reducing open defecation in several South Asian countries, such progress has largely been among the richest members of society (except in Bangladesh where the poorest have also made significant progress).³¹

Other than socio-economic factors, the analysis of geographic and ethnic divides assists in identifying people who experience discrimination and inequalities in access to sanitation. The latest report by the Joint Monitoring Programme of WHO and UNICEF

²⁸ See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, *U. CHI. LEGAL F.* 151 (1989); Nira Yuval-Davis, *Intersectionality and Feminist Politics*, 13 *EUR. J. WOMEN'S STUD.* 193 (2006); Mieke Verloo, *Multiple Inequalities, Intersectionality and the European Union*, 13 *EUR. J. WOMEN'S RTS.* 211 (2006); Ange-Marie Hancock, *Intersectionality as a Normative and Empirical Paradigm*, 3 *POL. & GENDER* 248 (2007); Stephanie Shields, *Gender: An Intersectionality Perspective*, 59 *SEX ROLES* 301 (2008).

²⁹ CESCR, *General Comment No. 20*, *supra* note 27, at ¶ 17.

³⁰ WHO and UNICEF, *JMP Update 2015*, *supra* note 6, at 20.

³¹ *Id.* at 23.

highlights continuing rural-urban disparities. It shows that 70% of people who do not use improved sanitation facilities, and 90% of people who practice open defecation live in rural areas.³² In many instances there is significant overlap between geographic, socio-economic, and ethnic divides as minorities often live in remote rural areas and are often among the poorest.

In the Lao Republic, for instance, access to sanitation among some minority populations is less than half that of the majority population.³³ In some countries, indigenous peoples living on reserves do not have access to sanitation services.³⁴ The Inter-American Court of Human Rights addressed the lack of access to adequate sanitation in indigenous communities in several cases and found that the lack of provision amounted to a violation of the right to life guaranteed in Art. 4 of the American Convention on Human Rights.³⁵ Dalits in South Asia often experience discrimination in accessing sanitation,³⁶ while Roma are disadvantaged in

³² *Id.* at 5.

³³ See WHO/UNICEF JOINT MONITORING PROGRAMME FOR WATER AND SANITATION (JMP), A SNAPSHOT OF PROGRESS - 2014 UPDATE, 25 (2014) (noting that only 30% of the Chinese-Tibetan and Mon-Khmer population use improved or shared sanitation facilities compared to 74% of the Lao-Thai population).

³⁴ See, e.g., Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Mission to Costa Rica*, ¶ 48, U.N. Doc. A/HRC/12/24/Add.1 (June 23, 2009) (detailing findings of water contamination due to the lack of wastewater treatment, the significant disparities existing in Costa Rica with regard to access to water and sanitation, and the adverse impact of productive and tourism activities on the right of affected communities to have access to safe water); Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Mission to United States of America*, ¶ 63, U.N. Doc. A/HRC/18/33/Add.4 (Aug. 2, 2011) (noting that some indigenous communities lack access to safe water and basic sanitation in disproportionate numbers).

³⁵ See generally *Yakye Axa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights Series C No 125 (June 17, 2005); *Sawhoyamaya Indigenous Community v. Paraguay*, Inter-American Court of Human Rights, Series C No. 146 (Mar. 29, 2006); *Xákmok Kásek Indigenous Community v. Paraguay*, Inter-American Court Of Human Rights, Series C No.214 (Aug. 24, 2010).

³⁶ See, e.g., Independent Expert on the Question of Human Rights and Extreme Poverty, Magdalena Sepúlveda Carmona & Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Mission to Bangladesh*, ¶ 25, U.N. Doc. A/HRC/15/55 (July 22, 2010) [hereinafter HRC, *Report on Mission to Bangladesh*] (noting that Dalits suffer from numerous diseases because of – among other factors – their lack of access to water and sanitation).

many European countries.³⁷ In France, the Cour de Cassation found that not providing seasonal workers with sufficient sanitation facilities is incompatible with human dignity.³⁸ Courts have also successfully adjudicated discrimination along racial divides in the extension of water and sanitation infrastructure. In *Dowdell v. City of Apopka, Florida*, a US Court of Appeals ordered the City not to initiate or construct new municipal services or improvements in the areas inhabited by a predominantly white population until water and sewerage facilities in predominantly black areas were on a par with services in the other residential areas.³⁹

Moreover, gender inequalities in the context of sanitation are vast. Sometimes women and girls are not allowed to use an existing toilet in the household due to cultural prescriptions.⁴⁰ Women and girls are frequently subjected to unacceptable risks of violence, including sexual violence, harassment, attacks from animals and other threats in accessing sanitation facilities. Their right to personal security may be violated by failures to provide adequate protection from violence.⁴¹

Persons with disabilities also disproportionately lack access to sanitation.⁴² The Committee on the Rights of Persons with Disabil-

³⁷ See, e.g., Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Mission to Slovenia*, ¶ 33, U.N. Doc. A/HRC/18/33/Add.2 (July 4, 2011) (noting that about 21 of 95 Roma settlements in Premurje and Dolenjska have no access to water, either from public water works or from a local water source, and many also have no access to sanitation).

³⁸ See *La Cour de Cassation, Chambre Criminelle* [The Supreme Court, Criminal Division] Feb. 16, 2010, *Laurent X*, Cass. crim., 09-84.012 9 (unpublished) (Fr.), available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000022004596&fastReqId=894994607&fastPos=1> [<https://perma.cc/NJU2-PX4V>] (finding that defendant's failure to provide proper sanitation facilities to temporary workers was incompatible with human dignity and a breach of the regulations on the safety of workers).

³⁹ *Dowdell and Others v. City of Apopka, Florida*, 698 F. 2d 1181, 1184–1185 (11th Cir. 1983).

⁴⁰ See BLACK AND FAWCETT, *supra* note 15, at 84–85.

⁴¹ Amnesty International, *Risking Rape to Reach A Toilet, Women's Experiences In The Slums of Nairobi, Kenya*, (July 7, 2010) <https://www.amnesty.org/en/documents/AFR32/006/2010/en/> [<https://perma.cc/ZNX6-KSS3>] [hereinafter Amnesty International, *Risking Rape*].

⁴² See, e.g., HRC, *Report on the Mission to Bangladesh*, *supra* note 36, at ¶ 21 (noting that, according to the Ministry of Social Welfare, approximately 10% of

ities raised concerns about sanitation service provision not taking into account the needs of persons with disabilities.⁴³ According to Art. 5 (3) of the Convention on the Rights of Persons with Disabilities (“CRPD”), states parties shall take all appropriate steps to ensure that reasonable accommodation is provided, i.e. “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”⁴⁴

People living in poverty and in informal settlements also frequently experience discrimination in access to sanitation, facing a range of barriers. Informal settlements are often not taken into account in urban planning. People living in informal settlements are often simply absent from official records and urban plans; thereby perpetuating the perception that “they do not count.”⁴⁵ Due to the lack of secure tenure, municipalities often refuse to provide formal services for the fear of formalizing a settlement.⁴⁶ In Kenya, the Akiba Mashinani Trust and Muungano Support Trust have launched a campaign for improving sanitation in the Mukuru informal settlements of Nairobi.⁴⁷ They have documented poor

Bangladesh’s population experiences a physical or mental disability and that that this group suffers from discrimination that perpetuates their poverty, including a lack of equal access to water and sanitation).

⁴³ See, e.g., Committee on the Rights of Persons with Disabilities (CRPD), Concluding Observations on the Initial Report of El Salvador, ¶ 57, U.N. Doc. CRPD/C/SLV/CO/1 (Oct. 8, 2013) (noting that existing social protection measures mainly protect persons whose disabilities result from armed conflict, and that the State does not have strategies for fulfilling the various aspects of the right to an adequate standard of living and social protection, including access to basic services such as water and sanitation).

⁴⁴ Convention on the Rights of Persons with Disabilities (CRPD), Article 2, U.N. Doc. A/Res/61/106 (2007).

⁴⁵ Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Rep. on Stigma and the Realization of the Human Rights to Water and Sanitation, ¶ 35, U.N. Doc. A/HRC/21/42 (July 2 2012) [hereinafter HRC, Report on Stigma].

⁴⁶ See, e.g., HRC, Report on the Mission to Bangladesh, *supra* note 36, ¶ 71.

⁴⁷ See generally Ariana K. MacPherson, In a Risky Place: Women & Sanitation in Nairobi’s Slums, (Apr. 26, 2013), <http://sdinet.org/2013/04/in-a-risky-place-women-sanitation-in-nairobis-slums/> [https://perma.cc/4YAB-6GF].

drainage and inadequate services.⁴⁸ Women living in Mukuru have played a central role in the campaign, highlighting the gendered dimension of inadequate sanitation. The Mukuru residents were able to collect 15,000 signatures demanding an improvement in sanitation conditions. Based on this mobilization, the women have requested a public inquiry, through the Ministry of Lands and the Ministry of Health into the sanitation and public health conditions in Mukuru.⁴⁹ Another avenue residents have been considering is litigation, invoking the right to sanitation under the Kenyan Constitution, to demand sustainable sanitation solutions based on adequate planning.⁵⁰

In other regions, there is a trend of criminalizing certain activities in public spaces, for instance through the adoption of local ordinances prohibiting public urination and defecation. While such laws are seemingly neutral, they disproportionately affect homeless people, who rely on public places for activities⁵¹ that others carry out in the privacy of their homes. A court in the United States struck down ordinances preventing homeless people from engaging in life-sustaining activities linked to the right to sanitation. It ruled that: “The harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless. Consequently, arresting homeless people for harmless acts they are forced to perform in public effectively punishes them

⁴⁸ See Akiba Mashinani, *Improving Access to Justice and Basic Services in the Informal Settlements of Nairobi* (in partnership with University of Nairobi, July 2013) (examining the situation of people living in poverty in Mukuru, noting the poor water quality, the lack of toilets or latrines, and the particular challenges women in Mukuru face).

⁴⁹ Sally Emali & Shadrack Mbaka, *City Slum Women Petition Government on Sanitation, TooPressed2Wait* (Aug. 21, 2014), <https://toopressed2wait.wordpress.com/2014/08/21/city-slum-women-petition-government-on-sanitation/> [<https://perma.cc/JD6V-P3BQ>].

⁵⁰ See generally Marc Anderson, *Kenyan Women Sue for Ownership in Nairobi Slum*, *The Guardian* (Oct. 2, 2013), www.theguardian.com/global-development/2013/oct/02/kenya-women-sue-nairobi-slum [<https://perma.cc/CY9W-PAAR>].

⁵¹ See Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, *Report, Penalization of people living in poverty*, ¶¶ 33–43, U.N. Doc. A/66/265 (Aug. 4, 2011) (detailing the difficulties that result when activities that the homeless do as a result of their homelessness are criminalized).

for being homeless.”⁵² The Human Rights Committee and the Committee on Racial Discrimination in their review of the United States also expressed concern with respect to the criminalization of behaviors related to homelessness.⁵³ States must ensure that they do not violate the rights of homeless people. In order to guarantee substantive equality, states have to find alternatives to the criminalization of homelessness⁵⁴ and enable people experiencing homelessness to practice adequate, safe and dignified sanitation.

Prisoners and other detainees also often face difficulties in accessing adequate sanitation. States must not deprive prisoners (or others) of sanitation as a form of punishment for unlawful or undesired activity. The Special Rapporteur on water and sanitation has voiced concerns that limiting access to water and sanitation may be used as a (sometimes excessive) form of punishment.⁵⁵ In cases of secret detention, Special Rapporteurs⁵⁶ and the Council of Europe have expressed concern about detainees being forced to wear diapers, which is “offensive to the notions of dignity.”⁵⁷ Such practices infringe on the human right to sanitation, alongside many

⁵² *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D.Fla. 1991).

⁵³ See generally Human Rights Committee, Concluding Observations on the Fourth Periodic Rep. of the United States of America, ¶ 19, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014); Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Report of United States of America, ¶12 (a)-(c), U.N. Doc. CERD/C/USA/CO/7-9 (Aug. 29, 2014).

⁵⁴ See Tristia Bauman et al., NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 35–43 (2014) (arguing that criminalization measures are expensive, ineffective, and may be unconstitutional and identifying alternatives that reduce homelessness).

⁵⁵ See Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Mission to Japan*, ¶ 52, U.N. Doc. A/HRC/18/33/Add.3 (July 4, 2011) (“... [P]lacing a prisoner in a protection cell because of his or her use of water for personal hygiene beyond the strict limits imposed by prison rules may be disproportionate punishment.”).

⁵⁶ UN Human Rights Council (HRC), Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, pp. 157, 163 & 166, U.N. Doc. A/HRC/13/42 (May, 20 2010) [hereinafter: HRC, Joint Study on Secret Detention, A/HRC/13/42].

⁵⁷ See EUR. PARL. ASS., Comm. on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States* (Draft Report - Part II), AS/Jur (2006) 16 Part II, ¶ 87 (June 7, 2006) (characterizing the practice of forcing detainees to strip and put on “nappies” as extreme humiliation that is unacceptable in Council of Europe member States).

other human rights, including violating people's dignity.

These groups and many others who experience inequalities in access to sanitation vary widely. They share similar experiences of marginalization in society, which shed light on certain structural patterns of discrimination. Many of the individuals and groups who lack access to sanitation are stigmatized and are pushed to the margins of society, having their needs rendered invisible, even being criminalized, altogether giving their right to sanitation a low priority.

2.3. *A Low Priority and Neglected Issue*

The fact that billions of people persistently lack access to sanitation can largely be attributed to sanitation being a very low priority. It has been—and still is—a neglected issue at all levels. Sanitation was forgotten in the original version of the MDGs. The target on sanitation was only added later during the World Summit on Sustainable Development in 2002.⁵⁸ The sanitation target was one of the most off-track MDG targets,⁵⁹ and even meeting the target, would have left 1.8 billion people without access to improved sanitation.⁶⁰

The low priority afforded to sanitation is reflected in a lack of policies and strategies, under-investment, low capacity and institutional fragmentation.⁶¹ Out of the total aid funding for water and sanitation combined, only about a third is targeted towards sanita-

⁵⁸ See World Summit on Sustainable Development, *Plan of Implementation*, Johannesburg, S. Afr., Aug. 26 to Sept. 4, 2002, *Rep. of the World Conference on Sustainable Development*, ¶ 8, U.N. Doc. A/CONF.199/20 (Sept. 4, 2002) (detailing the target to “halve, by 2015, the proportion of people who are unable to reach or to afford safe drinking water . . . and the proportion of people who do not have access to basic sanitation . . .”) (emphasis omitted).

⁵⁹ U.N. Secretary-General, *The Millennium Development Goals Report*, at 55 (2011).

⁶⁰ UNDP, HUMAN DEVELOPMENT REPORT 2006, *supra* note 7, at 4.

⁶¹ See generally HRC, *Report on Sanitation*, A/HRC/12/24, *supra* note *, at ¶ 7; WATERAID, TACKLING THE SILENT KILLER – THE CASE FOR SANITATION 2 (2008); *c.f.* UNDP, HUMAN DEVELOPMENT REPORT 2006, *supra* note 7, at 118 et seq. (analyzing the factors contributing to the low priority afforded to sanitation).

tion,⁶² while much larger efforts are needed in that field. At the national level, the share of government funding committed to sanitation is similarly low in many countries. Among a sample of 25 countries in 2014, about 43% of the combined water and sanitation funding was spent on sanitation. While this is an increase from previous years (20% in 2010 and 27% in 2012), the need for financing sanitation continues to be significantly greater.⁶³

More investments in sanitation would have enormous benefits, in particular from helping to reduce the disease burden and limiting the number of work and school days lost to illness. In fact, the costs of not investing in sanitation are much higher than the costs of the necessary investments. According to a recent report by the WHO, for every dollar invested in sanitation, there is a global economic return of US\$ 5.50.⁶⁴ Conversely, of the countries sampled in the report, there is a corresponding economic loss of 1.5 per cent of the Gross Domestic Product due to inadequate provision of water and sanitation.⁶⁵ In countries that did ensure universal access to sanitation, there was a remarkable effect on improving public health, increasing life expectancy and reducing child mortality.⁶⁶ Achieving universal access to sanitation can be a turning point in a country's development with a profound impact on poverty reduction.

Sanitation is surrounded by a powerful taboo, preventing it from receiving more attention. Hence, only by discussing the issue openly will it be possible to address the enormous challenges. Some recent trends are encouraging in that regard. A number of countries such as Bangladesh and Brazil have made impressive progress in improving access to sanitation by making it a national

⁶² WHO & U.N.-Water Global Analysis and Assessment of Sanitation and Drinking-Water (GLAAS): Investing in Water and Sanitation: Access, Reducing Inequalities 41 (2014).

⁶³ *Id.* at 32.

⁶⁴ Hutton, Guy, Global costs and benefits of drinking-water supply and sanitation interventions to reach the Millennium Development Goal target and universal coverage 4-5 (World Health Organization, 2012), www.who.int/water_sanitation_health/publications/2012/globalcosts.pdf [<https://perma.cc/47E8-SRKV>] (last visited Aug. 10, 2015).

⁶⁵ *Id.*

⁶⁶ UNDP, HUMAN DEVELOPMENT REPORT 2006, *supra* note 7, at 28-31.

priority.⁶⁷ At the international level, the U.N. General Assembly declared 2008 the International Year of Sanitation to increase attention to the issue,⁶⁸ for the first time considering sanitation delinked from water.⁶⁹ This was followed up by a “five year drive” for sustainable sanitation⁷⁰ to accelerate efforts to achieve the sanitation target of the MDGs. The Deputy Secretary General has issued a call for action to renew efforts to drive progress on sanitation⁷¹ and launched a campaign to end open defecation.⁷² A global partnership launched in 2009/2010, Sanitation and Water for All, also puts sanitation front and center.⁷³ In the most recent development, the Sustainable Development Goals adopted at the Sustainable Development Summit in September 2015, include a specific target on sanitation: “By 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations.”⁷⁴

3. PAVING THE WAY FOR THE POLITICAL RECOGNITION OF THE HUMAN RIGHT TO SANITATION

In the context of human rights, sanitation has had a similarly

⁶⁷ *Id.* at 12 et seq.

⁶⁸ See G.A. Res. 61/192, ¶ 1, U.N. Doc. A/RES/61/192 (Feb. 6, 2007) (reaffirming the importance of sanitation).

⁶⁹ BLACK AND FAWCETT, *supra* note 15, at 203.

⁷⁰ See G.A. Res. 65/153, ¶ 1, U.N. Doc. A/RES/65/153 (Feb. 11, 2011) (calling upon Member States to support the global effort to realize sustainable sanitation).

⁷¹ SANITATION FOR ALL: THE DRIVE TO 2015, <http://sanitationdrive2015.org/call-to-action/> [<https://perma.cc/HW3H-WARG>] (last visited Jul. 23, 2014).

⁷² See generally *With the help from Sesame Street, U.N. urges partners to break silence on open defecation*, U.N. NEWS CENTRE, www.un.org/apps/news/story.asp?NewsID=47908#U-L2iRbgCD1 [<https://perma.cc/99BC-QC4D>] (last visited Aug. 20, 2014) (“[L]aunching a new campaign to end the practice and improve access to toilets and latrines for the 2.5 billion people worldwide without basic sanitation.”).

⁷³ SANITATION AND WATER FOR ALL, <http://sanitationandwaterforall.org/about/> [<https://perma.cc/4ACF-RC4H>].

⁷⁴ G.A. Res. 70/1, Goal 6.2, U.N. Doc. A/RES/70/1, Declaration (Oct. 21, 2015).

low profile. Approaching sanitation as a human rights issue has only started recently.⁷⁵ However, a series of developments on the right to sanitation has taken place over a relatively short period of time within different U.N. human rights mechanisms. The first consideration of sanitation as a human rights issue was in the work of the Sub-Commission on Human Rights and in the context of other human rights such as health and housing. Yet, the issue only gained more traction during the drafting process of General Comment No. 15 by the CESCR,⁷⁶ subsequent developments in the Human Rights Council, and the adoption of political declarations on the right to sanitation. It culminated in the explicit recognition by the U.N. General Assembly and the Human Rights Council in 2010. The human right to sanitation bears a great potential to reinforce the encouraging trends in devoting more attention to sanitation—by putting the issue on the agenda, giving it a higher priority, and, most importantly, ultimately ensuring that the benefits become tangible in the lives of people who still do not have access to sanitation.

3.1. *The Work of the Sub-Commission on the Promotion and Protection of Human Rights*

Some of the earliest discussions on the right to sanitation from

⁷⁵ See generally COHRE, WaterAid, SDC and U.N.-HABITAT, *supra* note 21 (discussing the interaction of human rights and sanitation); MALCOLM LANGFORD, JAMIE BARTRAM & VIRGINIA ROAF, *A Right to Sanitation? Demands, Norms and Implications*, in THE HUMAN RIGHT TO WATER – THEORY, PRACTICE AND PROSPECTS, ch. 11 (Langford and Russell eds., forthcoming 2016); Keri Ellis and Loretta Feris, *The Right to Sanitation: Time to Delink from the Right to Water* 36(3) HUMAN RIGHTS QUARTERLY 607-629 (2014); Benjamin Mason Meier et al., *Implementing an Evolving Human Right through Water and Sanitation policy* 15(1) WATER POLICY 116-133 (2013); Rebecca M. Coleman, *The Human Right of Sanitation for All: A Study of India* 24(1) PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 267-290 (2011); Ana Paula de Barcellos, *Sanitation Rights, Public Law Litigation and Inequality: A Case Study from Brazil* 16(2) HEALTH AND HUMAN RIGHTS (2014), available at www.hhrjournal.org/2014/09/23/sanitation-rights-public-law-litigation-and-inequality-a-case-study-from-brazil [https://perma.cc/XP4C-ZDVU].

⁷⁶ A General Comment is an interpretative document issued by the CESCR. As the body responsible for monitoring the implementation of the ICESCR, its interpretation is an authoritative one and highly influential.

a normative perspective took place in the former Sub-Commission on the Promotion and Protection of Human Rights (previously the Sub-Commission on Prevention of Discrimination and Protection of Minorities). In 1997, the Sub-Commission started to deal with water and sanitation and tasked Mr. El Hadji Guissé to draft a working paper on the “question of the promotion of the realization of the right of access of everyone to drinking water supply and sanitation services.”⁷⁷ In 2001, the Sub-Commission asked the Commission on Human Rights to authorize it “to appoint Mr. El Hadji Guissé as Special Rapporteur to conduct a detailed study on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation.”⁷⁸ In 2006, the Sub-Commission adopted Guidelines on the realization of the right to drinking water and sanitation prepared by the Sub-Commission’s Special Rapporteur.⁷⁹ These clearly state that “[e]veryone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment.”⁸⁰ The Guidelines further specify that sanitation must be physically accessible, culturally acceptable, safe, and affordable.⁸¹

⁷⁷ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Promotion on the Realization of the Right of Everyone to Drinking Water Supply and Sanitation Services*, ¶ 3, U.N. Doc. E/CN.4/SUB.2/RES/1997/18 (Aug. 27, 1997).

⁷⁸ Sub-Commission on the Promotion and Protection of Human Rights, Res. 2006/10, *Promotion of the Realization of the Right to Drinking Water and Sanitation*, ¶ 3, U.N. Doc. E/CN.4/SUB.2/RES/2001/2 (Aug. 10, 2001).

⁷⁹ Sub-Commission on the Promotion and Protection of Human Rights, Res. 2006/10, *Promotion of the Realization of the Right to Drinking Water and Sanitation*, ¶ 4 at 39, U.N. Doc. A/HRC/Sub.1/58/36 (Sep. 11, 2006).

⁸⁰ Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation, *Realization of the Right to Drinking Water and Sanitation*, ¶ 1.2, U.N. Doc. E/CN.4/Sub.2/2005/25 (Jul. 11, 2005).

⁸¹ *Id.* ¶ 1.3.

3.2. *References to Sanitation in the Context of Other Human Rights*

Sanitation has also been addressed in the context of other human rights, both by treaty bodies and Special Procedures.

Given the huge impact the lack of adequate sanitation has on human health, a close link between access to sanitation and the right to health can be observed. The CESCR explained in its General Comment No. 14 that the right to the highest attainable standard of health is “an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation”.⁸² Similarly, in its General Comment No. 11 on indigenous children and General Comment No. 7/Rev.1 on implementing child rights in early childhood, the Committee on the Rights of the Child refers to sanitation under the right to health,⁸³ and it has regularly included sanitation under the right to health in its dialogues with states parties.⁸⁴ Moreover, the Special Rapporteur on the right

⁸² U.N. Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14, *The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, ¶ 11, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR, *General Comment No. 14*].

⁸³ U.N. Committee on the Rights of the Child (CRC), General Comment No.7, *Implementing Child Rights in Early Childhood*, ¶ 27, U.N. Doc. CRC/C/GC/7/Rev.1 (Sep. 20, 2006); U.N. Committee on the Rights of the Child (CRC), General Comment No. 11, *Indigenous Children and Their Rights under the Convention*, ¶ 25, U.N. Doc. CRC/C/GC/11 (Feb. 12, 2009).

⁸⁴ See, e.g., U.N. Committee of the Rights of the Child (CRC), Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations Dominica, ¶¶ 38-39, CRC/C/15/Add.238 (June 30, 2004) (addressing sanitation under the umbrella of “Health and health services”); CRC, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations Myanmar, ¶¶ 53-54, CRC/C/15/Add.237 (June 30, 2004); CRC, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations Ghana, ¶ 49, CRC/C/GHA/CO/2 (Mar. 17, 2006); CRC, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations Thailand, ¶¶ 55-56, CRC/C/THA/CO/2 (Mar. 17, 2006); CRC, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations Armenia, ¶ 50, CRC/C/15/Add.225 (Feb. 26, 2004); CRC, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations Kyrgyzstan, ¶ 50, CRC/C/15/Add.244 (Nov. 3, 2004).

to health has stressed that sanitation is an underlying determinant of health.⁸⁵

Sanitation has also been closely linked to the right to housing. The CESCR, in its General Comment No. 4 on the right to adequate housing, argues that an “adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to . . . sanitation and washing facilities . . .”⁸⁶ The Committee on the Rights of the Child also includes sanitation under the right to housing.⁸⁷ Moreover, the former Special Rapporteur on the right to adequate housing has stressed that the “full realization of the right to adequate housing is closely interlinked with and contingent upon fulfillment of other rights and services, including access to safe drinking water and sanitation”.⁸⁸ These statements demonstrate that a dwelling can hardly be characterized as adequate as required by the right to housing without sanitation facilities.⁸⁹

Apart from the rights to health and housing, sanitation is also closely linked to a range of other human rights and is indispensable for their realization, highlighting the interrelatedness of human rights. These include the rights to education, water, work, life, a healthy environment, physical security as well as the prohibition of

⁸⁵ See Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, *Report, Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶¶ 47-49, U.N. Doc. A/62/214 (Aug. 8, 2007) (focusing on water, sanitation and the right to the highest attainable standard of health) [hereinafter GA, *Report on the right of health*].

⁸⁶ U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4, The right to adequate housing*, ¶ 8 (b) at 126, U.N. Doc. HRI/GEN/1/Rev.6 (Jan. 1, 1992).

⁸⁷ See, e.g., U.N. Committee of the Rights of the Child (CRC), *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations Marshall Islands*, ¶ 59, CRC/C/MHL/CO/2 (Nov. 19, 2007); CRC, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations Kazakhstan*, ¶¶ 55-56, CRC/C/KAZ/CO/3 (June 19, 2007).

⁸⁸ Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, *Report, Economic, Social, and Cultural Rights*, ¶ 56, U.N. Doc. E/CN.4/2002/59 (Mar. 1, 2002).

⁸⁹ See HRC, *Report on Sanitation*, A/HRC/12/24, *supra* note 1, ¶ 20 (focusing on the human rights obligations related to sanitation).

inhuman or degrading treatment, gender equality, and equality and non-discrimination more broadly.⁹⁰

However, as will be further argued below, sanitation is not just a pre-condition for the realization of the right to housing or an underlying determinant of the right to health. It is also a human right in itself. In their statements, the Special Rapporteurs on the right to health and on the right to housing not only refer to sanitation in relation to the rights to health and housing, respectively, but they also explicitly speak of a “right to water and sanitation”⁹¹ as such paving the way for the recognition as a distinct human right.

3.3. *General Comment No. 15 of the Committee on Economic, Social and Cultural Rights*

The point when the discussion on the right to sanitation gained more traction can be traced to General Comment No. 15 on the human right to water of the CESCR. At the time, sanitation could not be considered de-linked from the right to water.⁹² While there had already been some developments on the right to sanitation in the late 1990s, in particular in the context of the Sub-Commission, the discussion became much more visible with General Comment No. 15.

One of the main questions during the drafting process was whether the General Comment should extend to sanitation.⁹³ Sev-

⁹⁰ See *Id.* at *supra* note 1 (analyzing these rights as they relate to sanitation in detail).

⁹¹ See Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Miloon Kothari, ¶¶ 26, U.N. DOC. A/HRC/7/16 (Feb. 13, 2008) (“right to water”), and GA, *Report on the right of health*, *supra* note 85, ¶ 63 (defining the human right to water and sanitation as a “self-standing right”).

⁹² See Paul J. Nelson, *Local Claims, International Standards, and the Human Right to Water*, in *THE INTERNATIONAL STRUGGLE FOR NEW HUMAN RIGHTS*, 130-140 (Bob Clifford ed., 2010) (discussing the social mobilization contributing to the recognition of the right to water, in particular around the anti-privatization agenda and broader social justice advocacy).

⁹³ See U.N. Committee on Social, Economic and Cultural Rights (CESCR), Summary Record, 29th Sess., 46th mtg., ¶ 2 (Riedel), E/C.12/2002/SR.46 (Nov. 27, 2002) (debating if sanitation is connected to water to such a degree that the two should be addressed together) [hereinafter CESCR, EC.12/2002/SR.46].

eral speakers during a Day of General Discussion, held to discuss and gather input for the drafting process, highlighted sanitation as inextricably linked to water⁹⁴ and argued that the draft General Comment did not sufficiently address the issue.⁹⁵ However, the Committee was not prepared to comprehensively address sanitation,⁹⁶ in particular because sanitation had hardly been taken up in state reporting at the time. In the final General Comment No. 15 on the right to water, the CESCR only touches on sanitation marginally. It lists personal sanitation as well as personal and household hygiene among the personal and domestic uses covered by the right to water.⁹⁷ It further observes:

[e]nsuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources States parties 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.⁹⁸

While General Comment No. 15 only addressed the issue of sanitation to a very limited extent, it has proven to deliver a strong impetus for the further discussion on sanitation as a human right. When the CESCR adopted its new Reporting Guidelines in 2009, it included an additional reference to sanitation under the right to health.⁹⁹ Moreover, the CESCR increasingly addresses sanitation

⁹⁴ *Id.* ¶ 3 (Watanabe), 10 (Bartram), 12 (Guissé), 14 (Guissé), 19 (Nath), 22 (Kothari).

⁹⁵ *Id.* ¶ 28 (Langford), 30 (Langford), 32 (Chapman).

⁹⁶ Langford, Bartram and Roaf, *supra* note 75.

⁹⁷ U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15, The right to water (Arts. 11 and 12 of the Covenant)*, ¶ 12(a), U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter CESCR, *General Comment No. 15*].

⁹⁸ *Id.*, ¶ 29 (footnotes omitted).

⁹⁹ U.N. Committee on Economic, Social and Cultural Rights (CESCR), *Guidelines on Treaty-Specific Documents to be submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights* ¶¶ 50 & 57, U.N. Doc. E/C.12/2008/2 (Mar. 24, 2009); Cf. CESCR, *Revised general guidelines regarding the form and contents of reports to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, Art. 11, ¶ 3 (b) (ii), U.N. Doc. E/C.12/1991/1 (June 17,

in its dialogue with states parties and in its Concluding Observations.¹⁰⁰ At a normative level, the Committee turned its attention to the issue again in November 2010 by adopting a statement explicitly focusing on sanitation and recognizing it as a human right.¹⁰¹

3.4. Further Developments in the Context of the Human Rights Council and its Special Procedures

After the adoption of General Comment No. 15, subsequent developments at the political level took place in the realm of the Human Rights Council with the objective to achieve political recognition of the right to water and sanitation. Germany and Spain devised a three-part initiative in the realm of the Human Rights Council. In the first step, the Human Rights Council requested the U.N. High Commissioner for Human Rights to undertake a study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.¹⁰² After conducting a broad process of consultation, the study concluded,

1991) (including only a reference to sanitation under the rights to housing in the previous version of the reporting guidelines).

¹⁰⁰ See Universal Human Rights Index, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, <http://uhri.ohchr.org/search/results?keyword=sanitation&searchoperator=And&bodies=0c43227f-61e1-48f9-878d-5af39566249b&documenttypes=ed8389c7-ca32-4d33-a747-4f148f0c1fc3&bodytypes=46627889-332d-4ae5-ad50-fead8cc2df5e&BodyFilter=00000000-0000-0000-0000-000000000000&AnnotationTypeFilter=00000000-0000-0000-0000-000000000000&CountryFilter=00000000-0000-0000-0000-000000000000&resultsOrder=Date> [https://perma.cc/5FM6-5EZJ] (demonstrating that CESCR has paid increasing attention to sanitation, and that the first references to sanitation can be found in 2000 with a significant increase starting in 2008); See also Benjamin Mason-Meier and Yuna Kim, *Human Rights Accountability through Treaty Bodies: Examining Human Rights Treaty Monitoring for Water and Sanitation*, 26(1) DUKE J. OF COMP. & INT'L L. (2015) (in press) (analyzing the reporting on water and sanitation in the CESCR's State reporting procedure).

¹⁰¹ U.N. Committee on Economic, Social and Cultural Rights (CESCR), *Statement on the Right to Sanitation*, ¶ 7, U.N. DOC. E/C.12/2010/1 (Nov. 19, 2010) [hereinafter CESCR, *Statement on Sanitation*].

¹⁰² U.N. Human Rights Council Decision 2/104, *Human Rights and Access to Water*, U.N. Doc. A/HRC/Dec/2/104 (Nov. 27, 2006).

“it is now time to consider access to . . . sanitation as a human right.”¹⁰³ In the second step, the Human Rights Council established a Special Procedures mandate on water and sanitation, while the envisaged third step was the explicit recognition of the rights to water and sanitation, which will be further detailed below.

In March 2008, the Human Rights Council established the mandate of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation. Catarina de Albuquerque was appointed as Independent Expert in September 2008 and took up her functions in November 2008. In March 2011, her mandate was extended for another three years and renamed in Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation.¹⁰⁴ The mandate was further extended in 2013,¹⁰⁵ and Léo Heller was appointed as new Special Rapporteur in 2014.

Among the tasks included in the mandate during the first term was the undertaking of a study “on the further clarification of the content of human rights obligations, including non-discrimination obligations, in relation to access to safe drinking water and sanitation.”¹⁰⁶ The Special Rapporteur (formerly Independent Expert) interpreted this task to focus on issues that might hinder the recognition of the rights to water and sanitation, in particular those identified in the study of the High Commissioner as requiring further clarification.¹⁰⁷ One of the issues identified was the normative

¹⁰³ United Nations High Commissioner for Human Rights, Report on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation under International Human Rights Instruments, ¶ 66, U.N. Doc. A/HRC/6/3 (Aug. 16, 2007) [hereinafter HRC, Report of High Commissioner].

¹⁰⁴ U.N. Human Rights Council Res. 16/2, *The Human Right to Safe Drinking Water and Sanitation*, ¶ 4, U.N. Doc. A/HRC/RES/16/2 (Apr. 8, 2011).

¹⁰⁵ U.N. Human Rights Council Res. 24/18, *The Human Right to Safe Drinking Water and Sanitation*, ¶ 16, U.N. Doc. A/HRC/RES/24/18 (Sep. 27, 2013).

¹⁰⁶ U.N. Human Rights Council Res. 7/22, *Human Rights and Access to Safe Drinking Water and Sanitation*, ¶ 2(b), U.N. Doc. A/HRC/RES/7/22 (Mar. 28, 2008).

¹⁰⁷ See HRC, Report of High Commissioner, *supra* note 103, ¶¶ 44–64 (mentioning national strategies, private provision, local authorities, disconnection, prioritization between various uses, and trade and investment).

content of human rights obligations related to sanitation.¹⁰⁸ During the first year of her mandate, the Special Rapporteur decided to focus precisely on sanitation because it lacked analysis from a human rights perspective. Her objective was to raise the profile of sanitation and to bring it on a par with water before concentrating on other issues. In her report, while not yet stating explicitly that sanitation as a distinct human right is part of international law, the Special Rapporteur encouraged the recognition of the right. She noted that there was

[A]n ongoing discussion about sanitation as a distinct right. She [saw] that there is momentum behind this issue, and recent developments in human rights law concerning sanitation suggest a trend towards recognition of 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] support[ed] and encourage[d] developments in line with this trend.¹⁰⁹

Throughout her work, she has kept 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 closely linked to sanitation.¹¹⁰

3.5. Political Declarations Recognizing the Right to Sanitation

As far as political declarations are concerned, the right to sanitation was already recognized in the 1990s in the outcomes of some of the World Conferences. Principle 2 of the Cairo Programme of Action adopted at the Conference on Population and Development held in Cairo in September 1994 assures that all people have the

¹⁰⁸ *Id.* ¶ 46.

¹⁰⁹ HRC, Report on Sanitation, A/HRC/12/24, *supra* note *, ¶ 59; *see also id.*, at ¶ 81.

¹¹⁰ *See generally* G.A., Report on Wastewater Management, *supra* note 12.

right to an adequate standard of living including sanitation.¹¹¹ Likewise, the Habitat Agenda adopted at the United Nations Conference on Human Settlements taking place in 1996 in Istanbul confirms that “[e]veryone has the right to an adequate standard of living for themselves and their families, including . . . sanitation”¹¹²

The Dublin Principles adopted at the International Conference on Water and the Environment held in Dublin in 1992 also recognize in Principle No. 4 “the basic right of all human beings to have access to clean water and sanitation at an affordable price.”¹¹³ The Conference was not part of an intergovernmental process and was attended by experts rather than by state officials.¹¹⁴ Nevertheless, the adopted principles have gained wide influence on water and sanitation policy.¹¹⁵ At the same time, the Conference served as a preparatory forum for the U.N. Conference on Environment and Development in Rio in 1992.¹¹⁶ However, the Agenda 21 adopted at the Rio Conference does not include a reference to the right to sanitation, but only the right to drinking water,¹¹⁷ using an older

¹¹¹ International Conference on Population and Development, Cairo, Egypt, *Report, Programme of Action, Principles*, ¶ 2, U.N. Doc. A/Conf.171/13/Rev.1, Annex (Sept. 1994).

¹¹² United Nations Conference on Human Settlements (Habitat II), *Report of the United Nations Conference on Human Settlements (Habitat II)*, Istanbul, Turk., *Habitat Agenda*, ¶ 11, U.N. Doc. A/Conf.165/14, Annex II (Aug. 7, 1996) [hereinafter U.N. Habitat II, *Habitat Agenda*].

¹¹³ International Conference on Water and the Environment: Development Issues for the 21st Century, *The Dublin Statement on Report of the Conference*, U.N. Doc. 37.819/H/D/Misc. (June 1992).

¹¹⁴ See generally Ken Conca, *Governing Water: Contentious Transnational Politics And Global Institution Building* 140 (2006); Waltina Scheumann & Axel Klaphake, *Freshwater Resources And Transboundary Rivers On The International Agenda: From UNCED to Rio+10* 9 (Deutsches Institut für Entwicklungspolitik ed., 2001); Gordon J. Young, James C. I. Dooge & John C. Rodda, *Global Water Resource Issues* 32 (1994).

¹¹⁵ Scheumann & Klaphake, *supra* note 114, at 4, and Benno Pilardeaux, *Entwicklungslinien der internationalen Süßwasserpolitik*, in *Warnsignal Klima: Genug Wasser Für Alle?* 529 (José L. Lozán, Hartmut Graßl, & Peter Hupfer eds., 3d ed. 2005).

¹¹⁶ Pilardeaux, *supra* note 115, at 529.

¹¹⁷ United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Agenda 21*, ¶ 18.47, U.N. Doc. A/Conf.151/26/Rev.1 (Vol. I), Annex II (1993).

formulation from the Mar del Plata Action Plan adopted at the U.N. Conference on Water in 1977.¹¹⁸ Twenty years later, at the Rio+20 conference in 2012, states reaffirmed their “commitments regarding the human right to safe drinking water and sanitation”.¹¹⁹

At a regional level, the “Message from Beppu” adopted in 2007 recognizes “the people’s right to safe drinking water and basic sanitation as a basic human right.”¹²⁰ Similarly, the Abuja Declaration from 2006 commits to promoting “the right of our citizens to have access to clean and safe water and sanitation within our respective jurisdictions.”¹²¹

The regional sanitation conferences in South Asia, Latin America and Africa (SacoSan, LationSan and AfricaSan) have also played a critical role in furthering the recognition of the right to sanitation. They are of particular interest for their specific focus on sanitation, delinking the issue from water. The process in South Asia was the first to recognize the right to sanitation. The Delhi Declaration adopted in 2008 recognizes “that access to sanitation and safe drinking water is a basic right, and according national priority to sanitation is imperative.”¹²² This commitment was affirmed at SacoSan IV held in Colombo in April 2011, where states pledged “[i]n light of the recent UN resolution recognising the right to sanitation, to work progressively to realise this in programmes and projects

¹¹⁸ United Nations Water Conference, Mar del Plata, Arg., Mar. 14-25, 1977, *Resolution II: Community Water Supply*, 66, U.N. Doc. E/Conf.70/29 (1977).

¹¹⁹ G.A. Res. 66/288, ¶ 121, U.N.Doc. A/RES/66/288 (Sept. 11, 2012).

¹²⁰ First Asia-Pacific Water Summit, Beppu, Japan, Dec. 3-4, 2007, *Message from Beppu*, 1 (2007), www.apwf.org/archive/documents/summit/Message_from_Beppu_071204 [https://perma.cc/GP]2-X3R6] (37 States in the Asia-Pacific recognizing “the people’s right to safe drinking water and basic sanitation as a basic human right”).

¹²¹ First Africa - South America Summit, Nov. 26-30, 2006, *Abuja Declaration*, ¶ 18, (Nov. 30, 2006), available at <http://asasummit.itamaraty.gov.br/documents/1st-africa-south-america-summit> [https://perma.cc/A6FB-YMFD] (stating that 45 African and 12 South American States recognize the human right to drinking water and sanitation).

¹²² Third South Asian Conference on Sanitation (SACOSAN III), New Delhi, India, Nov. 16-21, 2008, *The Delhi Declaration*, ¶ 1, (2008), available at www.wateraid.org/~media/Publications/delhi-declaration.pdf [https://perma.cc/KQ3G-YU7U] (stating that eight South Asian States recognize the human right to drinking water and sanitation).

and eventually in legislation.”¹²³ States again renewed their commitment to the human right to sanitation at SacoSan V held in Kathmandu, Nepal, in 2013 committing to “achieve an open defecation free and hygienic South Asia, through accessible, affordable, appropriate, acceptable and environmentally safe sanitation and hygiene services that all people can use and maintain with dignity, safety and comfort.”¹²⁴ The LatinoSan Panama Declaration from 2013 refers to the recognition of the right to water and sanitation through the General Assembly¹²⁵ and reiterates the political will to achieve universal access to sanitation services.¹²⁶ This was reaffirmed through the Declaration of Lima adopted at the Fourth LatinoSan conference held in March 2016.¹²⁷ In the AfricaSan regional process, the Ngor Declaration on Sanitation and Hygiene adopted at AfricaSan IV held in Dakar, Senegal, in 2015 reaffirms “the human right to safe drinking water and sanitation for all.”¹²⁸

¹²³ Fourth South Asian Conference on Sanitation (SACOSAN IV), Colombo, Sri Lanka, Apr. 4–7, 2011, *The Colombo Declaration*, ¶ (i), available at [http://www.unicef.org/srilanka/Colombo_declaration_\(4_pages\).pdf](http://www.unicef.org/srilanka/Colombo_declaration_(4_pages).pdf) [https://perma.cc/Q3HY-JC2K].

¹²⁴ Fifth South Asian Conference on Sanitation (SACOSAN V), Kathmandu, Nepal, Oct. 22–14, 2013, *The Kathmandu Declaration*, ¶ 2, available at www.sacosanv.gov.np/file/file_down/AYis9zKathmandu%20Declaration%2024%20Oct%20FINAL.pdf [https://perma.cc/QX45-LFFF].

¹²⁵ Tercera Conferencia Latinoamericana y del Caribe de Saneamiento (LatinoSan 2013), Ciudad de Panamá, Pan., May 29–31, 2013, *Declaración de Panamá*, Preamble (iii), available at http://web.archive.org/web/20130810011802/http://latinosanpanama2013.com/upload/pdf/declaracion_de_panama.pdf [https://perma.cc/7ETV-U5GK].

¹²⁶ *Id.* ¶ (ii).

¹²⁷ Cuarta Conferencia Latinoamericana y del Caribe de Saneamiento (LatinoSan 2016), Lima, Perú, Mar. 9–11, 2016, *Declaración de Lima*, ¶ i, available at http://washwatch.org/uploads/filer_public/c6/e3/c6e32472-5435-4c22-8494-19b4150e3312/declaracion_de_lima_latinosan_2016.pdf [https://perma.cc/7NDZ-JECZ].

¹²⁸ Fourth African Conference on Sanitation and Hygiene (AfricaSan 4), Dakar, Sen., May 27, 2015, *The Ngor Declaration on Sanitation and Hygiene*, <http://sanitationandwaterforall.org/the-ngor-declaration-on-sanitation-and-hygiene/> [https://perma.cc/2HJ8-ARW5].

3.6. Resolutions by the General Assembly and the Human Rights Council

The resolutions of the U.N. General Assembly and the Human Rights Council in 2010 brought the breakthrough for the recognition of the right to sanitation. Originally, Spain and Germany had envisaged introducing a resolution in the Human Rights Council in 2011 that would explicitly recognize the right to water and sanitation. The process was sped up when Bolivia decided to introduce a resolution in the General Assembly in the summer of 2010. At the beginning, the first draft of the resolution prepared by Bolivia focused solely on the right to water. However, after suggestions from the U.N. Special Rapporteur on Water and Sanitation, its scope was broadened to also acknowledge the right to sanitation. When introducing the resolution in the U.N. General Assembly, the Bolivian Ambassador acknowledged the contribution the Special Rapporteur had made to the draft and quoted from her report on sanitation to explain the importance of including sanitation.¹²⁹ In the end the resolution adopted by the General Assembly on July 28, 2010, explicitly “[r]ecognises the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”¹³⁰

The United States called for a vote on the resolution. One hundred twenty-two states voted in favor and none against. Forty-one states abstained from voting, and twenty-nine states were absent.¹³¹ However, the fact that states abstained from voting did not neces-

¹²⁹ Stmt. of Ambassador Solón of the Plurinational State of Bolivia, U.N. GAOR, 64th Sess., 108th Plen. Mtg., 5, U.N. Doc. A/64/PV.108 (July 28, 2010) [hereinafter Stmt. of Ambassador Solón].

¹³⁰ G.A. Res. 64/292, ¶ 1, U.N. Doc. A/RES/64/292 (Aug. 3, 2010).

¹³¹ See Press Release, General Assembly, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None against, 41 Abstentions, U.N. Press Release GA/10967 (Jul. 28, 2010), available at www.un.org/News/Press/docs/2010/ga10967.doc.htm [https://perma.cc/8AH3-Z8DK] [hereinafter Press Release, GA/10967]; see also Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over-Privatization*, 31(1) BERKELEY J. OF INT’L L. 89, 103 (2013) (discussing recognition by the United Nations of access to drinking water and sanitation as a human right)

sarily mean that they did not recognize the right to sanitation. Many states abstained for procedural reasons, arguing that the resolution was tabled after a relatively short period of deliberations leaving insufficient time for considering its implications, that the discussion on the issue at the Human Rights Council was still ongoing, and that they did not want to pre-judge the findings of that process.¹³² Hence, the abstentions should not be attributed major substantive implications. The significance of the resolution was further underlined by the fact that no state voted against its adoption. It sent a strong political signal and was considered a breakthrough for the recognition of the human right to water and sanitation in the public perception.¹³³

In the Human Rights Council, as seen with the original title of the mandate on water and sanitation, early resolutions used the language of “human rights obligations relating to access to safe drinking water and sanitation.”¹³⁴ This changed in 2010. After the General Assembly had recognized the right to water and sanitation, Spain and Germany followed up by introducing a resolution in the Human Rights Council. The resolution recalls the General Assembly resolution¹³⁵ and “[a]ffirms that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.”¹³⁶

The resolution had more than 50 co-sponsors, including states that had abstained from voting on the General Assembly resolution,¹³⁷ highlighting that they had indeed done so for procedural,

¹³² See the explanations of vote contained in UN General Assembly, U.N. Doc. A/64/PV.108, *supra* note 129; see also Meier et al., *supra* note 75, at 121 (discussing the abstentions).

¹³³ See, e.g., U.N. Declares Clean Water a ‘Fundamental Human Right,’ BBC NEWS (July 29, 2010), <http://www.bbc.com/news/world-us-canada-10797988> [<https://perma.cc/VCL4-NBRA>] (last visited Aug. 6, 2015).

¹³⁴ See HRC, Res. 7/11, *supra* note 106; U.N. Human Rights Council, Res. 12/8, *Human Rights and Access to Safe Drinking Water and Sanitation*, U.N. Doc. A/HRC/RES/12/8 (Oct. 12, 2009).

¹³⁵ U.N. Human Rights Council, Res. 15/9, *Human Rights and Access to Safe Drinking Water and Sanitation*, ¶ 2, U.N. Doc. A/HRC/RES/15/9 (Oct. 6, 2010).

¹³⁶ *Id.* ¶ 3.

¹³⁷ See HRC, Draft Res. 15/L.14, *Human Rights and Access to Safe Drinking Wa-*

but not substantive reasons. The resolution was then adopted without a vote. While no state called for a vote, the United Kingdom disassociated itself from consensus in its explanation of vote, arguing that it did not want to prevent consensus, but saw no basis for the right to sanitation in international law.¹³⁸ The United Kingdom has since changed its stance and officially recognized sanitation as a human right under international law as an element of the right to an adequate standard of living.¹³⁹ The United States joined consensus, perhaps due to the fact that the United States views the right to water and sanitation being derived from Art. 11 (1) ICESCR to which it is not a state party.¹⁴⁰

The recognition of the right to sanitation was confirmed by the Human Rights Council in subsequent resolutions on the issue explicitly entitled "The human right to safe drinking water and sanitation."¹⁴¹ In 2013, the U.N. General Assembly adopted another

ter and Sanitation, 15th Sess., Sept. 24, 2010, U.N. Doc. A/HRC/15/L.14 (listing many countries as co-sponsors of the resolution tabled by Spain and Germany).

¹³⁸ See Webcast: Human Rights Council, 15th Sess. (Sept. 13 - Oct. 1, 2010), www.un.org/webcast/unhrc/archive.asp?go=100930 (last visited Oct. 1, 2014) (describing the position of the UK in the explanation of vote by the British delegate). See also Webcast: Human Rights Council, 15th Sess., www.un.org/webcast/unhrc/archive.asp?go=100930 (last visited Jul. 31, 2015) (describing the reasons for the vote of the United States).

¹³⁹ FOREIGN & COMMON WEALTH OFFICE, THE HUMAN RIGHT TO SANITATION, June 27, 2012, www.gov.uk/government/uploads/system/uploads/attachment_data/file/36541/human-right-sanitation270612.pdf [<https://perma.cc/6Q4R-EEK9>] (giving more details to the explanation of the UK position, putting forward a narrow interpretation of the right to sanitation, solely containing the provision of a system for the treatment and disposal or re-use of human sewage and associated hygiene, but no requirement for collection and transport of human waste. They further consider the CESCR Statement on the Right to Sanitation and the Special Rapporteur's 2009 report as useful guides on meeting obligations, but do not accept these reports in their entirety).

¹⁴⁰ See Webcast: Human Rights Council, 15th Sess., <http://www.un.org/webcast/unhrc/archive.asp?go=100930%20> (describing the reasons for the vote of the United States).

¹⁴¹ HRC, Res. 16/2, *supra* note 104; U.N. Human Rights Council, Res. 18/1, *The Human Right to Safe Drinking Water and Sanitation*, U.N. Doc. A/HRC/RES/18/1 (Oct. 12, 2011); U.N. Human Rights Council, Res. 21/2, *The Human Right to Water and Sanitation*, U.N. Doc. A/HRC/RES/21/2 (Oct. 9, 2012); HRC, Res. 24/18, *supra* note 105; U.N. Human Rights Council, Res. 27/7, *The Human Right to Safe Drinking Water and Sanitation*, U.N. Doc. A/HRC/RES/27/7 (Oct. 2, 2014).

resolution reaffirming the recognition of the human right to water and sanitation – this time adopted by consensus.¹⁴²

Moreover, the 2011 World Health Assembly recalled the Human Rights Council and General Assembly resolutions and urged states to ensure that national health strategies support “the progressive realization of the human right to water and sanitation that entitles everyone, without discrimination, to water and sanitation that is sufficient, safe, acceptable, physically accessible and affordable for personal and domestic uses.”¹⁴³ With these resolutions, the final step for moving from “human rights obligations related to access to sanitation” to the explicit recognition of “the human right to sanitation” was performed.

Another major breakthrough for the right to sanitation as such was brought forth in 2015. While the resolutions adopted between 2010 and 2013 recognized the right to sanitation, it must be acknowledged that they always referred to water and sanitation as one combined human right (“the human right to safe drinking water and sanitation”). In 2015, Spain and Germany introduced a new resolution in the General Assembly’s Third Committee that was adopted by consensus. It uses the plural (“rights”) and speaks of sanitation and water as two distinct human rights.¹⁴⁴

¹⁴² U.N. General Assembly (GA) Res. 68/157, *The Human Right to Safe Drinking Water and Sanitation*, ¶ 1, U.N. Doc. A/RES/68/157 (Feb. 12, 2014); see U.N. GA, 68th Sess., 70th plen. mtg. at 17/30, U.N. Doc. A/68/PV.70 (Dec. 18, 2013). See also Amnesty International, *Public Statement, United Nations: General Assembly makes progress on the human rights to water and sanitation, but only so far as the USA permits*, www.amnesty.org/en/library/info/IO40/005/2013/en (explaining the negotiation process and arguing that further progress could have been made) [hereinafter Amnesty International, *Statement*].

¹⁴³ World Health Assembly, *Sixty-fourth World Health Assembly, Drinking-Water, Sanitation and Health*, WHA64.24 at 3, (May 24, 2011), http://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_R24-en.pdf [<https://perma.cc/7E3M-9JSG>].

¹⁴⁴ See U.N. General Assembly (GA) Res. 70/169, *The human rights to safe drinking water and sanitation*, ¶ 1, U.N. Doc. A/RES/70/169 (2015). See also Section 4.4. below.

4. A "NEW" HUMAN RIGHT? – THE LEGAL STATUS OF THE RIGHT TO
SANITATION

At the political level, the resolutions of the General Assembly and the Human Rights Council brought the breakthrough for the recognition of the right to sanitation. In legal terms, these resolutions do not create international human rights law by themselves, but they must be seen in the context of existing human rights obligations to determine the legal status of the right to sanitation. Is the right to sanitation part of international human rights law? Does it have the status as a legally binding human right?

It has been warned that the cause of recognized human rights may be undermined by a proliferation in human rights. Alston argued

[t]he challenge is to achieve an appropriate balance between, on the one hand, the need to maintain the integrity and credibility of the human rights tradition, and on the other hand, the need to adopt a dynamic approach that fully reflects changing needs and perspectives and responds to the emergence of new threats to human dignity and well-being.¹⁴⁵

Does the recognition of the right to sanitation undermine the cause of other human rights? Is sanitation a "new" human right in that sense? To achieve the balance that Alston calls for, guidelines put forward by the U.N. General Assembly in the context of developing new human rights standards can be drawn upon. The General Assembly has stated that new international instruments in the field of human rights should, *inter alia*, be "of fundamental character and derive from the inherent dignity and worth of the human person" and be "sufficiently precise to give rise to identifiable and practicable rights and obligations."¹⁴⁶

First, it must be noted that the lack of sanitation is not a new threat to human dignity and well-being. While the challenges and

¹⁴⁵ Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 609 (1984).

¹⁴⁶ G.A. Res. 41/120, *Setting International Standards in the Field of Human Rights*, ¶ 4 (b)-(c), U.N. DOC. A/RES/41/120 (Dec. 4, 1986).

risks associated with the lack of adequate sanitation are only recently receiving more attention, this has little to do with changing needs, even if the problems associated with the lack of access to sanitation become more pronounced with more people living in densely populated areas. Access to sanitation has always been essential for human dignity, health and well-being. What is new is the attention to the issue culminating in its recognition as a human right by the General Assembly and the Human Right Council. However, as will be further outlined below, these resolutions must not be understood as proclaiming a “new” human right. Rather, sanitation is already enshrined explicitly in some human rights treaties, while other provisions must be interpreted to include sanitation implicitly. Second, it will be delineated that sanitation is of essential significance for human dignity. Lastly, it will be shown (in sections 5 and 6) that the human right to sanitation can be specified with sufficient precision to give rise to specific rights and obligations. The recognition of the human right to sanitation therefore must not be seen as undermining the cause of human rights, but rather filling a significant gap in the human rights framework.

4.1. The Human Right to Sanitation in International and National Law

The International Bill of Rights does not guarantee the human right to sanitation explicitly. However, more recent human rights treaties refer to sanitation such as Art. 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”). It includes sanitation alongside water in the context of adequate living conditions. Moreover, Art. 24(2)(e) of the Convention on the Rights of the Child (“CRC”) makes mention of sanitation in the context of the right to the highest attainable standard of health. In terms of regional human rights instruments, Art. 11 of the Protocol of San Salvador can be interpreted to include sanitation through its guarantee of the right to have access to basic public services, and similarly, Art. 39(2)(f) of the Arab Charter on Human Rights details the right to the highest attainable standard of health by including the provision of proper sanitation systems. Finally, the African Charter on Rights and Welfare of the Child refers to

environmental sanitation in the context of children's right to health in Art. 14(2)(h) requiring states parties to "to ensure that all sectors of the society . . . are informed and supported in the use of . . . hygiene and environmental sanitation . . ."

The most explicit recognition of sanitation as a human right, as part and parcel of the right to an adequate standard of living, is presented by Art. 14(2)(h) CEDAW. CEDAW's objective is to eliminate discrimination and discrepancies in the enjoyment of human rights; not to create altogether new rights for women. The treaty tailors existing human rights to the specific challenges faced by women (and especially rural women in the context of Art. 14 CEDAW) and provides a framework of measures that states should take to prevent and eliminate discrimination. Including sanitation in the right to an adequate standard of living demonstrates that it is viewed as a pre-existing human right—one that is presently guaranteed to all individuals. The significance of the provision in CEDAW must be understood beyond the Convention's limited scope *ratione personae* relating to women implicating that the right to sanitation is guaranteed to all individuals.¹⁴⁷

Lastly, several states, such as Bolivia,¹⁴⁸ Ecuador,¹⁴⁹ Kenya,¹⁵⁰ the Maldives,¹⁵¹ and Uruguay,¹⁵² include the right to sanitation within the text of their Constitutions, moreover, legislation and policies of some states also acknowledge the right to sanitation.¹⁵³ In summary, a range of human rights instruments, at all levels, in-

¹⁴⁷ See also Winkler, *supra* note *, at 60-61 (making a similar argument regarding the right to water).

¹⁴⁸ CONSTITUCIÓN POLÍTICA DEL ESTADO, [Constitution], Jan. 25 2009, art. 20 (Bolivia).

¹⁴⁹ CONSTITUCIÓN, Oct. 20, 2008, art. 66(2) (Ecuador).

¹⁵⁰ CONSTITUTION, Aug. 27, 2010, art. 43(1)(b) (Kenya).

¹⁵¹ CONSTITUTION OF THE REPUBLIC OF MALDIVES, Aug. 7, 2008, art. 23(f).

¹⁵² CONSTITUTION OF THE ORIENTAL REPUBLIC OF URUGUAY, amended Oct. 31, 2004, art. 47 (Uruguay).

¹⁵³ See *Loi relative à l'eau* Loi n. 05/12, Art. 3 (Algeria); Water Services Act No. 108 of 1997, § 3 (1-4) (South Africa); "Ley general del marco regulatorio y tarifario del servicio de provisión de agua potable y alcantarillado sanitario" D.O., 2 Noviembre de 2000 (Paraguay); Ministry of Natural Resources, Lesotho Water and Sanitation Policy, at 2 (Guiding principles F) (February, 2007) (Lesotho); Ministry of Local Government, Rural Development and Cooperatives (People's Republic of Bangladesh), National Sanitation Strategy at 11 (Guiding principles) (March 2005).

clude explicit references to sanitation.

4.2. *A Component of the Right to Adequate Standard of Living*

Art. 11(1) of the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) guarantees the right to an adequate standard of living. It consists of several components and explicitly refers to food, clothing, and housing. By using the formulation “including”, it provides a non-exhaustive account of the components of the right. While food, clothing, and housing are necessary to achieve an adequate standard of living, they are not by themselves sufficient. Art. 11(1) ICESCR and other provisions on the right to an adequate standard of living leave the door open to the identification of further implicit components. For example, the right to water has been recognized as such an unnamed component.¹⁵⁴

An adequate standard of living is impossible to realize without sanitation, since sanitation, ill-health, poverty, and insecurity are too tightly interrelated. Sanitation is as critical a component of an adequate standard of living as food, clothing, housing, and water.¹⁵⁵ For example, open defecation and illness due to a lack of hygiene after contact with human excreta make it impossible to realize an adequate standard of living.

The CESCR agrees with this understanding. The Committee lists sanitation beside other elements of an adequate standard of living in its General Comment No. 19 on the right to social security.¹⁵⁶ Likewise, the Committee has repeatedly taken up the issue of sanitation as part of the right to an adequate standard of living in

¹⁵⁴ See CESCR, *General Comment No. 15*, *supra* note 97, at ¶ 29; WINKLER, *supra* note *, at 175–176.

¹⁵⁵ See Catarina de Albuquerque, *The Human Right to Sanitation – Essential for Survival, Health and a Life in Dignity*, 19(2) *Human Rights Defender* 3, 4 (2010) (examining the extent of the sanitation crisis and its significant implications for billions of people worldwide).

¹⁵⁶ U.N. Committee of Economic, Social and Cultural Rights (CESCR), *General Comment No. 19, The right to social security (Art. 9 of the Covenant)*, ¶ 18, U.N. Doc. E/C.12/GC/1 (Feb. 4, 2008).

its Concluding Observations on state reports.¹⁵⁷ Most explicitly, the CESCR has reaffirmed that sanitation is an essential component of the right to an adequate standard of living in its statement on the right to sanitation.¹⁵⁸ Similarly, the Committee on the Rights of the Child has read Art. 27(1) CRC, regarding the right to an adequate standard of living, to include sanitation. It speaks of the “right to an adequate standard of living, including access to food, clean drinking water, adequate housing and latrines.”¹⁵⁹

The explicit inclusion of sanitation in Art. 14(2)(h) CEDAW further underscores sanitation as a component of the right to an adequate standard of living. This provision contains an expansion of the components of an adequate standard of living, explicitly mentioned in Art. 11(1) ICESCR, and shows that sanitation is understood to be a component of this right. Turning to non-binding declarations, the above-mentioned Cairo Programme of Action,¹⁶⁰ as well as the Istanbul Habitat Agenda,¹⁶¹ also mention sanitation as a component of the right to an adequate standard of living. While the understanding of the term “adequate standard of living” in these instruments cannot be transferred one by one, it provides an indication of other elements commonly assumed to be covered by

¹⁵⁷ U.N. Committee on Economic, Social and Cultural Rights (CESCR), Consideration of Reports Submitted by States Parties in Accordance with Articles 16 and 17 of the Covenant, Concluding Observations Slovakia, ¶ 21, U.N. Doc. E/C.12/SVK/CO/2 (June 8, 2012); CESCR, Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding observations Cameroon, ¶ 29, U.N. Doc. E/C.12/CMR/CO/2-3 (Jan. 23, 2012); CESCR, Consideration of Reports Submitted by States Parties under articles 16 and 17 of the Covenant, Concluding observations Ethiopia, ¶¶ 21, 23, U.N. Doc. E/C.12/ETH/CO/1-3 (May 5, 2012); CESCR, Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations Peru, ¶ 19, U.N. Doc. E/C.12/PER/CO/2-4 (May 30, 2012).

¹⁵⁸ CESCR, *Statement on the Right to Sanitation*, *supra* note 101, ¶ 7.

¹⁵⁹ See e.g., U.N. Committee of the Rights of the Child (CRC), Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations Uganda, ¶ 57, CRC/C/UGA/CO/2 (Nov. 23, 2005); CRC, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations Ethiopia, ¶ 61, CRC/C/ETH/CO/3 (Nov. 1, 2006).

¹⁶⁰ United Nations Conference on Population and Development, Cairo Sep. 5-13, 1994, *Report of the Conference, Cairo Programme of Action*, Principle 2, U.N. Doc. A/Conf.171/13/Rev.1, Annex.

¹⁶¹ U.N. Habitat II, *Habitat Agenda*, *supra* note 112, ¶ 11.

the term and hence reinforces the interpretation of Art. 11(1) ICESCR to include sanitation as an implicit component.

The recognition of the right to sanitation through the U.N. General Assembly and the Human Rights Council is also in line with this interpretation and further supports it. The General Assembly did not declare a “new” right in 2010, but recognized the right to sanitation.¹⁶² This shows that the General Assembly is of the view that sanitation is a pre-existing human right. The resolution did not proclaim a “new” human right, for which a legal basis in international law might be doubtful, but formally recognized its existence under international human rights law. In the process of adoption, many states supported this understanding in their explanations of vote, some of them explicitly referring to it as a component of the right to an adequate standard of living.¹⁶³

The subsequent resolutions by the Human Rights Council further support this understanding by explicitly affirming “that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity,”¹⁶⁴ hence putting the right to sanitation in the framework of legally binding human rights instruments on the right to an adequate standard of living including Art. 11(1) ICESCR, Art. 14(2)(h) CEDAW and Art. 27 CRC. The 2013 General Assembly resolution also reaffirms the understanding that the right to sanitation is derived from the right to an adequate standard of living.¹⁶⁵ The most recent resolution, from 2015, is unequivocal and explicitly refers to “the human rights to safe drinking water and sanitation as components of the

¹⁶² See U.N. General Assembly, *The Human Right to Water and Sanitation*, ¶ 1, U.N. Doc. A/64/L.63/Rev.1 (Jul. 2, 2010) (comparing the draft with the final resolution reveals that the original draft used “declares” which was changed to “recognizes” through an oral revision in order to show that the human right to sanitation has a legal foundation in already existing human rights law).

¹⁶³ See Press Release, GA/10967, *supra* note 131 (containing explanations of votes by several countries, of particular note those of Germany, Spain, and Hungary, but also of Argentina, Egypt, Colombia, Mexico and Liechtenstein).

¹⁶⁴ See HRC, Doc. A/HRC/RES/15/9, *supra* note *, at ¶ 3 (recognizing sanitation as a component of the right to an adequate standard of living for the first time).

¹⁶⁵ GA, Res. 68/157, *supra* note 142, at 3 (Preamble).

right to an adequate standard of living.”¹⁶⁶

All in all, sanitation must be understood as a component of the right to an adequate standard of living. As an implicit component, it is equivalent to the human rights to food and housing that are commonly understood to belong within the right to an adequate standard of living.

4.3. *The Underlying Notion of Human Dignity*

The understanding and interpretation of human rights and the elements that make up an adequate standard of living can also rely on the notion of human dignity.¹⁶⁷ The notion of human dignity is present in all human rights instruments.¹⁶⁸ In fact, the preamble of the ICESCR recognizes that all human rights derive from the inherent dignity of the human person. Despite this centrality, there is no consensus on the definition of human dignity in human rights law. In this regard, Schachter stated “I know it when I see it even if I cannot tell you what it is” explaining that the understanding of dignity is largely intuitive and to a significant extent derived from the cultural context.¹⁶⁹ Although this makes the concept difficult to grasp and define, it leaves room to recognize instances where human dignity has been compromised. Schachter believes that such instances include “[d]egrading living conditions and deprivation of basic needs.”¹⁷⁰ Further, there is a close connection between

¹⁶⁶ GA, Res. 70/169, *supra* note 144, ¶ 1.

¹⁶⁷ See generally Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-Economic Rights*, 21(1) S. AFR. J. HUM. RTS. 1 (2005) (employing the concept of dignity for the interpretation of human rights); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19(4) EUR. J. INT'L L. 655, in particular 681, 721 et seq. (2008). See also Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19(5) EUR. J. INT'L L. 931 (2008) (“lay[ing] the foundations for understanding why a substantive...dialogue on the meaning of human dignity is so vital to the future of the human rights experiment”).

¹⁶⁸ Cf. McCrudden, *supra* note 167, at 664 et seq. (providing an overview of human dignity in national, international, and regional human rights instruments).

¹⁶⁹ Oscar Schachter, *Human Dignity as a Normative Concept*, 77(4) AM. J. INT'L L. 848, 849 (1983).

¹⁷⁰ *Id.* at 852.

human dignity and certain human rights.¹⁷¹ For example, a pronounced link between privacy and dignity has been recognized¹⁷² in that having one's own privacy invaded can compromise human dignity.¹⁷³

In most cultures, the act of defecating is a highly intimate one and requires a high degree of privacy.¹⁷⁴ As a result, human dignity may be compromised for people who have no choice but to use a bucket or a plastic bag, who have to use latrines that do not ensure privacy, or who do not have any privacy at all such as having to use a receptacle in front of others, as in prisons or in informal settlements, or trying to hide behind bushes or in ditches. Human dignity may be further compromised by the lack of opportunity to clean themselves after defecating. The Indian Supreme Court, in *Municipal Council Ratlam v. Shri Vardhichand and Others*, described the humiliation and indignity caused by the failure of municipalities to provide sanitation facilities, driving "the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under Nature's pressure, bashfulness becomes a luxury and dignity a difficult art."¹⁷⁵

Women and girls in particular, due to cultural norms and expectations, often require privacy when urinating or defecating. In the absence of adequate sanitation facilities, they are forced to defecate only before dawn or after dark to maintain privacy.¹⁷⁶ Consequences of such behavior include serious health repercussions such as liver infection and constipation. It can also increase the risk of being attacked by animals or being assaulted or raped. Therefore, not having access to sanitation is "a daily source of in-

¹⁷¹ See David Feldman, *Human Dignity as a Legal Value – Part I*, PUB. L. 682, 690 (1999) (discussing dignity as central to human life).

¹⁷² *Id.* at 694-95; Heiner Bielefeldt, *Menschenwürde, Der Grund der Menschenrechte*, 25 (Deutsches Institut für Menschenrechte, 2008) (analyzing various aspects of human dignity).

¹⁷³ Patrick Lee and Robert P. George, *The Nature and Basis of Human Dignity*, 21(2) *RATIO JURIS*. 173, 174 (2008).

¹⁷⁴ See *Id.* at 174.

¹⁷⁵ *Municipal Council, Ratlam v. Shri Vardhichand and Others*, (1981) 1 S.C.R. 97 (India) [hereinafter *Municipal Council, Ratlam v. Shri Vardhichand and Others*].

¹⁷⁶ BLACK AND FAWCETT, *supra* note 15, at 5.

dignity as well as a threat to well-being.”¹⁷⁷

For many people, lacking adequate access to sanitation can be described as a “source of shame, physical discomfort, and insecurity.”¹⁷⁸ The Special Rapporteur’s report on sanitation comes to the conclusion that the “lack of access to sanitation . . . is an affront to the intrinsic worth of the human being and should not be tolerated in any society.”¹⁷⁹ The close link between human dignity and sanitation further reinforces the interpretation of the right to sanitation as an implicit component of the right to an adequate standard of living.

4.4. A Distinct Human Right – also Distinct from the Right to Water

Just like the rights of food and housing, sanitation is most appropriately understood as a distinct human right.¹⁸⁰ The right to sanitation is on its own a component of an adequate standard of living, and thus is distinct from the right to water.

It is true that until recently, resolutions by the General Assembly and the Human Rights Council have addressed “the right to water and sanitation” as a combined issue, failing to recognize them as distinct human rights issues. More broadly, sanitation and water are often discussed in unison, and in some ways are closely linked. Providing access to sanitation and managing excreta is a pre-condition for adequate water quality. Moreover, where water-

¹⁷⁷ UNDP, HUMAN DEVELOPMENT REPORT 2006, *supra* note 7, at 111.

¹⁷⁸ *Id.* at 48.

¹⁷⁹ HRC, *Report on Sanitation*, A/HRC/12/24, *supra* note *, at ¶ 57.

¹⁸⁰ See also Ellis & Feris, *supra* note 75, and Murthy, *supra* note 131, at 117 (arguing in favor of sanitation as a distinct human right). *But cf.* HRC, *Report on Sanitation*, A/HRC/12/24, *supra* note *, at ¶¶ 14-19 (giving a detailed analysis of linkages between sanitation and other human rights to underline the indivisibility of human rights in addition to discussing the distinct features of sanitation). Whereas food and housing have been well established as distinct human rights as components of the right to an adequate standard of living, clothing has received surprisingly little attention, *but see* KATHARINA ENGBRUCH, DAS MENSCHENRECHT AUF EINEN ANGEMESSENEN LEBENSSTANDARD: ERNÄHRUNG, WASSER, BEKLEIDUNG, UNTERBRINGUNG UND ENERGIE ALS ELEMENTE DES ART. 11(1) IPWSKR 225 et seq. (2012) (comparing the guarantees of human rights such as food, housing, sanitation, and clothing).

borne sanitation is used, such infrastructure relies on water. Still, water and sanitation are not one in the same, and it is important to distinguish them as two distinct human rights.

To a certain extent there may have been a benefit in linking sanitation to water. Some argue that the increased attention to water has shed light on the issue of sanitation.¹⁸¹ It is fair to assume that the original political recognition of the human right to water and sanitation was only possible as one combined human right. However, this does not mean that both issues must continue to be combined as one human right. Even though linking the two issues may increase awareness of the importance of sanitation, it can also be harmful. This link contributes to the perception of sanitation being merely attached as an add-on to water,¹⁸² and to treating it as its “poor cousin.” If that perception is not challenged, sanitation will continue to be treated as an afterthought, continuing to be under-funded compared to water and other fields of social policy, and failing to take into account the particular challenges in its implementation.

Sanitation is distinct from water in a number of ways. First, sanitation is not necessarily water-borne.¹⁸³ There are alternative systems that do not transport and flush excreta away when used, but instead store them in a pit.¹⁸⁴ Such on site solutions are chosen among a wide range of possibilities that do not necessarily require water.¹⁸⁵ They require services that are entirely different from piped water supply with regard to construction, maintenance, and emptying of latrines and septic tanks to the treatment and disposal of feces. In addition, they may also require the selling of products such as soap and products for menstrual hygiene.

Solutions to improve access to water and sanitation may not

¹⁸¹ Marion W. Jenkins & Steven Sugden, *Rethinking Sanitation: Lessons and Innovation for Sustainability and Success in the New Millennium*, 2006 (27) Occasional Paper 8 (UNDP, Human Development Report Office, 2006).

¹⁸² BLACK AND FAWCETT, *supra* note 15, at 216 et seq.

¹⁸³ See, Ellis & Feris, *supra* note 75, at 609-14 (explaining the historical links between sanitation and water resulting in the pre-dominance of promoting water-based sanitation solutions).

¹⁸⁴ BLACK AND FAWCETT, *supra* note 15, at 60 et seq., cf. 101 et seq. (presenting different on-site sanitation options).

¹⁸⁵ COHRE, WaterAid, SDC and U.N.-HABITAT, *supra* note 21, at 6.

present the same challenges under all circumstances. For example, providing water supply to remote rural areas, in particular if they are mountainous or lack groundwater resources, can be an enormous challenge, while on-site sanitation solutions can be implemented more easily. Pit latrines, for instance, can be simply built and moved once the first pit has filled up.¹⁸⁶ However, in densely populated informal settlements, sanitation can be a more massive challenge than water supply.¹⁸⁷ Challenges range from locating space for household facilities or public toilet blocks to safely disposing waste. This can be a particular problem where sludge removal trucks cannot easily access pits due to narrow lanes.¹⁸⁸

Improving sanitation conditions involves more than these technical considerations. It also requires continually focusing on the demand for sanitation as well as prompting changes in behavior by educating on the importance of hygiene.¹⁸⁹ It is impossible to simply “deliver” access to sanitation. Technical solutions have to be accompanied by raising awareness of the benefits of safe sanitation. This is represented in the slogan “not latrinization, sanitation!”¹⁹⁰ Some of the benefits of sanitation felt by individuals are increased comfort, convenience, safety, privacy, and dignity. These are often ranked higher than the benefits of public health, developmental, and environmental benefits and should therefore also be taken into account when promoting sanitation.¹⁹¹ These benefits can only be fully realized when latrines are used and

¹⁸⁶ *Id.* at 19.

¹⁸⁷ Inga T. Winkler, *Lebenselixier und letztes Tabu, Die Menschenrechte auf Wasser und Sanitärversorgung* 14 (Berlin, Deutsches Institut für Menschenrechte, 2011).

¹⁸⁸ See BLACK AND FAWCETT, *supra* note 15, at 35 et seq., 210 et seq. (discussing the particular sanitation challenges and potential solutions in informal settlements); Jenkins and Sugden, *supra* note 181, at 20 et seq.

¹⁸⁹ See BLACK AND FAWCETT, *supra* note 15, at 135 et seq., 188 et seq.

¹⁹⁰ Office of the High Commissioner of Human Rights (OHCHR), Statement by the Independent Expert on The Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation at the 65th Session of the General Assembly, New York, Oct. 25, 2010, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10520&LangID=E> [https://perma.cc/FB7Q-8FVN].

¹⁹¹ BLACK AND FAWCETT, *supra* note 15, 137 et seq., 160 et seq.; Jenkins and Sugden, *supra* note 181, at 3, 14.

maintained, not just constructed.¹⁹² Furthermore, the complete health benefits can only be experienced when entire communities move to safe sanitation practices.¹⁹³ In contrast, the benefits of water supply can be experienced at the individual level without changes in community practices as a whole. This notable difference is another reason why sanitation should be assessed independently from access to water.

Finally, in normative terms, the link between human dignity and sanitation may be even more pronounced than in the case of water. Only when understanding sanitation as a distinct right—also distinct from the right to water—can its specific characteristics be captured,¹⁹⁴ the particular challenges in implementation be addressed, and the much needed increased attention be devoted to sanitation. Recognizing sanitation as a distinct right can significantly help to overcome the powerful taboo that surrounds it.

This status as a distinct human right is also reflected in the most recent General Assembly resolution and in the statement on the right to sanitation adopted by the CESCR.¹⁹⁵ The Committee did not opt to revise its General Comment on the right to water to add sanitation to the existing document, but rather declared itself in favor of considering sanitation distinct from water. It states that “sanitation has distinct features which warrant its separate treatment from water in some respects.”¹⁹⁶ To take its consideration of the right to sanitation a step further and to delineate its content and the corresponding obligations in more detail, the CESCR should be encouraged to adopt a separate General Comment on the right to sanitation.¹⁹⁷ Moreover, to demonstrate its understanding of the right to sanitation as a distinct component of the right to an adequate standard of living, the Committee should be encouraged to revise its Reporting Guidelines. The guidelines already address the issue of sanitation, albeit only under the right to hous-

¹⁹² WaterAid, *supra* note 61, at 1.

¹⁹³ COHRE, WaterAid, SDC and U.N.-HABITAT, *supra* note 21, at 7.

¹⁹⁴ De Albuquerque, *supra* note 155, at 5.

¹⁹⁵ CESCR, *Statement on Sanitation*, *supra* note 101.

¹⁹⁶ *Id.* ¶ 7.

¹⁹⁷ See also Langford, Bartram and Roaf, *supra* note 75.

ing and the right to health.¹⁹⁸ Taking up sanitation separately and in its own right would place it on equal footing with other components of the right to an adequate standard of living and accord it more significance in the dialogue with state parties.

To summarize, sanitation is a distinct human right and is a component of the right to an adequate standard of living. While only recently appearing on the international human rights agenda, it is not a “new” human right, but one that has only recently received political recognition, or using the words of Takele Soboka Bulto, it is a “discovery” rather than an “invention.”¹⁹⁹

5. SPECIFYING THE RIGHT TO SANITATION

The human right to sanitation has been recognized at the international level. It is part of the corpus of human rights and is legally binding as a component of the right to an adequate standard of living. But what does the right to sanitation mean? What does it entail and require? How can it be defined? What is its normative content? This section seeks to briefly address these questions²⁰⁰ by building upon the legal foundations of the human right to sanitation and its close links to health and human dignity. Apart from work by the Special Rapporteur on the Human Rights to Water and Sanitation, this section also draws on relevant case law from various countries. While the right to sanitation has been adjudicated to a limited extent, the existing case law provides useful guidance as to its concrete meaning.

¹⁹⁸ CESCR, *Reporting Guidelines*, *supra* note 99, ¶¶ 50, 57.

¹⁹⁹ See Takele Soboka Bulto, *The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?* 12(2) MELBOURNE JOURNAL OF INT. L. 1, 14 (2011) (analyzing the emergence of the human right to water).

²⁰⁰ See HRC, *Report on Sanitation*, A/HRC/12/24, *supra* note * (giving a more detailed delineation of the normative content); see also Langford, Bartram and Roaf, *supra* note 75 (providing more information on the normative content and State obligations).

5.1. *Defining Sanitation in Human Rights Terms*

In her report on sanitation, the Special Rapporteur offered a definition of sanitation in human rights terms: “[a] system for the collection, transport, treatment and disposal or reuse of human excreta and associated hygiene.”²⁰¹ The report stresses that “[S]tates must ensure without discrimination that everyone has physical and economic access to sanitation, in all spheres of life, which is safe, hygienic, secure, socially and culturally acceptable, provides privacy and ensures dignity.”²⁰² This definition has, *inter alia*, been endorsed by the Human Rights Council welcoming the report of the Special Rapporteur²⁰³ and the CESCR in its statement on the right to sanitation.²⁰⁴

According to this definition, adequate sanitation is more than just access to and use of toilets or latrines. It entails the treatment and safe disposal or re-use of feces, urine, and associated wastewater in a way that avoids direct contact in order to minimize health risks. Such a broad understanding of sanitation is warranted as sanitation not only concerns one’s own right to use a latrine or toilet, but also the rights of other people, in particular their right to health, which can be negatively impacted if excreta and wastewater are not properly managed.²⁰⁵

5.2. *Normative Content of the Right to Sanitation*

The normative content of the human right to sanitation can be specified through a number of criteria, which have evolved in a

²⁰¹ HRC, *Report on Sanitation*, A/HRC/12/24, *supra* note *, at ¶ 63 (footnotes omitted).

²⁰² *Id.* (footnotes omitted).

²⁰³ A/HRC/RES/12/8, *supra* note 134, ¶ 2.

²⁰⁴ CESCR, *Statement on Sanitation*, *supra* note 101, ¶ 8; *see also* Langford, Bartram and Roaf, *supra* note 75, (detailing others who have also proposed a definition of sanitation in human rights terms with similar elements).

²⁰⁵ *See* Zimmer, Winkler and de Albuquerque, *supra* note 16 (providing further information on the consequences of inadequate treatment and management of feces and wastewater as a source of contamination and responses from the perspective of human rights).

common typology that is used more generally by human rights bodies to define the normative content of human rights.²⁰⁶ In its 2013 resolution, the Human Rights Council for the first time spelled out the content of the right to water and sanitation in some detail and recognized that everyone, without discrimination, is entitled “[t]o have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, and acceptable, and that provides privacy and ensures dignity.”²⁰⁷ Each of the criteria of availability, accessibility, affordability, quality and hygiene, and acceptability will be considered in more detail below.

5.2.1. Availability

Sanitation facilities must be available within each household, or its immediate vicinity.²⁰⁸ Facilities must be available on a reliable and continuous basis. In order to meet requirements throughout the day and night, including when not at home, sanitation facilities must also be available wherever people spend significant amounts of time. This includes health and educational institutions, public institutions and places, the workplace, and prisons and other detention facilities.

²⁰⁶ See Special Rapporteur on the right to education, Katarina Tomaševski, *Preliminary Report*, 1998/33, ¶¶ 50-74, U.N. Doc. E/CN.4/1999/49 (Jan. 13, 1999) (devising originally the typology in the context of the right to education as the first mandate in the area of economic, social and cultural rights). See also General Comment No. 13, *the right to education (Art. 13 of the Covenant)*, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) (adopting the same framework). See also KATARINA TOMAŠEVSKI, HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME, (2006) (explaining the typology and framework further in the context of the human right to education). See e.g., CESCR, *General Comment No. 14*, *supra* note 82 (adopting the same framework in a slightly adapted form in subsequent General Comments).

²⁰⁷ HRC, Res. 24/18, *supra* note 105, at 3. The draft for the GA resolution (A/RES/68/157) of the same year included a very similar paragraph. However, this paragraph was removed from the draft prior to the adoption of the resolution mainly due to pressure from the United States, see U.N. Doc. A/C.3/68/L.34, (Oct. 28, 2013) (defining the content of the human right to safe drinking water and sanitation); Amnesty International, *Statement*, *supra* note 142. See also HRC, Res. 27/7, *supra* note 141, at 3 (confirming the previous resolutions, but slightly changing the wording in the definition to include “socially and culturally acceptable”).

²⁰⁸ HRC, *Report on Sanitation*, A/HRC/12/24, *supra* note *, at ¶ 75.

Where sanitation facilities are shared, including at the work place or in health and other public institutions, there must be a sufficient number of facilities to avoid unreasonably long waiting times. In determining a minimum number of toilets for a given population, the particularities of a given community and the special needs of each one of its members must be taken into account. For instance, women, persons with disabilities, children, and others, may have particular sanitation requirements.²⁰⁹

There has been some discussion about whether sanitation facilities that are shared among several households meet human rights standards. Some have raised concerns about the privacy and security of users.²¹⁰ Women and girls, in particular, are often at risk of assault, rape and harassment when accessing sanitation facilities outside of the premises where they live.²¹¹ There is no standard answer to the question whether shared facilities meet human rights standards. It depends on the circumstances whether shared facilities ensure privacy and the security of users. Human rights require minimizing risk of attack or assault from animals or people both during the day and at night. The path leading to the sanitation facility should be convenient and secure for all users, including children, older people, persons with disabilities, women, including pregnant women, and people with health conditions.²¹²

5.2.2. Accessibility

Sanitation facilities must be accessible to everyone. All users should be able to physically access them, including those with spe-

²⁰⁹ *Id.* ¶ 71.

²¹⁰ See Jamie Bartram, *Improving on Haves and Have-nots*, 452 NATURE 283, 284 (March 20, 2008) (discussing options for a better system of monitoring progress in access to water and sanitation).

²¹¹ See U.N. Human Rights Council (HRC), *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, ¶ 30, U.N. DOC. A/HRC/17/26 (May 2, 2011); AMNESTY INTERNATIONAL, *RISKING RAPE*, *supra* note 41; Global Justice Clinic and Center for Human Rights and Global Justice, *Yon Je Louvri: Reducing Vulnerability to Sexual Violence in Haiti's IDP Camps* (New York, NYU School of Law, 2012).

²¹² HRC, *Report on Sanitation*, A/HRC/12/24, *supra* note *, at ¶ 75.

cial needs in terms of accessibility, such as children, persons with disabilities, older persons, pregnant women, people with special health conditions, and others accompanying them.²¹³ The entrance, the interior space, support mechanisms such as handrails, the position of defecation, and other aspects must be designed to accommodate these individuals.²¹⁴

Sanitation facilities must also be technically safe to use. This requires the superstructure to be sufficiently stable to support the facility and the floor to be designed in a manner that reduces the risk of accidents. Regular cleaning and maintenance are essential to guarantee technical safety.²¹⁵

All members of the household should be able to use sanitation facilities. In some instances, sanitation facilities are physically accessible, but women and girls, in particular, are prevented from using existing toilets due to cultural or religious norms,²¹⁶ often based on patriarchal understanding of these norms. Sometimes such restrictions apply when guests are present, sometimes on the days women and girls menstruate, and sometimes more generally. Similarly, maids, on-site workers, or renters are sometimes excluded from using latrines or toilets. Ensuring accessibility in these contexts shows the importance of going beyond technical measures and requires tackling gender stereotypes, taboos, and stigma around sanitation.

5.2.3. Affordability

Using sanitation services must be available at a price that is affordable to everyone, including the poorest. This must cover all costs associated with sanitation, ranging from tariffs in the case of sewerage networks, to connection fees that contribute to capital construction costs, to costs of on-site solutions such as pit latrines and septic tanks (including costs for construction as well as opera-

²¹³ *Id.* ¶ 76.

²¹⁴ *Id.*

²¹⁵ *Id.* at ¶ 73.

²¹⁶ BLACK & FAWCETT, *supra* note 15, at 84.

tion, maintenance and repair).²¹⁷ Such costs are often not recognized at the time of planning for and construction of infrastructure. Where water-based sanitation, including sanitation connected to a centralized sewerage system, is used it will potentially imply the payment for large quantities of water for flushing the toilets.

Paying for sanitation services must not limit people's capacity to acquire other basic services and goods guaranteed by human rights such as food, housing, health services, and education. Affordability does not necessarily require services to be provided free of charge. To the contrary, the human right to sanitation requires people to contribute to its realization according to their ability. However, when people are unable, for reasons beyond their control, to access sanitation through their own means, the state is obliged to find solutions for ensuring their access to sanitation.²¹⁸

5.2.4. *Quality and Hygiene*

The human right to sanitation requires that facilities are hygienically safe to use and easy to clean. They must effectively prevent human and animal, including insect, contact with human excreta.²¹⁹

As outlined above, sanitation entails the treatment and safe disposal or re-use of feces, urine, and associated wastewater. For water-borne sanitation, this implies the need for sewage treatment so that people and the environment are not negatively affected by wastewater. Where on-site sanitation solutions are used, pits and septic tanks are required to be constructed in a way that prevents leakage and overflow as well as regulation, support, monitoring, and oversight to ensure that contents are adequately collected and disposed of rather than dumped into the environment.²²⁰ Manual emptying of pit latrines should be avoided because it is unsafe, as

²¹⁷ HRC, *Report on Sanitation*, A/HRC/12/24, *supra* note *, at ¶ 77.

²¹⁸ *Id.* at ¶¶ 77-79.

²¹⁹ *Id.* at ¶ 72.

²²⁰ See also Zimmer, Winkler and de Albuquerque, *supra* note 16, at 347 (discussing the need for legislation to set specific standards and the use of independent regulators in order to combat these concerns).

well as unacceptable in many countries from a socio-cultural perspective, as it leads to the stigmatization of sanitation workers.²²¹ Mechanized alternatives that prevent direct contact with human excreta should be used. In India, the Supreme Court observed that manual scavengers (the term used for manual sanitation workers in India who are mainly Dalits) “are thrown into a vortex of severe social and economic exploitation.”²²² It held that the continuation of manual scavenging, in spite of being legally banned, violates human rights and thus ordered the state to take appropriate action in response to any violations.²²³

Sanitation facilities must further ensure access to safe water for hand washing, anal and genital cleansing, and menstrual hygiene,²²⁴ as well as mechanisms for the hygienic disposal of menstrual products. Regular cleaning, emptying of pits or tanks that collect human excreta, and maintenance are essential for ensuring that people can continue to use these.²²⁵ Finally, safe sanitation relies on adequate hygiene promotion to encourage individuals to ensure their own health and to respect the safety and dignity of others by using toilets and latrines hygienically.²²⁶

5.2.5. Acceptability

Social and cultural acceptability are important considerations when designing sanitation facilities. Sanitation is a highly sensitive issue across cultures and regions. What is acceptable may vary across societies and cultures and change over time. Therefore, the design, positioning, and conditions for use must be tailored to the differing perspectives about which sanitation solutions are acceptable.²²⁷

²²¹ Cf. HRC, *Report on Stigma*, *supra* note 45, ¶¶ 32-34.

²²² *Safai Karamchari Andolan and Ors. v. Union of India and Ors.* 2014, ¶ 2 Writ Petition (C) No. 583 of 2003 (India).

²²³ *Id.* at ¶ 15.

²²⁴ See Winkler and Roaf, *Menstrual hygiene*, *supra* note 25 (discussing the challenges of menstrual hygiene using the framework of human rights).

²²⁵ HRC, *Report on Sanitation*, A/HRC/12/24, *supra* note *, at ¶ 72.

²²⁶ *Id.* at ¶ 74.

²²⁷ *Id.* at ¶ 80.

Facilities should accommodate acceptable hygiene practices in specific cultures, such as anal and genital cleansing, and women's and girls' toilets must accommodate menstrual hygiene.²²⁸ Acceptability will often require separate facilities for women and men in public places, and for girls and boys in schools.²²⁹ In most cultures, toilets must be constructed so as to ensure privacy. The aspect of privacy of toilets came to the fore in the South African Beja case²³⁰ concerned with unenclosed toilets, also described as "loos with a view."²³¹ The Court found that the provision of toilets without enclosure, inter alia, violated Art. 14 of the South African Constitution on the right to privacy.²³²

5.2.6. Summary

The criteria of availability, accessibility, affordability, quality and hygiene, and acceptability define the normative content of the human right to sanitation—they provide the standard to be achieved for the realization of the right to sanitation. The delineation of the normative content of sanitation also demonstrates that the right to sanitation can be specified with sufficient precision. Individuals have a clearly defined human right to sanitation, and

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Beja et al. v. Premier of the Western Cape et al.*, 2011 (21332/10) BCLR 1077 (CC) ¶ 146 (S. Afr.). See also South African Human Rights Commission, *Report*, ¶ 8.-8.4, <http://www.saflii.org/za/cases/ZAWCHC/2011/97.pdf> [https://perma.cc/65BA-FQAB] (issuing recommendations on the enclosing of toilets before the case was heard in court). See also South African Human Rights Commission, *Report*, ¶¶ 14-15, www.sahrc.org.za/home/21/files/Makhaza%20Finding%202010.pdf [https://perma.cc/6CVT-XZN2] (giving findings and recommendations by the SAHRC); see South African Human Rights Commission, *SAHRC satisfied with progress made in enclosing toilets in Rammulotsi*, www.sahrc.org.za/home/21/files/FS%20Open%20Toilet%20Finding.pdf [https://perma.cc/7CKR-E7KA] (expressing satisfaction with the progress made); see also KATE TISSINGTON, *BASIC SANITATION IN SOUTH AFRICA - A GUIDE TO LEGISLATION, POLICY AND PRACTICE* 15 (Socio-Economic Rights Institute, Jul. 2011) (explaining the background and the politicization of the "open toilet saga" in the local government elections).

²³¹ TISSINGTON, *supra* note 230, at 46.

²³² *Beja et al. v. Premier of the Western Cape et al.*, *supra* note 230, ¶ 150.

states have corresponding obligations to realize this human right as will be discussed in the next section.

6. REALIZING THE HUMAN RIGHT TO SANITATION

Sanitation is a complex human right that is closely interlinked with other human rights. For most people, sanitation is a very private matter. Practicing adequate sanitation and investing in sanitation is often perceived as a personal responsibility. Yet, sanitation also has a public health dimension: sanitation is not only a private issue, but whether or not people practice adequate sanitation has an enormous impact on the health and well-being of all individuals in a given community (or even beyond). In this regard, sanitation extends far beyond the actual individual use of a latrine or toilet and relates to the management, treatment and disposal (or re-use) of urine, feces and associated wastewater through sewerage networks and treatment plants or other systems.

Against this complexity, this section discusses the role of the state and role of the individual in realizing the right to sanitation and related human rights.²³³ What is the role of the state in realizing the individual right to sanitation? What is its role in ensuring public health and related human rights? And given the impact an individual's behavior may have on the rights of others, do individuals have responsibilities towards others?

6.1. The Role of the State in Realizing the Individual's Right to Sanitation

Sanitation is perceived as a private matter, not as a topic for public discussion. Practicing adequate sanitation depends on indi-

²³³ The Article does not attempt to provide comprehensive guidance on how to realize and implement the human right to sanitation, but rather seeks to discuss a number of key aspects and controversial issues that are essential to the understanding of sanitation as a human right. See CATARINA DE ALBUQUERQUE, REALISING THE HUMAN RIGHTS TO WATER AND SANITATION: A HANDBOOK (2014), www.righttowater.info/handbook/ (last visited Oct. 6, 2014) [hereinafter] (providing detailed guidance on the implementation of the right to sanitation).

vidual behavior. And in many, if not most cases, it is the responsibility of individuals (or other private individuals such as landlords) to build latrines or toilets and invest in sanitation. Given this importance of the individual in realizing his or her right to sanitation, the question is whether there is a role for the state in realizing the right to sanitation. If so, what are the state's obligations that correspond to the individual's right to sanitation?

In order to realize the right to sanitation, states need to adopt a complex array of measures: creating an enabling environment; developing, implementing and monitoring strategies, plans and programs; raising, allocating and utilizing the maximum available resources; and (as an exception to the general rule) directly providing sanitation services under certain circumstances, including in public institutions; as well as ensuring participation in decision-making on measures related to sanitation. This section will focus on state obligations in the context of the individual's access to and use of a latrine or toilet, whereas obligations related to sanitation and wastewater governance "beyond the latrine" will be discussed in section 6.2. below.

6.1.1. Creating an Enabling Environment

As a general rule, it is not the role of the state to provide sanitation services directly and free of charge. Primarily, it is the responsibility of individuals to take all measures within their capacity to ensure the enjoyment of the human right to sanitation, for instance by building a latrine or connecting to the sewerage network and paying charges associated with the use of latrines or sewerage connection. However, states' obligations are twofold: Where individuals do not have the means to ensure adequate sanitation, for instance, because they cannot afford the connection fee or buying the hardware, the state's obligation turns into an obligation of direct provision.²³⁴ States have to adopt the necessary measures,

²³⁴ See Asbjorn Eide, *Economic, Social and Cultural Rights as Human Rights* in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS – A TEXTBOOK*, 9, 24 (Asbjorn Eide, Catarina Krause and Allan Rosas eds., 2nd ed., 2001) (describing the debate about what are states obligations in the context of economic, social and cultural rights).

whether through tariff schemes or subsidies, to ensure that services are affordable to everyone. Moreover, states have to facilitate access to sanitation by enabling people to gain access and practice safe and hygienic sanitation. States have to create the regulatory framework and enabling environment for sanitation.

Experience shows that use of sanitation facilities does not necessarily improve by simply providing latrines. Such interventions have proven to be unsustainable.²³⁵ A recent study in India—the country with by far the largest share of the world's population defecating in the open, accounting for an overall 60 percent of open defecation²³⁶—reveals that many people living in households with a functioning latrine (that may be used by other members of the household) nevertheless practice open defecation.²³⁷ Merely providing access to latrines is therefore unlikely to reduce open defecation. Indeed, the study estimates that more than half of the rural population in the four Northern Indian states where the study was conducted would continue to practice open defecation, even if the government were to build a latrine in every household.²³⁸ The focus on the hardware of sanitation needs to be—at the very least—complemented by promoting good hygiene, demonstrating the social and cultural benefits of adequate sanitation and hygiene as well as health benefits, and changing people's behavior to move away from open defecation or the use of inadequate facilities.

However, sometimes this focus on behavior change results in a paternalistic attitude of “having to teach people proper sanitation behavior.” This goes hand in hand with blaming people for not exercising adequate sanitation, or even criminalizing their behav-

²³⁵ Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Report, Sustainability and Non-retrogression in the Realization of the Rights to Water and Sanitation*, ¶ 48, U.N. Doc. A/HRC/24/44 (July 11, 2013).

²³⁶ See Diane Coffey, Aashish Gupta, Payal Hathi, Nidhi Khurana, Dean Spears, Nikhil Sivastav and Sangita Vyas, *Revealed Preference for Open Defecation, Evidence from a New Survey in Rural North India* XLIX (38) ECONOMIC AND POLITICAL WEEKLY 43 (Sep. 20, 2014) (conducting a survey in rural India and finding that even if latrines were provided for every rural household people would likely continue defecating in the open).

²³⁷ *Id.* at 49.

²³⁸ *Id.* at 53.

ior.²³⁹ The reasons for not using sanitation facilities are complex, they vary between individuals, groups, countries and regions, and there is no one-size-fits-all solution for improving sanitation. People may be unaware of the benefits of adequate sanitation, they may prefer open defecation due to long-held socio-cultural practices, or they may be excluded from using existing sanitation facilities in the household.²⁴⁰ What is essential from the perspective of human rights, is to adopt approaches that respect and strengthen people's agency and dignity. Putting the blame on people who have no other choice does not lead to improvements; states must also enable individuals to practice safe behavior.

A positive lesson in strengthening people's agency and demonstrating that improving sanitation does not necessarily have to be cost-intensive can be learned from Community-Led Total Sanitation ("CLTS"), which relies on a community's capacity for collective action in order to end open defecation. At least eighteen states have adopted CLTS as part of their sanitation policy.²⁴¹ The approach challenges the dominance of "expert" solutions and subsidies for sanitation. It focuses on self-critical reflection and behavior change through community mobilization, looking beyond the individual household to creating open-defecation free villages and communities. Facilitators engage the community in analyzing the implications of open defecation on health, dignity, and women's security. The process usually succeeds in making clear that unless the entire community uses latrines, everyone is affected.²⁴²

Some commentators have raised concerns about the approach from the perspective of human rights.²⁴³ One concern is about the

²³⁹ See *supra* Section 2.2. (discussing the criminalization of homeless people's behavior).

²⁴⁰ See *supra* Section 2.2. (discussing the exclusion of women and girls).

²⁴¹ See KAMAL KAR AND ROBERT CHAMBERS, HANDBOOK ON COMMUNITY-LED TOTAL SANITATION (2008) (outlining the governments that have adopted CLTS in Asia, Latin America, and Africa including Bangladesh where CLTS was first used); see also PLAN INTERNATIONAL, TRIGGER: PUBLICATION OF THE PAN-AFRICA COMMUNITY-LED TOTAL SANITATION PROJECT, Annual Report (2012).

²⁴² Kamal Kar and Robert Chambers, Handbook on CTLS, *supra* note 241, at 9. See also Jane Wilbur and Hazel Jones, Disability: Making CLTS Fully Inclusive, *Frontiers of CTLS: Innovations and Insights* Issue 3 (Brighton, IDS, 2014) (focusing on how CLTS can be made inclusive for persons with disabilities).

²⁴³ See Jamie Bartram, Katrina Charles, Barbara Evans, Lucinda O'Hanlon

lack of subsidies and affordability for people who live in extreme poverty. Many CLTS proponents acknowledge this issue, and there has been internal debate on whether hardware subsidies should be allowed in cases of extreme poverty.²⁴⁴ Another concern relates to the strategies for achieving behavior change. Anecdotal evidence suggests that people in the community have sometimes turned to taking photographs of others still resorting to open defecation, publicly shaming them or even throwing stones at them.²⁴⁵ While these concerns do not appear to be widespread, what is important to stress from the perspective of human rights is that any approach must respect the agency and dignity of all people in the community and must not stigmatize anyone. What the CLTS approach demonstrates is that the role of individuals and communities is key in realizing the right to sanitation. States do, however, have a significant role to play in creating the environment, in which everyone can practice adequate sanitation.

6.1.2. *Adopting Strategies, Plans and Programs*

Article 2(1) ICESCR stipulates that states must take steps to progressively achieve the full realization of economic, social and cultural rights by all appropriate means. The concept of progressive realization acknowledges that the right to sanitation cannot be fully realized immediately, but it does not leave its realization to states' discretion or turn it into a merely aspirational policy goal.

and Steve Pedley, *Commentary on Community-led Total Sanitation and Human Rights: Should the Right to Community-wide Health be Won at the Cost of Individual Rights?* 10(4) J. OF WATER AND HEALTH 499, 501 (2012) (exploring the negative aspects to using the community to encourage safe sanitation practices).

²⁴⁴ Kamal Kar and Petra Bongartz, *Update on Some Recent Developments in Community-Led Total Sanitation* (2015), Working paper number 257 (Nov. 2005).

²⁴⁵ See generally, Mary Galvin, *Talking shit: is Community-Led Total Sanitation a radical and revolutionary approach to sanitation?* 2 WIREs Water 9 (2015); Bartram et al., *supra* note 243; Celestine N. Musembi and Samuel M. Musyoki, *Is CLTS Compatible with Human Rights?* *Frontiers of CLTS: Innovations and Insights*, available at http://www.communityledtotalsanitation.org/sites/communityledtotalsanitation.org/files/Frontiers8_CLTS_and_right_to_sanitation.pdf [https://perma.cc/8T7J-LT75]; Liz Chaterjee, *Time to acknowledge the dirty truth behind community led sanitation*, GUARDIAN, Jun. 9, 2011.

The obligation to progressively realize the human right to sanitation is legally binding, requiring states to move towards the goal of full realization as expeditiously and effectively as possible.²⁴⁶ States have to take concrete, deliberate and targeted steps²⁴⁷ to the maximum of their available resources.²⁴⁸ Even where states face resource constraints that prevent them from fully realizing the right to sanitation immediately, they have an immediate obligation to adopt a strategy for the full realization of the right. States may involve other actors in service delivery and the realization of the right to sanitation more broadly, but they are the ones who have to develop the overall strategy on how to achieve the full realization of the human right to sanitation, how to determine intermediate targets and steps and how to set priorities. For instance, if one part of a given city is connected to a sewerage network while other parts are not, states need to devise a strategy to ensure city-wide adequate sanitation. States are required to address existing disparities in access to sanitation. In order to achieve substantive equality, they must dismantle discriminatory laws, policies, or practices, and take steps to reverse the impact of discrimination by targeting disadvantaged individuals and groups.

The notion of progressive realization tailors the ultimate goal of universal coverage to the country situation and allows for a realistic timeframe. It also implies gradually higher levels of service. States should set clear targets, in line with human rights standards, based on a realistic assessment of resources and capacity, and formulate the necessary measures to meet them.²⁴⁹ States must also ensure that their institutions have the capacity to implement these

²⁴⁶ U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3, The Nature of States Parties' Obligations (art. 2, para. 1, of the Covenant)*, ¶ 9, U.N. DOC. E/1991/23, Annex III (Jan. 1, 1991); see also MAGDALENA SEPÚLVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 319 (2003).

²⁴⁷ CESCR, *General Comment No. 3, supra* note 246, ¶ 10.

²⁴⁸ *Id.*; U.N. Committee on Economic, Social and Cultural Rights (CESCR), *An Evaluation of the Obligation to Take Steps to the Maximum of Available Resources under an Optional Protocol to the Covenant*, Statement, U.N. DOC. E/C.12/2007/1 (Sep. 21, 2007).

²⁴⁹ Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Report, Planning for the Realization of the Human Rights to Water and Sanitation*, ¶¶ 28–33, UN Doc. A/HRC/18/33 (Jul. 4, 2011).

measures and to manage and regulate service delivery.

In South Africa, the cases mentioned above²⁵⁰ concerning unenclosed toilets prompted the South African Human Rights Commission to carry out an investigation into the realization of the right to sanitation. The Commission held provincial hearings on the right to sanitation in 2012.²⁵¹ It developed comprehensive recommendations, which included improving institutional arrangements to reflect the obligations of the human right to sanitation, and improving access to services in schools, particularly for girls.²⁵² In an effort to hold the government to account, the Commission engaged extensively with government departments on these recommendations.²⁵³ In another recent case, the Commission found that the City of Cape Town failed to meet its obligations under the right to sanitation. Its sanitation program based on emergency guidelines including the use of chemical toilets without a more long-term plan was found unreasonable and discriminatory against a predominantly black population in the concerned settlements.²⁵⁴

6.1.3. Raising, Allocating and Utilizing the Maximum Available Resources

Even though individuals are expected to contribute to the realization of the right to sanitation with their own means and states

²⁵⁰ See section 5.2.5.

²⁵¹ See South African Human Rights Commission (SAHRC), *Briefing note on the provincial hearings 2012*, www.sahrc.org.za/home/21/files/Briefing%20note%20for%20on%20the%20Provincial%20Hearings%202012.pdf [https://perma.cc/JD49-LEDS] (listing the times and dates for each hearing, along with their respective subject matters).

²⁵² South African Human Rights Commission, *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa* ¶ 72 (2014), http://www.gov.za/sites/www.gov.za/files/report_right_access_water_sanitation2014_a.pdf [https://perma.cc/P4Q3-UMKT] [hereinafter SAHRC, *Report on Sanitation in Schools*].

²⁵³ *Id.*

²⁵⁴ South African Human Rights Commission, *Investigative Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa* ¶¶ 8.1 and 8.2 (2014), www.sjc.org.za/wp-content/uploads/2014/07/Investigative-Report-Western-Cape-Social-Justice-Coalition-9-July-2014.pdf [https://perma.cc/825E-AM5Z].

are not generally obliged to provide services free of charge, the realization of the human right to sanitation still requires financial resources, whether for regulation, hygiene promotion, or subsidies. Human rights law requires states to raise, allocate and utilize necessary resources.²⁵⁵ Moreover, states have a significant role to play in ensuring wastewater management and treatment, i.e. managing sanitation beyond the latrine, which will be further discussed below under the dimension of public health.

Current budgets for sanitation may not reflect maximum available resources, as they may have been developed on the basis of budget decisions or fiscal policies that fail to prioritize the right to sanitation. Existing budgets must therefore not be equated with “available resources.”²⁵⁶ Human rights law requires states to raise the maximum available resources through taxation and other sources of revenue.²⁵⁷ States must allocate appropriate levels of funding and fully utilize these allocated resources, including through curbing corruption.²⁵⁸ At least as important as the absolute amount of resources is their targeting. States must direct resources to meet the needs of marginalized and disadvantaged communities.²⁵⁹ Yet current funding patterns disproportionately favor large systems in urban areas over rural and deprived urban areas²⁶⁰ that tend to benefit those who already have access by improving service provision. The human rights framework requires states to prioritize using resources for meeting basic sanitation services for everyone. Where barriers exist and persist, which lead to

²⁵⁵ See Radhika Balakrishnan, Diane Elson, James Heintz and Nicholas Lusiani, *Maximum Available Resources & Human Rights: Analytical Report 4* (Rutgers, 2011) (examining States’ obligation to use the maximum available resources for the realization of human rights).

²⁵⁶ See *City of Johannesburg Metro Municipality v. Blue Moonlight Properties 2012 (2) SA 104 (CC) (S.Afr.)* (discussing the right to housing).

²⁵⁷ BALAKRISHNAN ET AL., *supra* note 255, at 4.

²⁵⁸ Ann Blyberg and Helena Hofbauer, *Art. 2 and Governments’ Budgets, The Use of Maximum Available Resources*, <http://www.internationalbudget.org/publications/ESCRArticle2/> [<https://perma.cc/J98M-ZX7A>] (examining Governments’ human rights obligations in the use of resources); BALAKRISHNAN ET AL., *supra* note 255, at 19-22.

²⁵⁹ Ann Blyberg and Helena Hofbauer, *Art. 2 and Governments’ Budgets, Non-Discrimination*, www.internationalbudget.org/publications/ESCRArticle2/ [<https://perma.cc/R3GW-H2KD>].

²⁶⁰ GLAAS Report, *supra* note 62, at ix-xii and 1-6.

denial of the right to sanitation for certain individuals or groups, positive measures are necessary to ensure the equal participation of all and the redistribution of power and resources to groups subordinated by discrimination.²⁶¹

6.1.4. *Providing Adequate Services in Public Institutions*

While states do not generally have an obligation of direct provision, there is an exception to this general rule. Where individuals are in a situation where they cannot provide for themselves, states have an obligation to provide sanitation services, for instance in places of detention, in schools or other public institutions.²⁶²

The Indian Supreme Court ordered schools to provide adequate toilet facilities.²⁶³ Relying on empirical research showing that “parents do not send their children (particularly girls) to schools”²⁶⁴ whenever sanitation facilities are not provided, the Court found that a lack of toilets violated the right to education. Sanitation in schools—or rather the lack of adequate sanitation—has also been a central issue in South Africa’s Limpopo province, tragically being highlighted when a 6-year-old boy fell into a pit and died in January 2014.²⁶⁵ Prior to this incident, a number of NGOs had been campaigning for the Ministry of Basic Education to adopt the school sanitation standards contained in the Norms

²⁶¹ See UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), *General Recommendation No. 25*, ¶ 38 at 282, U.N. Doc. HRI/GEN/1/Rev.7 (2004) (describing the societal barriers faced by women in society).

²⁶² Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Common Violations of the Human Rights to Water and Sanitation*, ¶¶ 51–54, UN Doc. A/HRC/27/55 (Jun. 30, 2014).

²⁶³ *Environment & Consumer Protection Foundation v. Delhi Administration*, AIR 2013 SC 1111 [hereinafter *Environment & Consumer Protection Foundation v. Delhi Administration*].

²⁶⁴ *Environment & Consumer Protection Foundation v. Delhi Administration*, supra note 263, ¶ 4.

²⁶⁵ South African Human Rights Commission, SAHRC Calls for the Eradication of Pit Toilets in Schools following the Death of a 6-year Old Limpopo Pupil, <http://www.sahrc.org.za/home/index.php?ipkArticleID=256> [<https://perma.cc/7VH2-TGG2>] (calling for improvements in the toilets of South Africa after the death of a boy who fell into a latrine).

and Standards for School Infrastructure. These NGOs eventually resorted to litigation, but the case was settled and the Norms and Standards were adopted before any hearing took place. The South African Human Rights Commission started to investigate the matter and the overall lack of sanitation in schools. They then called on the government to roll out long terms plans for improving school sanitation²⁶⁶ and to devise temporary solutions to address the immediate risks.²⁶⁷ At the time of writing, the case *Komape v Minister of Basic Education and Others* is also pending in South African Courts with the boy's parents seeking damages from the Ministry. Several NGOs are supporting the case seeking to draw attention to the broader issue of inadequate school infrastructure.²⁶⁸

Overall, States must ensure that all students have access to adequate, safe and private sanitation facilities. They must ensure that these facilities are accessible to everyone on the basis of equality, including girls, students with disabilities, LGBTI and gender non-conforming students, among others, and must take measures to accommodate their needs. What measures are appropriate depends on the context: some schools have introduced gender-neutral bathrooms, while others have built "third-gender" bathrooms.

In the context of detention, failure to provide sanitation to those deprived of liberty has been addressed by courts and inter-

²⁶⁶ See Republic of South Africa, Department of Basic Education, Government Notice R.920 South African Schools Act (84/1996) ("[A]ll schools that do not have access to any form of power supply, water supply or sanitation must be prioritised and provided with the above within a period of three years from the date of publication of the regulations."); *Regulations relating to minimum uniform norms and standards for public school infrastructure*, Gazette No. 37081 (Nov. 29, 2013) (regulating schools in South Africa).

²⁶⁷ SAHRC, REPORT ON SANITATION IN SCHOOLS, *supra* note 252. See also Equal Education, School infrastructure, Basic Infrastructure for every school, Overview and History, www.equaleducation.org.za/campaigns/minimum-norms-and-standards [https://perma.cc/68U9-JPDX] (providing background information on basic education and school sanitation requirements).

²⁶⁸ See EQUAL EDUCATION LAW CENTRE, THE DUTY TO PROTECT LEARNERS FROM DANGEROUS ENVIRONMENTS AT SCHOOL: THE KOMAPE CASE, <http://eelawcentre.org.za/2015/11/20/the-duty-to-protect-learners-from-dangerous-environments-at-school-the-komape-case/> [https://perma.cc/K9LX-58FB] (describing the reasoning behind a recent amicus curiae filed by the Equal Education Law Centre).

national bodies primarily as constituting cruel, inhuman and degrading treatment. For instance, the High Court of Fiji held that prisoners' right to freedom from inhuman and degrading treatment was violated by lack of access to adequate sanitation facilities.²⁶⁹ Similarly, an Irish High Court found that detaining a prisoner in a cell with merely a cardboard box as a "sanitation facility" violates the constitutional right to the protection of the human person.²⁷⁰ The U.N. Human Rights Committee has found human rights violations, as have regional human rights bodies, in a number of cases in which prisoners have been denied access to sanitation.²⁷¹

6.1.5. Ensuring Participation

With such a deeply personal issue as sanitation, cultural, local and personal preferences cannot be overestimated. Where sanitation facilities have been built without participation, they often do not match people's preferences and remain unused or are put to other uses, such as storage facilities or livestock quarters.²⁷² The taboo around sanitation does not always make it easy to openly

²⁶⁹ State v. Senijeli Boila, [2004] High Court (Suva), Criminal Jurisdiction, HAC032D.04S (Fiji).

²⁷⁰ Kinsella v Governor of Mountjoy Prison 2011 IEHC 235, ¶ 10. See also Habeas Corpus Colectivo presentado por Víctor Atencio c. el Ministerio de Gobierno y Justicia, Director General del Sistema Penitenciario 2011 (Corte Suprema de Justicia de Panama) 928-09 (dealing with inadequate sanitation conditions in prisons in Panama).

²⁷¹ U.N. Human Rights Committee, *Communication No. 731/1996, M. Robinson v. Jamaica*, ¶ 10.1-10.2 at 128, U.N. Doc. A/55/40 (vol. II) CCPR/C/68/D/731/1996 (Mar. 29, 2000); U.N. Human Rights Committee, *Communications Nos. 241 and 242/1987, F. Birindwa ci Birhashwirwa and E. Tshisekedi wa Malumba v. Zaire*, ¶¶ 11.5-12.2, U.N. Doc. A/55/40 (vol. II) CCPR/C/37/D/242/1987 (Nov. 2, 1989); *Institute for Human Rights and Development in Africa v Angola*, ¶ 50, Afr. Comm'n on Human and Peoples' Rights Sess. 43, 292/04 (May 22, 2008); *Tadevosyan v. Armenia*, ¶¶ 53-55 (2009) ECHR (41698/04), Section III; *Eugen Gabriel Radu v. Romania*, ¶ 30 (2009) ECHR (3036/04), Section III; *Fedotov v. Russia*, ¶¶ 20, 27, 65 (2006) ECHR (5140/02), Section IV; *Melnik v. Ukraine*, ¶¶ 107-109 (2006) ECHR (72286/01), Section II; *Paul Lallion v. Grenada*, Case 11.765, Inter-Am. Comm'n H.R., Report No. 55/02, Doc. 5 rev. 1 at 551 (2002).

²⁷² HRC, Report of the Special Rapporteur, *supra* note 235, ¶ 48.

discuss sanitation options and preferences, but once the silence and taboo around the issue is broken, participation brings enormous benefits in ensuring the sustainability of solutions.

Article 25 (a) of the International Covenant on Civil and Political Rights provides for the right to participate in public affairs. More recent human rights instruments, including Article 7(b) and (c) and Article 14(2)(a) CEDAW, Article 12 CRC, and Article 3(c) and Article 29 CRPD include more detailed guarantees of the right to participation. They also mark a trend towards a broader and more robust understanding of participation that demands inclusive, active, free and meaningful participation in all areas at all stages. Such participation must be inclusive, and States must take particular measures to ensure that everyone concerned can actively participate and make their voice heard. In this regard, communities must not be considered as a coherent whole, but specific measures are needed to ensure that marginalized and stigmatized groups and individuals can influence decision-making. While it is often stressed that participation has significant instrumental value in ensuring more sustainable results, participation is a human right in itself.²⁷³

Some courts have pronounced themselves on the right to participation. The South African Constitutional Court developed the concept of “meaningful engagement” in the 51 Olivia Road case, in the context of the right to housing,²⁷⁴ holding that rights holders have a right to participate in decisions affecting the enjoyment of social rights, including in the development of plans. The Court found that the City of Johannesburg had made no effort to engage and hence had not met its obligations. The concept of meaningful engagement has since been developed further²⁷⁵ and taken up by courts in other countries, for instance in Kenya.²⁷⁶ With regard to

²⁷³ Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, *Report, Participation in the realization of the Human Right to Safe Drinking Water and Sanitation*, ¶¶ 9–17, U.N. Doc. A/69/213 (Jul. 31, 2014).

²⁷⁴ *Occupiers of 51 Olivia Road v. City of Johannesburg* (24/07), 2008 (5) BCLR 475 (CC) ¶ 35 (S. Afr.).

²⁷⁵ See generally Brian Ray, *Proceduralisation’s triumph and engagement’s promise in socio-economic rights litigation*, 27 S. AFRICAN J. ON HUM. RTS. 107 (2011).

²⁷⁶ See *Ibrahim Sangor Osman v. Minister of State for Provincial Administra-*

sanitation, in the Beja case, a South African court dealt with an agreement between the local government and the community regarding decisions on the design of toilets. The court held that such agreements must satisfy certain requirements including being concluded with authorized representatives and being preceded by information sharing and technical support where necessary.²⁷⁷ It also voiced concerns that “a majority within a community [cannot] approve arrangements in terms of which the fundamental rights of a vulnerable minority within that community will be violated”²⁷⁸ pointing to the importance of ensuring inclusive participation.

6.1.6. *Summary*

Sanitation is a private matter; it is an individual responsibility and a highly personal issue. However, this does not imply that states do not have human rights obligations relating to an individual’s right to sanitation. In fact, states have a key role to play in creating the environment for individuals to exercise their right to sanitation, through the adoption of policies, strategies, budgetary measures and in some instances, direct provision. Ensuring participation is key in guaranteeing that the measures taken respond to people’s needs and preferences. The role of the state in realizing the right to sanitation and related human rights is further heightened because of the public health dimension of sanitation, which will be discussed next.

6.2. *The Role of the State in Ensuring Public Health*

Sanitation is not only an individual, private and personal matter. Sanitation—or the lack thereof—has a significant public health dimension. Where people practice open defecation, feces contami-

tion & Internal Security (2011) Constitutional Petition No. 2 of 2011 (H.C.K.) (finding that twenty one days of notice was insufficient for an eviction and does not satisfy the requirements of meaningful engagement).

²⁷⁷ *Beja v. Premier of the Western Cape*, *supra* note 230, ¶ 98.

²⁷⁸ *Id.*, at ¶ 99.

nate the environment. Where the contents of pits and septic tanks overflow, leak into groundwater or are dumped into the environment, this may contaminate the environment and other people's water supply and increases risk of contamination through flies or other vectors. Where sewage is not adequately contained and treated, it contaminates watercourses and the wider environment. According to recent estimates, more than 4 billion people lack access to sanitation that includes sewage treatment,²⁷⁹ and over a billion people use a source of drinking water that is contaminated with feces.²⁸⁰ Such contamination not only impacts people's right to water, but also their rights to health, life, food and an adequate standard of living, among others. These broader impacts raise questions in terms of the state's obligation to protect the rights of people under their jurisdiction as well as responsibilities of third parties including—ultimately—private individuals, which will be discussed next.

Exercising one's right to sanitation is not only an individual human right, but because of these impacts on the community and on society at large, adequate sanitation is also a collective concern in the interest of public health. In the definition of sanitation under the human rights framework developed by the U.N. Special Rapporteur on the Human Rights to Water and Sanitation outlined above, she refers to a "system for the collection, transport, treatment and disposal or reuse of human excreta."²⁸¹ This broad definition is not necessarily warranted because individuals have a right to have their feces properly treated and disposed of, but because others have human rights not to be negatively impacted by contamination through feces and wastewater, and states have a corresponding obligation to protect people from harm to their human rights.

²⁷⁹ Rachel Baum, Jeanne Luh & Jamie Bartram, *Sanitation: A Global Estimate of Sewerage Connections without Treatment and the Resulting Impact on MDG Progress*, 47 *Environ. Sci. Technol.* 1994, 1998 (2013).

²⁸⁰ See Robert Bain, Ryan Cronk, Rifat Hossain, Sophie Bonjour, Kyle Onda, Jim Wright, Hong Yang, Tom Slaymaker, Paul Hunter, Annette Prüss-Ustün & Jamie Bartram, *Global Assessment of Exposure to Faecal Contamination Through Drinking Water Based on a Systematic Review*, 19(8) *TROPICAL MEDICINE & INTERNATIONAL HEALTH* 917 (2014) (estimating exposure to fecal contamination).

²⁸¹ HRC, *Report on Sanitation*, A/HRC/12/24, *supra* note *, at ¶ 63.

States must ensure that people using sanitation facilities themselves and others are not negatively affected by inadequate sanitation and wastewater management. They must protect people from contamination, which would negatively affect their human rights, including their rights to health, food and water. This obligation to protect requires states to enact and enforce the necessary measures to protect individuals from human rights abuses by third parties, including other individuals. Such measures need to include legislation, policies, regulation and enforcement. The need for regulation is particularly acute for the process of emptying pits and tanks and the management of contents for their adequate disposal.²⁸²

This dimension of public health reinforces the state's role in ensuring adequate sanitation for everyone. It is, in fact, what historically caused many countries to invest public finances into water and sanitation systems.²⁸³ It was – and is – in the interest of public health to ensure that all households have the means to safely dispose of their waste.²⁸⁴ Looking back at the 19th century “sanitary revolution” in the United Kingdom and other countries, individual households were often responsible for putting in a toilet, but public measures, including financing, was deemed necessary to transport and dispose of feces and wastewater.²⁸⁵

More recently, the public health dimension, combined with the dimension of individual dignity, have been addressed in a number of cases. The Supreme Court of India dealt with lack of basic sanitation in a case where informal settlements collectively complained that the cesspits used for sanitation were overflowing and causing serious health concerns. The Court ordered the municipality to construct a sufficient number of public latrines and to provide desludging services.²⁸⁶ In Argentina, a court considered the situation

²⁸² See Zimmer, Winkler and de Albuquerque, *supra* note 16, at 347.

²⁸³ See generally Bisaga I and Norman G, *Universal water and sanitation: how did the rich countries do it?*, Finance Brief 2, Public Finance for WASH (2015), available at http://www.publicfinanceforwash.com/sites/default/files/uploads/Finance_Brief_2_-_Universal_water_and_sanitation.pdf [https://perma.cc/X227-TCLW]. See also Ellis and Feris, *supra* note 75, at 620 et seq.

²⁸⁴ BLACK AND FAWCETT, *supra* note 15, at 7.

²⁸⁵ BLACK AND FAWCETT, *supra* note 15, at 17-18.

²⁸⁶ Municipal Council, Ratlam v. Shri Vardhichand and Others, *supra* note 175. See also Koolwal v. State of Rajasthan 1986, AIR 1988 Raj. 2 (India) (dealing

of impoverished neighborhoods in Córdoba, where wells had been contaminated with fecal and other matter from a wastewater treatment plant overflowing with untreated sewage.²⁸⁷ The court ordered the municipality to take urgent measures to address the situation, including providing 200 liters of safe water per household per day until a permanent solution was found. These cases demonstrate that states are often required to address the dimension of individual dignity and public health simultaneously in ensuring adequate sanitation for all people.

6.3. *Individual Responsibilities?*

A particular challenge often brought up in the context of the right to sanitation relates to the collective dimension of sanitation: practicing safe sanitation is not only in one's own interest, but also serves to avoid negative impacts on public health and the human rights of others. In this context, taken to the ultimate level, the role of non-state actors and their responsibility to respect human rights leads to the question of individual responsibilities. Professionals in the sanitation sector often argue "with rights come responsibilities," implying that once individuals enjoy the right to sanitation, they also assume responsibilities.²⁸⁸

The reality is that unless everyone in a given community stops open defecation and practices safe sanitation, the full health benefits do not accrue. Even if just a few people continue to practice open defecation or do not dispose adequately of their waste, for instance by letting septic tanks leak, everyone in the community con-

with the sanitation situation). See *Rampal v. State of Rajasthan* AIR 1981 Raj. 121 (India) (concerning the construction of sewers and drains).

²⁸⁷ *Marchisio José Bautista y Otros Ciudad de Córdoba, Primera Instancia y 8a Nominación en lo Civil y Comercial, Acción de Amparo* (Expte. No 500003/36) (Oct. 19, 2004) (Argentina).

²⁸⁸ HRC, *Report on Sanitation*, A/HRC/12/24, *supra* note *, at ¶ 65. See generally Thomas Levin and Andrea Kämpf, *Human Rights meet Water: A Conversation 2* (Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH (2009) available at http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/E-Info-Tool/e-info-tool_human_rights_based_approach_in_German_development_cooperation.pdf [https://perma.cc/3KJE-PEVW]).

tinues to be exposed to the health risks of uncontained feces.²⁸⁹ In that situation, not exercising one's right to sanitation infringes on the right to health of others. Does that mean that individuals have responsibilities under international human rights law to stop practicing open defecation and to build and maintain adequate facilities that discharge waste without risk to others? Do individuals actually have a responsibility to exercise their right to adequate sanitation?

There has been some discussion in international human rights law on individual responsibilities. In the process of drafting the Universal Declaration of Human Rights, the importance of not only including rights, but also duties was repeatedly stressed.²⁹⁰ The final Universal Declaration of Human Rights stipulates in Art. 29(1) that "everyone has duties to the community in which alone the free and full development of his [or her] personality is possible."²⁹¹ Similarly, the preamble to the ICESCR states "that the individual, having duties to other individuals and to the community to which he [or she] belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."²⁹² These instruments do not, however, include more specific or detailed references to the responsibilities of individuals. The discussion became revitalized in the 1990s, culminating in a proposal by the InterAction Council of a Universal Declaration of Human Responsibilities,²⁹³ which would supposedly serve to balance rights and responsibilities.²⁹⁴

²⁸⁹ See Annette Prüss-Üstün et al., Burden of disease from inadequate water, sanitation and hygiene in low- and middle-income settings: a retrospective analysis of data from 145 countries, 19(8) TROPICAL MEDICINE AND INTERNATIONAL HEALTH 894 (2014) (estimating the extent of disease borne from inadequate water, sanitation, and hygiene in the world).

²⁹⁰ Mary Ann Glendon, *A World Made New*, 75-76, 120 (Random House, 1st ed. 2001).

²⁹¹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 29, U.N. Doc. A/RES/217 (Dec. 10, 1948).

²⁹² G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Preamble (Dec. 16, 1966).

²⁹³ INTERACTION COUNCIL, *A UNIVERSAL DECLARATION OF HUMAN RESPONSIBILITIES* (Sep. 1, 1997), available at <http://interactioncouncil.org/universal-declaration-human-responsibilities> [<https://perma.cc/9X4U-V742>] (discussing the proposal on human responsibilities to balance with human rights).

²⁹⁴ *Id.*; see also INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *TAKING*

However, to a much larger extent, developments in the area of responsibilities of non-state actors have focused on transnational companies and other business enterprises, as well as international organizations in particular, as far as normative development and standard-setting are concerned.²⁹⁵ Generally speaking, these non-state actors are powerful entities that exercise a certain degree of control over whether or not individuals will enjoy their human rights. The reason for direct responsibilities lies in the fact that protection gaps might arise when relying solely on states to regulate the activities of these non-state actors and to protect individuals from human rights abuses.²⁹⁶ Other developments related to direct individual responsibility can be witnessed in international criminal law seeking to hold perpetrators accountable for genocide, crimes against humanity, and war crimes.²⁹⁷ Art. 25 (1) of the

DUTIES SERIOUSLY: INDIVIDUAL DUTIES IN INTERNATIONAL HUMAN RIGHTS LAW 35, 38. (1999) (offering an overview and critical discussion of the proposal to complement human rights with responsibilities); Mia Giacomazzi, *Human Rights and Human Responsibilities: A Necessary Balance* 3 SANTA CLARA J. INT'L L. 164 (2005) (balancing responsibilities and rights); Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities*, 32 COLUM. HUM. RTS. L. REV. 565 (2000-2001) (lamenting the lack of attention paid to the responsibilities that come with rights).

²⁹⁵ See generally Nicola M.C.P. Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Intersentia, 2002); Adam McBeth, *International Economic Actors and Human Rights*, 43 et seq. (Routledge, 2010); David Weissbrodt and Maria Kruger, *Human Rights and Responsibilities of Business as Non-State Actors* in NON-STATE ACTORS AND HUMAN RIGHTS, 315-50 (Philip Alston ed., 2005); and more broadly Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006). The role of international organizations as non-State actors is different from corporations and companies as States play a direct role in the governing bodies of these institutions. The role of international financial institutions, in particular, has attracted a lot of attention. See, e.g., McBeth, at 85 et seq., 165 et seq.; François Gianviti, *Economic, Social and Cultural Human Rights and the International Monetary Fund*, in NON-STATE ACTORS AND HUMAN RIGHTS 113-40 (Philip Alston ed., 2005); Mac Darrow, *Between Light and Shadow* (Hart Publishing, 2003). See also U.N. Human Rights Council Res., 26/9, U.N. Doc. A/HRC/ 26/9 (Jun. 25, 2014).

²⁹⁶ U.N. Human Rights Council, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶ 3, UN Doc. A/HRC/8/5 (Apr. 7, 2008).

²⁹⁷ See ANTONIO CASSESE AND PAOLA GAETA, *INTERNATIONAL CRIMINAL LAW*, 119-113 (3rd ed., 2013); M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 779-81 (Martinus Nijhoff Publishers 2nd rev. ed. 2003) (noting the

Rome Statute of the International Criminal Court establishes the jurisdiction of the International Criminal Court over natural persons. While international criminal law thus directly holds individuals to account, it is again characterized by the attempt to address human rights abuses through powerful actors. The direct accountability of individuals for international crimes is a narrowly framed exception in international law.²⁹⁸ This rationale is not necessarily transferable to individuals who may cause harm to others through inadequate sanitation practices.

However, it is beyond doubt that individuals have a direct moral responsibility to avoid causing harm to others, whether through practicing unsafe sanitation or other actions. At the same time, states have a duty to protect individuals from harm being caused by others. As such, they may and must impose responsibilities on individuals through legislation and regulation. The only difference is that these responsibilities do not stem directly from international human rights law, but have been imposed through domestic law. It is up to the state to define the concrete parameters for individual behavior and to determine what responsibilities individuals have. An example serves to illustrate this: many countries follow certain rules and protocols to deal with infectious diseases, including provisions on vaccination requirements or quarantine where necessary, and such measures are expected from states under their obligation to protect. Yet, international human rights law, and the rights to life and health in particular, do not directly bind individuals to put themselves into quarantine when they have been infected, but this obligation is imposed on them by the state. Most importantly, when regulating individual behavior states must also ensure that individuals can comply with these regulations through creating the enabling environment that puts people in a position to comply with these norms. In the context of sanitation this means that they must enable individuals to exercise safe sanitation so as to avoid harm to others. Correspondingly, it also implies that states must not criminalize open defecation and urination when individuals do not have the opportunity to practice

evolution of international criminal law).

²⁹⁸ CASSESE AND GAETA, *supra* note 297, at 63–65.

adequate sanitation.²⁹⁹ In those cases where individuals cannot practice safe sanitation because of inaction by the state, individuals cannot be held responsible for practicing unsafe sanitation. Taking into account the capacity and opportunities that individuals have, states can and must therefore impose and define responsibilities on individuals in the realm of their obligation to protect, yet these are not direct responsibilities under human rights law. In summary, in order to realize the right to sanitation, States must develop an appropriate framework that combines the dimensions of individual dignity and public health. It is the state's role to create an enabling environment that empowers everyone to practice adequate sanitation, to build and maintain adequate facilities, to regulate individual behavior accordingly and to take the necessary measures to protect public health.

7. CONCLUSION

Sanitation is one of the most basic human needs. We all have to relieve ourselves, we have to urinate and defecate. It is a human need that we all share. At the same time, defecation is a highly private matter for most people and is closely linked to human dignity. The human right to sanitation requires guaranteeing such privacy. Yet this does not mean that sanitation has to be taboo. In fact, making sanitation less of a taboo will contribute to increasing attention and according sanitation greater priority in law, policy and practice.

The explicit recognition of the human right to sanitation bears a great potential in this regard. While the road towards its political recognition was long, this process also demonstrates how opportunities may arise unexpectedly, resulting in the explicit recognition of the human right to sanitation in July 2010. Still, even five years later, the right to sanitation is still the "new kid on the block." It has not yet received sufficient attention in human rights policies, scholarship and practice.

From a normative perspective however, sanitation is not a "new" human right. It was not simply declared or invented by the

²⁹⁹ See *supra* Section 2.2.

U.N. General Assembly. Rather, it has a firm legal basis in international human rights law as a component of the human right to an adequate standard of living. As such, sanitation is best understood as a distinct human right—also distinct from the human right to water. Only by focusing on sanitation as a distinct human right can its specificities be addressed. Only then will sanitation no longer be water's "poor cousin," but will be fully realized and adequately funded.

Realizing the human right to sanitation does not mean that states have to directly provide everyone with sanitation facilities free of charge. Adequate sanitation is largely a matter of individual responsibility: Individuals invest in toilets and latrines, they pay regular tariffs for sewerage, they clean and maintain toilets, and they actually practice adequate sanitation. However, states have a significant role to play in creating an environment that enables individuals to practice adequate sanitation, states have to facilitate access to sanitation and have to create the legislative, policy and regulatory framework.

To add to the complexity, sanitation also has an essential public health dimension. Where feces leak into the environment, where wastewater is not adequately contained and treated, or where people practice open defecation or unsafe sanitation, such activities not only affect the rights of the people who practice unsafe sanitation, but the rights of all other people in the area are also affected, particularly their right to health. As part of their obligation to protect human rights, states must therefore take the necessary measures to protect others from contamination. States must develop an appropriate legislative, policy and regulatory framework that brings together the dimensions of individual dignity and public health. In doing so, states will fulfill their role in realizing human rights and protecting public health, as such making the right to sanitation tangible for all people.