

**Human Rights Council****Twenty-seventh session**

Agenda item 3

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

The Special Rapporteur on the human right to safe drinking water and sanitation submits the present report in accordance with Human Rights Council resolutions 16/2 and 21/2. She focuses on common violations of the human rights to water and sanitation, as identifying violations of those rights is critical to ensure their realization, to prevent further violations and to ensure that concerted action is taken to remedy them. The report is based on a comprehensive understanding of the human rights violations which occur when States fail to meet any human rights obligation. All components of human rights are justiciable, and any violation must be subject to effective remedies.

The Special Rapporteur develops a typology of violations, examining breaches of the obligations to respect, to protect, to fulfil, to refrain from discrimination, to ensure substantive equality and to ensure active, free and meaningful participation, as well as extraterritorial obligations. The report then briefly discusses the importance of access to justice for these violations before ending with conclusions and recommendations.

* The annex to the present report is circulated as received, in the language of submission only.
The annex and footnotes have not been edited and remain in the language of submission only.



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I. Introduction

1. The present report is submitted to the Human Rights Council by the Special Rapporteur on the human right to safe drinking water and sanitation in accordance with Human Rights Council resolutions 16/2 and 21/2. The Special Rapporteur examines the wide range of violations of the human rights to water and sanitation, seeking to increase awareness of those violations and to promote a greater commitment to identifying, preventing and remedying them.

2. In the report, the Special Rapporteur presents a typology of common violations of the human rights to water and sanitation. This framework is intended to assist States and others to identify and prevent violations, and to ensure access to effective remedies for existing violations. The Special Rapporteur draws on her work over the course of her mandate. To a large extent, her activities have focused on compiling good practices and providing guidance regarding how to implement the rights to water and sanitation. Given the multitude of violations she has been confronted with, it is crucial to complement this by devoting a report to failures in realizing those rights, shedding light on persisting human rights violations.

3. In 1992, the Committee on Economic, Social and Cultural Rights stated that we “tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action”.¹ Even though recent decades have witnessed enormous progress in identifying violations, taking them more seriously and remedying them, at the national as well as the international level, there is still a long way to go before violations of economic, social and cultural rights provoke not only outrage, but also give rise to adequate preventive and remedial action.

4. The framework presented is based on a comprehensive understanding of violations that may occur with respect to all components of human rights and the corresponding State obligations. The Special Rapporteur hopes to promote greater awareness of violations that are most likely to escape attention. While it is generally recognized that a failure to comply with any human rights obligation constitutes a violation, key components of the rights to water and sanitation are still too often viewed primarily as aspirational policy goals. Many situations of lack of enjoyment of the rights to water and sanitation have not been clearly identified as violations; judicial or quasi-judicial mechanisms have not been resorted to, and such situations have not been addressed with the urgency and level of commitment that they require, particularly in the light of their potentially devastating effects on large numbers of people. Where States have the necessary resources, it is unjustifiable that deprivations of access to even basic provision of water and sanitation persist.

5. Violations of the rights to water and sanitation are often connected with systemic patterns of exclusion and unequal power relationships. Greater attention to violations of the rights to water and sanitation and their structural causes can empower marginalized groups to secure effective remedies. Beyond remedying individual violations, identifying patterns of violation will also help to prevent such violations and will require governments to address their structural causes in policy-making and budgeting.

6. Violations of the human rights to water and sanitation frequently correlate with broader deprivations and other violations, including of the human rights to life, health, food, housing, education, work and a healthy environment. Lack of adequate sanitation in

¹ A/CONF.157/PC/62/Add.5, para. 5.

schools has huge implications for the right to education and gender equality. It also puts the right to privacy and human dignity at risk. These linkages become apparent in the case law dealing with water and sanitation, which frequently relies on the rights to life, to health, to housing, to a healthy environment and to freedom from inhuman and degrading treatment.

7. The present report reflects critical developments in international human rights law and attempts to respond to new opportunities and challenges. The Special Rapporteur expects that the recent entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights will lead to a greater commitment to address violations of the rights to water and sanitation, contribute to a better conceptual understanding and promote their justiciability at the national level, leading to greater compliance with these rights.

8. While it primarily focuses on the role of States, the Special Rapporteur hopes that the present report will be useful to quasi-judicial bodies in adjudicating complaints, and that it will assist civil society organizations, national human rights institutions and other advocates to provide strategic support in cases that address any type of violations of the rights to water and sanitation. Lastly, the report acknowledges the important role of non-State actors, both in causing and remedying human rights violations.

9. The identification of human rights violations is not intended as an accusation of those responsible or to undermine collaborative partnerships in addressing violations. On the contrary, the Special Rapporteur considers exposing human rights violations as constructive and invites participatory dialogue about how to better address violations of the rights to water and sanitation. This will involve identifying barriers faced by victims in accessing justice, and assisting courts and other bodies to become more accessible and open to adjudicating cases concerning the rights to water and sanitation. Examples of violations drawn from domestic courts and international or regional human rights mechanisms are not intended to suggest that violations are more serious in certain States. Indeed, States from which more decisions originate are generally those that have provided access to justice, and may provide guidance to others.

10. The report is informed by a broad consultative process with States, international organizations, civil society organizations, national human rights institutions, other stakeholders and human rights experts. The Special Rapporteur received nearly 50 responses to a questionnaire, bringing common patterns of violation to the fore.² The report is also based on the experience gained during her mandate, in particular from communications received and country missions. While the countries visited were extremely diverse, many challenges faced were remarkably similar: patterns of marginalization and discrimination; failure to take the necessary steps to realize the rights to water and sanitation with the urgency required and to the maximum of available resources; failure to regulate and protect those rights where services were delegated to third parties; and instances of retrogressive measures and lack of sustainability.

11. The report establishes a comprehensive framework for assessing violations of the rights to water and sanitation. It surveys the wide range of violations, establishes corresponding categories and references them to cases. It briefly considers how accountability and remedial measures can most effectively address those violations. The report concludes with recommendations on how to better ensure that violations are identified, prevented and addressed.

² www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SubmissionsHRViolations.aspx.

II. Establishing a comprehensive understanding of violations of the human rights to water and sanitation

12. Developments over recent decades have brought greater clarity to the identification of violations of economic, social and cultural rights. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights draw on the typology of obligations to respect, protect and fulfil human rights, clarifying that failures to comply with any obligation – be it failures to utilize maximum available resources, or deliberate actions – constitute violations.³

13. During the drafting of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the debates about the scope of violations of economic, social and cultural rights were definitively resolved. Initial proposals for a narrow concept of violations based on deliberate State “interference” or known failures to provide minimum essential levels of those rights were rejected.⁴ It was recognized that realizing the rights of the most disadvantaged relies also on addressing violations resulting from failures to take positive steps.⁵ States are obliged to progressively realize rights by applying “maximum available resources” and by prioritizing essential levels of access to the most marginalized. Ultimately, States have the obligation to fully realize the rights to water and sanitation by ensuring access to sufficient, safe, acceptable, accessible and affordable water and sanitation services for all.

14. Ensuring access to justice for victims of a State’s failure to meet any of its obligations is critical to guaranteeing that judicial and quasi-judicial mechanisms do not reinforce patterns of systemic inequality and deprivation, or exclude some of the most egregious human rights violations. The Optional Protocols to the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities provide that any failure to comply with human rights obligations, including obligations to progressively realize economic, social and cultural rights, constitutes a violation.

15. The Special Rapporteur embraces a comprehensive understanding of violations of the rights to water and sanitation. Even though all types of violations of rights to water and sanitation are serious, denial of access to services due to discrimination or disconnection from services may be more easily identified as violations. Situations where States have failed to adopt reasonable measures or to allocate appropriate resources are less familiar to many courts and raise additional challenges in determining whether a violation has occurred. Yet such types of violations often involve the greatest number of victims and the most intolerable deprivations.

III. A typology of common violations of the human rights to water and sanitation

16. In its general comment No. 15 (2003) on the right to water, the Committee on Economic, Social and Cultural Rights builds on a comprehensive understanding of

³ E/C.12/2000/13, p. 17, paras. 5–6.

⁴ Catarina de Albuquerque, “Chronicle of an announced birth: The coming into life of the optional protocol to the International Covenant on Economic, Social and Cultural Rights – The missing piece of the International Bill of Human Rights”, *Human Rights Quarterly* 32.1 (2010): 144–178.

⁵ Bruce Porter “The Reasonableness of Article 8 (4) – Adjudicating Claims from the Margins” *Nordisk Tidsskrift for Menneskerettigheter*, 27.1 (2009): 39–53.

violations, applying the categories of human rights obligations to respect, protect and fulfil the right to water. While the Committee has not yet adopted a general comment on the right to sanitation, it has issued a formal statement recognizing that similar obligations apply,⁶ following an approach taken by the Special Rapporteur in her 2009 report to the Council.⁷ The present report applies this framework and develops a typology of common violations of the rights to water and sanitation. In addition to the obligations to respect, protect and fulfil, it puts a particular emphasis on equality and non-discrimination, as well as on participation, and also examines extraterritorial obligations. The latter obligations cut across the “respect, protect, fulfil” framework. This typology is not proposed as a rigid classification, being utilized as a framework for surveying the range of violations which must be addressed, with inevitable overlaps in the categories. What is most important is to ensure that no type of violation is ignored and that no victim is denied access to effective remedies.

A. Violations of the obligation to respect

17. The obligation to respect the rights to water and sanitation requires States to refrain from action that will unjustifiably interfere with their enjoyment. This obligation is of immediate effect. Common violations of the obligation to respect can be placed within the following categories:

- (a) Direct interference with access to water or sanitation;
- (b) Pollution, diversion or depletion of water resources;
- (c) Criminalization of activities linked to water or sanitation and punitive measures.

1. Direct interference with access to water or sanitation

18. Under the category of direct interference, common violations take the form of (a) unjustifiable or discriminatory denial of access to water or sanitation; (b) unjustifiable disconnection from services (including from prepaid water meters), for example when people are unable to pay and are left without access to even basic services; (c) unjustifiable restrictions on access to water or sanitation, such as latrines and toilets being locked at night or fenced-off water sources; (d) unaffordable increases in pricing; (e) land grabbing or other measures resulting in forced relocation that deprive the affected persons of access to water or sanitation services without an adequate alternative; and (f) destroying or poisoning water facilities or infrastructure during armed conflict, which would violate international humanitarian law.

19. Violations through direct interference are often addressed by national courts interpreting domestic law in line with international human rights law. The Court of Appeal of Botswana, for example, relied on the right to water as set out in general comment No. 15 and the General Assembly resolution on the right to water and sanitation to interpret constitutional provisions. It found that preventing a community of Bushmen from accessing their traditional boreholes amounted to inhuman and degrading treatment.⁸ In the context of informal settlements in Argentina, a court found that a discontinuation of water supplied with tanker trucks violated the rights to “a healthy environment and dignified housing”,

⁶ E/C.12/2010/1, para. 8.

⁷ A/HRC/12/24.

⁸ Court of Appeal of the Republic of Botswana, *Matsipane Moseithanyane & Ors v The Attorney General*, 2011, Civil Appeal No. CACLB-074-10, paras. 19.1, 19.2 and 22.

ordering the resumption of water provision.⁹ The court also ordered the progressive improvement of the water distribution system, thereby demonstrating that violations of the obligation to respect are often linked to violations of obligations to fulfil. The Human Rights Committee found that Bulgaria had violated the right to home and family, as well as the rights to life and non-discrimination, by allowing the Municipality of Sofia to disconnect the water supply to a Roma community.¹⁰ The Committee requested Bulgaria to issue interim measures requiring the authorities to reconnect the water supply.

2. Pollution, diversion or depletion of water resources

20. Pollution and over-abstraction of water resources through industrial activities or dumping are among the most commonly identified threats to the realization of the human rights to water and sanitation.¹¹ Where such pollution or over-abstraction results from State action, such as (a) dumping of waste and sewage, (b) the activities of State-controlled extractive industries, or (c) licensing of projects predicted to result in human rights violations, States may be in violation of their obligation to respect the rights to water and sanitation.

21. In Argentina, a court considered the situation of impoverished neighbourhoods in Córdoba, where wells had been contaminated with faecal and other matter from a water treatment plant overflowing with untreated sewage.¹² The court ordered the municipality to take urgent measures to address the situation, including providing 200 litres of safe water per household per day until a permanent solution was found. With regard to the licensing of projects such as mining, the Special Rapporteur has received numerous communications alleging water contamination.¹³

3. Criminalization of activities linked to water or sanitation and punitive measures

22. Other violations arise from the criminalization of activities linked to access to water or sanitation, such as the prohibition of public defecation or urination when no other options are available – partially as a result of increasing closures of public facilities.¹⁴ The criminalization of homelessness frequently leads to serious violations of the right to sanitation, but these are rarely taken to court by affected groups, as they often face serious stigma and a constant battle to survive. However, a court in the United States struck down ordinances preventing homeless people from engaging in life-sustaining activities linked to the right to sanitation: “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 for being homeless”.¹⁵ On her mission to the United States, the Special Rapporteur observed

⁹ Cámara de Apelaciones en lo Contencioso Administrativo y Tributario de la Cdad. de Bs. As., Sala I, *Asociación Civil por la Igualdad y la Justicia c/ GCBA s/ Amparo*, Argentina, 18 July 2007, Expte. N° 20.898/0.

¹⁰ Human Rights Committee, communication No. 2073/2011, *Liliana Assenova Naidenova et al. v. Bulgaria*, Views adopted on 30 October 2012, paras. 9 and 14.2.

¹¹ www.ejatlases.org/commodity/water.

¹² Ciudad de Córdoba, Primera Instancia y 8a Nominación en lo Civil y Comercial, *Marchisio José Bautista y Otros*, Acción de Amparo (Expte. No 500003/36) (19 October 2004).

¹³ E.g. Communication ARM 2/2012, https://spdb.ohchr.org/hrdb/23rd/public_-_AL_Armenia_03.12.12_%282.2012%29.pdf and the reply of 2 April 2013, https://spdb.ohchr.org/hrdb/23rd/Armenie_02.04.13_%282.2012%29.pdf.

¹⁴ A/66/265, para. 3; A/HRC/21/42, para. 42.

¹⁵ District Court, SD Florida, United States, *Pottinger v. City of Miami*, 810 F. Supp. 1551 (16 November 1992).

circumstances among homeless people who had devised a makeshift “toilet” from which one individual carried bags of human waste to dispose of in public toilets. The Special Rapporteur noted that this may amount to cruel, inhuman or degrading treatment.¹⁶ The Human Rights Committee in its review of the United States also expressed concern with respect to the criminalization of behaviours related to homelessness.¹⁷

23. Violations also result from decisions to deprive stigmatized groups, such as homeless people, undocumented migrants, occupiers of informal settlements or prisoners, of water and sanitation as a form of punishment for unlawful or undesired activity. The Special Rapporteur on torture has documented that detainees have been forced to rely on water to drink delivered by their families, or on water from toilets.¹⁸ The Special Rapporteur on water and sanitation has also voiced concerns that limiting access to water and sanitation may be used as a, sometimes excessive, form of punishment for prisoners.¹⁹ In cases of secret detention, Special Rapporteurs²⁰ and the Council of Europe have expressed concern about detainees being forced to wear diapers, which is “offensive to the notions of dignity”.²¹ #

24. The Special Rapporteur is pleased to see that violations of the obligation to respect, such as unjustifiable disconnections or pollution of water resources are regularly brought to court. She encourages greater attention to violations that are linked to discrimination and stigmatization and threaten the inherent and equal dignity of all human beings.

B. Violations of the obligation to protect and abuses by non-State actors

25. The obligation to protect requires States to enact and enforce necessary protections of the rights to water and sanitation to protect individuals from human rights abuses by third parties. Such obligation is generally considered to be of immediate effect, although in some cases it will take time and resources to develop the necessary institutional capacity and frameworks. Non-State actors, including private actors and international organizations, also contribute to the realization of human rights and, conversely, their action or inaction may also lead to human rights abuses. Where private actors are involved in the provision of water and sanitation services, their role comes with human rights responsibilities.²² Where States fail to provide services, private actors may be the only ones who step in as providers. Other private actors may have an impact on the rights to water and sanitation through their industrial or agricultural activities.

26. Violations of the obligation to protect can be grouped under several categories:

- (a) Failure to protect in the context of service provision;
- (b) Failure to protect necessary resources or infrastructure from pollution or interference;
- (c) At the same time, non-State actors may fail to comply with their human rights responsibilities.

¹⁶ A/HRC/18/33/Add.4, para. 58.

¹⁷ CCPR/C/USA/CO/4, para. 19.

¹⁸ A/64/215 and Corr.1, paras. 43–44.

¹⁹ A/HRC/18/33/Add.3, para. 52.

²⁰ A/HRC/13/42, pp. 157, 163 and 166.

²¹ Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states, AS/Jur (2006) 16 Part II, provisional version, 7 June 2006, para. 87.

²² A/HRC/15/31, para. 23.

1. Failure to protect in the context of service provision

27. Failures to protect rights in the context of service provision usually stem from a lack of regulation or lack of enforcement of such regulation. They may also be the result of negotiating service contracts that fail to protect users' rights. Violations may occur when States (a) fail to effectively regulate and control service providers in relation to safety, quantity, conditions of service or disconnections; (b) fail to regulate pricing to ensure that services are affordable for everyone; (c) fail to prevent discrimination by private actors; (d) fail to ensure that service providers extend services to marginalized households or communities; (e) fail to require provision of reasonable accommodation of disability or extenuating circumstances; or (f) fail to ensure that monitoring and complaints procedures are in place.

28. One example of enforcing the obligation to protect is an Argentine case in which the court prohibited a private company from disconnecting the water supply due to non-payment, relying on the International Covenant on Economic Social and Cultural Rights (art. 11) and other human rights instruments, which are directly applicable in Argentina.²³ The Greek Council of State recently blocked the planned privatization of the Athens Water Supply and Sewerage Company, arguing that it could put public health at risk due to the anticipated deterioration of water and sanitation quality.²⁴

2. Failure to protect resources or infrastructure from pollution or interference

29. Failures to protect necessary resources and infrastructure relate to issues such as (a) failure to protect water distribution or sanitation infrastructure from interference, damage and destruction; (b) failure to regulate excessive exploitation of water resources by third parties that leads to deprivation of water necessary for personal and domestic uses; and (c) failure to develop and enforce regulation to protect water resources from contamination.

30. In the case of *Sardinal*,²⁵ the Costa Rican Supreme Court ordered the authorities to assess whether a permit should be granted to build a pipeline that would withdraw water from an aquifer, in order to make sure that the pipeline would not deprive the local population of water for personal and domestic use. Without certainty that there would be sufficient water, the pipeline would violate the residents' rights, including that to a healthy environment. A French court held a public water company accountable for ensuring that the water it provided was not detrimentally impacted by agricultural runoff.²⁶ The African Commission on Human and Peoples' Rights found violations, inter alia of the rights to life and to health, owing to the failure of the Government of Nigeria to monitor the impact of oil operations polluting water in the Niger Delta.²⁷

31. While there is a growing body of cases addressing the obligation to protect the rights to water and sanitation, far too many violations continue. Many violations of the rights to water and sanitation stemming from large-scale development projects – frequently

²³ Juez de paz (Moreno, Buenos Aires, Argentina), *Usuarios y Consumidores en Defensa de sus Derechos Asociación Civil c/ Aguas del Gran Buenos Aires SA*, 21 agosto 2002.

²⁴ Decision of the Council of State 1906/2014 of 28 May 2014, available from www.ste.gr/portal/page/portal/StE/ProfatesApofaseis.

²⁵ Sala Constitucional de la Corte Suprema de Justicia, Costa Rica, Sentencia 2009-000262, 14 January 2009.

²⁶ Cour de cassation, Chambre civile 1, France, *M. X c. Syndicat d'Adduction d'Eau du Trégor*, 30 Mai 2006, N° de pourvoi: 03-16335.

²⁷ African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, App. No.155/96, 27 October 2001.

supported by international financial institutions – have been brought to the attention of the Special Rapporteur.²⁸ The Special Rapporteur on toxic waste also examined the detrimental impact of extractive industries and disposal of toxic wastes on water.²⁹ Such violations can be prevented by effective regulation. Where violations take place, access to justice for those affected must be guaranteed. Courts and human rights bodies should play a more active role in requiring governments to enact protective measures.

3. Failure to comply with human rights responsibilities by non-State actors

32. Independently of State obligations to protect vis-à-vis non-State actors, the latter also have human rights responsibilities and may be held accountable for failures. Under the United Nations Guiding Principles, businesses have a responsibility to respect human rights and to exercise due diligence to avoid any action which would result in human rights abuses in the scope of their operations, including their supply chain.³⁰ If non-State actors abuse human rights, victims must be ensured access to justice.

33. International organizations may also contribute to the perpetration of violations, which calls for enhanced accountability. Article 55 (c) of the Charter of the United Nations stipulates that the United Nations shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all”. It would go against the very object and purpose of the Charter if the United Nations itself were not required to respect the human rights law it promotes.

34. The United Nations Stabilization Mission in Haiti has come under scrutiny for its role in the cholera epidemic in Haiti in the aftermath of the 2010 earthquake. The epidemic killed over 8,500 people, sickened more than 700,000 and is still ongoing. It has been alleged that the cholera was brought in by peacekeepers and that it spread because of haphazardly constructed sanitation facilities that leaked sewage into a river that was an important source of drinking water.³¹ The United Nations has rejected the accusations and claimed immunity based on the Convention on the Privileges and Immunities of the United Nations, but United Nations human rights representatives are increasingly calling on the United Nations to establish responsibility. The Independent Expert on Haiti has stressed the need “to assure the Haitian people that the epidemic will be halted as soon as possible and that full reparation for damages will be provided”. He called for clarification of the facts and for realization of the right to a remedy, arguing that the “United Nations should be the first to honour these principles”³² and that “silence is the worst response”.³³ The United Nations High Commissioner for Human Rights called for an investigation by the United Nations and the country concerned, and called for “those who suffered as a result of that cholera be provided with compensation”.³⁴ The Special Rapporteur wishes to emphasize the obligation to investigate the allegations in order to establish responsibility for any violations and to ensure the alleged victims’ right to a remedy, including compensation, if warranted. She welcomes the commitment by the United Nations to eradicate the disease in Haiti and urges it to meet that commitment by providing adequate resources. She further

²⁸ Communication COL 4/2013 < https://spdb.ohchr.org/hrdb/24th/public_-_AL_Colombia_23.05.13_%284.2013%29.pdf >

²⁹ A/HRC/21/48, para. 39.

³⁰ OHCHR, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (2011).

³¹ A/HRC/25/71, para. 76.

³² *Ibid.*, para. 77.

³³ *Ibid.*, para. 77, quoting A/HRC/22/65, para. 89.

³⁴ Quoted in Trenton Daniel, UN Official Makes Rare Case For Compensation For Haiti Cholera Victims, *Huffington Post*, 10/08/13.

calls on the United Nations to establish appropriate accountability mechanisms for ongoing and future missions as well as to review and reinforce measures for adequate sanitation and preventive measures.

C. Violations of the obligation to fulfil

35. Violations of the obligation to fulfil may be the most critical category. Such violations are often complex and affect a large number of victims, yet they have generally received the least attention. Potential claimants face considerable challenges in relation to gaining access to justice for alleged structural or systemic violations. Jurisprudence, including the standards of review developed by courts in recent years, has demonstrated, however, that violations of the obligation to fulfil can indeed be adjudicated.

36. Violations of the obligation to fulfil can be grouped in the following categories:

- (a) Failure to develop, implement and monitor strategies, plans and programmes;
- (b) Failure to properly raise, allocate and utilize the maximum available resources;
- (c) Corrupt practices;
- (d) Unjustified retrogressive measures;
- (e) Failure to prioritize the necessary steps to ensure minimum essential levels of access to water and sanitation;
- (f) Failure to provide adequate services in public facilities and institutions and in emergency situations.

1. Failure to develop, implement and monitor strategies, plans and programmes

37. Article 2(1) of the Covenant stipulates that States must take steps to achieve progressively the full realization of economic, social and cultural rights by all appropriate means. Steps must be deliberate, concrete and targeted as clearly as possible towards the full realization of human rights.³⁵ Where resource constraints prevent a State from fully realizing the rights to water and sanitation immediately there is an immediate obligation to adopt a strategy for the realization of those rights. To assess progress towards the full realization of human rights, States must monitor progress. The Committee on Economic, Social and Cultural Rights regularly calls on countries to put into place mechanisms for that purpose.³⁶

38. Violations may result from failure: (a) to design and implement a strategy based on human rights standards and principles; (b) to identify and meet targets in line with human rights standards; (c) to ensure effective monitoring and accountability; and (d) to target vulnerable or marginalized communities.

39. A seminal decision on the obligation to progressively realize socioeconomic rights is that taken in the *Grootboom* case, in which the Constitutional Court of South Africa considered the plight of a community lacking basic shelter, sanitation facilities and access to clean water.³⁷ To determine whether the State had complied with the obligation of

³⁵ Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990), on the nature of States parties' obligations, para. 2.

³⁶ See, for example, E/C.12/YEM/CO/2, para. 4; E/C.12/BIH/CO/2, para. 21.

³⁷ Constitutional Court, South Africa, *Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 (11) BCLR 1169 (CC).

progressive realization, the Court applied a standard of “reasonableness”.³⁸ It held that a reasonable programme must: be comprehensive, coherent and coordinated; be capable of facilitating the realization of the right; prioritize the needs of those in the most desperate situations; make appropriate financial and human resources available; be balanced and flexible; make appropriate provision for short-, medium- and long-term needs; be reasonably conceived and implemented; and be transparent.³⁹ Through that approach, the Court clarified that, while it is the role of the Government to determine precise policies and programmes, it is the proper role of courts to assess whether policies and programmes are in compliance with human rights. In *Grootboom*, the Court found that the State’s programmes failed to address as a priority the circumstances of those in the most desperate situations, and required the Government to take measures to correct this.⁴⁰

40. The Optional Protocol incorporates the standard of reasonableness in article 8(4), which stipulates that States may choose the precise means to realize Covenant rights from a range of options, but stresses that it is the role of the Committee to assess whether those measures are reasonable. In the light of limited national jurisprudence addressing States’ failures to progressively realize the rights to water and sanitation, the Special Rapporteur urges States to ensure that courts have the authority to adjudicate such cases and that judges and prosecutors are adequately trained to make such assessments.

2. Failure to properly raise, allocate and utilize available resources or to budget appropriately

41. A leading cause of systemic violations of the rights to water and sanitation relates to the failure of States to raise, allocate and utilize necessary resources.⁴¹ Violations can be grouped into the following types: (a) failure to raise the maximum available resources through taxation and other sources of revenue; (b) failure to combat tax evasion and illicit financial flows; (c) failure to seek and accept international assistance where needed; (d) failure to allocate appropriate levels of funding; (f) failure to fully utilize allocated resources; (e) failure to direct resources to meeting the needs of vulnerable or marginalized communities; and (g) failure to direct sufficient funds to sub-national governments and other delegated authorities to allow them to fulfil their roles.

42. Current water and sanitation budgets may not reflect maximum available resources, as they may have been developed on the basis of budget decisions or fiscal policy that failed to prioritize the rights to water and sanitation. Existing budgets must therefore not be equated with available resources. In the *Blue Moonlight* case, the South African Constitutional Court demonstrated the role that courts can play in determining whether budgets comply with human rights obligations using the standard of reasonableness, holding that “it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations”.⁴²

43. Civil society organizations have also made important advances in assessing whether maximum available resources are being raised and utilized, providing evidence on which to

³⁸ Ibid., para. 45.

³⁹ Ibid., at paras. 39 and 40; Constitutional Court of South Africa, *Minister of Health v Treatment Action Campaign*, 5 July 2002, 2002 (10) BCLR 1033 (CC), para. 123.

⁴⁰ Constitutional Court, South Africa, *Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 (11) BCLR 1169 (CC), para. 96.

⁴¹ Radhika Balakrishnan et al., *Maximum Available Resources & Human Rights* (Rutgers, 2011).

⁴² Constitutional Court of South Africa, *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties et al.*, Case CCT 37/11, [2011] ZACC 33.

adjudicate claims. The Special Rapporteur recommends that courts, human rights bodies, and civil society make concerted efforts to demand budget transparency and bring budgetary decisions under review for human rights compliance.

3. Corrupt practices

44. Human rights violations may result from misappropriation of resources allocated for the realization of the rights to water and sanitation. Corruption directly affects the available resources for basic service provision: in 2006 the World Bank estimated that there would be a loss of US\$ 20 billion in financing over the next decade.⁴³ Corruption increases the price of services, making them unaffordable, for example when bribes have to be paid. Corrupt practices disproportionately affect poor and marginalized groups, who lack the resources to pay bribes and the power and voice to oppose the vested interests of elites.⁴⁴

45. While courts tend to address corruption as an issue of criminal law, there has also been success in securing compensation for users of services who suffer the effects of corruption, and in linking corruption to human rights. In a case of corruption in the privatization of water services in Grenoble, France, the Court of Appeal ruled that FF 300,000 in compensation be awarded.⁴⁵ The Court of Justice of the Economic Community of West African States found that the misappropriation of public funds could constitute a violation of the right to education and required compensation.⁴⁶

4. Unjustified retrogressive measures

46. A retrogressive measure is one that leads to a backward movement in the enjoyment of the human rights to water and sanitation.⁴⁷ The Committee on Economic, Social and Cultural Rights has stated that the burden of proof rests with the State to show that the adoption of retrogressive measures was based on the most careful consideration of alternatives, that disadvantaged groups have been prioritized and that the measures can be justified by reference to the totality of the rights and by the fact that full use was made of available resources.⁴⁸ The Committee has mainly expressed concern about measures that are deliberately retrogressive, in particular in the context of austerity measures.⁴⁹ The Special Rapporteur has previously stated that even if not deliberately retrogressive, some acts and omissions may have a retrogressive effect, for instance where States fail to ensure operation and maintenance and services are unsustainable as a result. Even where retrogression is non-deliberate, the human rights framework obliges States to act with care and deliberation, to assess the impacts of their actions and omissions, and to adjust their policies and measures as soon as they become aware that current policies might lead to unsustainable results.⁵⁰ States' failure to meet this obligation may result in human rights violations.

⁴³ Stalgren, P., *Corruption in the Water Sector: Causes, Consequences and Potential Reform*. Swedish Water House Policy Brief No. 4, p. 3 (SIWI ed., 2006).

⁴⁴ Transparency International, *Global Corruption Report 2008: Corruption in the Water Sector*, p. 44 et seq.

⁴⁵ Cour de Cassation, chambre criminelle, France, arrêt du 08/04/1999, pourvoi n.°060 98-84539.

⁴⁶ Court of Justice of the Economic Community of West African States, *SERAP v. Nigeria*, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10, paras. 21 and 28 (ECOWAS, Nov. 30, 2010).

⁴⁷ A/HRC/24/44, para. 14.

⁴⁸ E/C.12/2007/1, para. 9; Letter to States parties by the Chairperson of the Committee on Economic, Social and Cultural Rights, 16 May 2012.

⁴⁹ Letter to States parties by the Chairperson of the Committee on Economic, Social and Cultural Rights, 16 May 2012..

⁵⁰ Report by the Special Rapporteur on water and sanitation (A/HRC/24/44), para. 16.

47. Examples of common violations include (a) raising prices excessively so that poor people can no longer afford even basic services; (b) reducing social benefits on which poor people rely; (c) allowing infrastructure to deteriorate due to a failure to ensure operation and maintenance; and (d) implementing austerity measures that create long-term retrogression not limited to the period of crisis or which disproportionately impact marginalized or vulnerable groups.

48. A particular concern relates to private sector participation and withdrawal of State regulation, oversight and provision in times of austerity. The Portuguese auditing institution found that private-public partnerships – by not sharing risks and benefits equally – benefit largely the private sector, that they are detrimental to the people and that services are often of lower quality while higher prices are charged.⁵¹ The Special Rapporteur has raised related concerns in a series of communications.⁵²

5. Failure to ensure minimum essential levels of access to water and sanitation

49. The obligation to ensure minimum essential levels of water and sanitation is considered an immediate obligation.⁵³ However, huge numbers of people lack access to even basic services, and more than one billion people practise open defecation. Where a State has the capacity and resources to ensure minimum essential levels of rights, this obligation must be met immediately. In many instances, it can be achieved with a redistribution of resources and comprehensive strategies and plans aimed at achieving universal access. However, the human rights framework does not demand the impossible. There are situations where States lack the capacity to ensure access to basic services for all immediately. In such circumstances, human rights law requires that addressing such massive deprivations related to the minimum essential levels of the rights to water and sanitation be accorded the highest priority. A State “must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations”.⁵⁴ Hence, where minimum essential levels are not ensured, the State is, *prima facie*, violating human rights, and it bears the burden of proof to demonstrate that it lacks the capacity to do so.⁵⁵

50. Courts have held in a number of circumstances that minimum essential levels of water and sanitation must be ensured immediately. In circumstances where capacity existed, the Constitutional Court of Colombia held that the authorities had to connect housing to water and sewerage and to ensure a sufficient daily amount of water.⁵⁶ The Supreme Court of India dealt with lack of basic sanitation in more desperate circumstances, 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

⁵¹ See www.tcontas.pt/pt/actos/rel_auditoria/2014/2s/audit-dgic-rel003-2014-2s.pdf.

⁵² Communication GBR 3/2013 at [https://spdb.ohchr.org/hrdb/24th/public_-_AL_UK_29.08.13_\(3.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_AL_UK_29.08.13_(3.2013).pdf); Reply 28/10/2013, available from [https://spdb.ohchr.org/hrdb/24th/UK_28.10.13_\(3.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/UK_28.10.13_(3.2013).pdf); Communication PRT 2/2013 at [https://spdb.ohchr.org/hrdb/24th/public_-_AL_Portugal_21.06.13_\(2.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_AL_Portugal_21.06.13_(2.2013).pdf); Reply 26/09/2013 at [https://spdb.ohchr.org/hrdb/24th/Portugal_26.09.13_\(2.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/Portugal_26.09.13_(2.2013).pdf).

⁵³ E/C.12/2002/11, para. 37(a).

⁵⁴ Committee on Economic, Social and Cultural Rights, general comment No. 3, para. 10.

⁵⁵ Inga Winkler, *The Human Right to Water – Significance, Legal Status and Implications for Water Allocation* (Hart, Oxford, 2012), p. 122.

⁵⁶ Corte Constitucional, Ninth Chamber of Revision, *Hernán Galeano Díaz c/ Empresas Públicas de Medellín ESP y Marco Gómez Otero y Otros c/ Hidropacífico SA ESP y Otros*, 5 August 2010.

municipality to construct a sufficient number of public latrines and to provide water supply and desludging services.⁵⁷

6. Failure to provide adequate services in public facilities and institutions and in emergency situations

51. Where individuals are in a situation where they cannot provide for themselves, States have an obligation to provide services, for instance in places of detention, in schools or other public institutions, and in times of emergency.

52. The Indian Supreme Court ordered schools to provide adequate toilet facilities in schools.⁵⁸ Relying on empirical research showing that “parents do not send their children (particularly girls) to schools”⁵⁹ wherever sanitation facilities are not provided, the Court found that a lack of toilets violated the right to education. Failure to provide water and sanitation to those deprived of liberty has been addressed by courts and international bodies primarily as constituting cruel, inhuman and degrading treatment. 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.⁶⁰ The 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.⁶¹

53. States are obliged to have plans in place to respond to potential situations of emergency or natural disaster. Because individuals are usually unable to provide for themselves in such situations, States have an obligation to provide culturally appropriate services directly.⁶² As State capacity is often limited in such situations, international organizations, non-governmental organizations, donors and other humanitarian organizations play an important role in responding to emergencies. Violations can occur where States and other actors (a) fail to design sustainable, resilient systems; (b) fail to have emergency plans in place; (c) fail to respond promptly to provide essential services to affected populations as the highest priority; (d) fail to allow access to humanitarian service providers, or create onerous barriers to access; or (e) fail to prioritize the most vulnerable populations during times of emergency.

54. While case law for enforcing the obligation to fulfil is still relatively limited, the Special Rapporteur is pleased to witness significant advances in almost all areas – from ensuring minimum essential levels to progressive realization through plans and strategies and scrutinizing budgets. She encourages all stakeholders to further such initiatives to build a more comprehensive body of case law.

⁵⁷ Supreme Court of India, *Municipal Council, Ratlam v. Shri Vardhichand & Others*, SCR (1) 97, 29 July 1980.

⁵⁸ *Environment & Consumer Protection Foundation v. Delhi Administration* 2012 STPL(Web) 543 SC.

⁵⁹ *Ibid.* para. 4.

⁶⁰ High Court (Suva), Fiji, *State v. Senijeli Boila and Pita Nainoka*, HAC032D.04S, 25 October 2004.

⁶¹ Human Rights Committee, communication No. 731/1996, *M. Robinson v. Jamaica* (29 March 2000), in A/55/40 (vol. II), p. 128, paras. 10.1-10.2; Human Rights Committee, Communications Nos. 241 and 242/1987, *F. Birindwa ci Birhashwirwa and E. Tshisekedi wa Malumba v. Zaire* (2 November 1989), in A/55/40 (vol. II); African Commission on Human and Peoples’ Rights, *Institute for Human Rights and Development in Africa v. Angola*, 22 May 2008; European Court of Human Rights, Third Section, *Tadevosyan v. Armenia*, 2 December 2008; European Court of Human Rights, Third Section, *Eugen Gabriel Radu v. Romania*, 13 October 2009; European Court of Human Rights, Fourth Section, *Fedotov v. Russia*, 25 October 2005; Inter-American Commission on Human Rights, *Paul Lallion v. Grenada*, Case 11.765, Report No. 55/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 551 (2002).

⁶² E/C.12/2002/11, para. 22.

D. Violations of the obligation to refrain from discrimination and to ensure substantive equality

55. The prohibition of discrimination is of immediate effect, while positive measures and programmes to ensure substantive equality may require resource allocation and infrastructure development over time. The prohibition of discrimination allows for, and in many circumstances requires, differential treatment and other measures designed to eliminate systemic or structural discrimination. To identify inequalities, and progress towards eliminating them, States must develop monitoring mechanisms and collect disaggregated data.⁶³ Moreover, States are obligated not only to eliminate discrimination resulting from State action or inaction, but also to “immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination” including discrimination by private actors,⁶⁴ which must include measures to combat stigmatization.⁶⁵ Moreover, the Convention on the Rights of Persons with Disabilities explicitly stipulates that denial of reasonable accommodation constitutes discrimination (art. 2).

56. Examples of violations of the right to equality and non-discrimination can be grouped in the following categories:

- (a) Exclusion of groups or individuals from services or facilities, or failure to take measures to achieve substantive equality and address systemic patterns of inequalities;
- (b) Failure to reasonably accommodate persons with disabilities and take into account particular requirements;
- (c) Failure to prevent and combat discrimination and stigmatization in the private sphere, or endorsement of stigmatizing practices through State action;
- (d) Failure to monitor inequalities in access to water and sanitation and to collect disaggregated data for that purpose.

1. Exclusion from facilities or services or failure to address systemic inequalities

57. Inequalities in access to water and sanitation are often due to systemic neglect or exclusion. Courts have successfully adjudicated on discrimination in provision of water, and the requirement to prioritize access by marginalized groups in order to remedy systemic discrimination. In a case in Florida, the court ruled that the municipality could not implement any infrastructure in white majority areas until the African-American majority areas that lacked provision of water were on par with those areas.⁶⁶ The European Committee of Social Rights also ordered remedial action including “a positive obligation of authorities to take such [disproportion] into account and respond accordingly” to improve the situation with regard to housing and water for Roma.⁶⁷ Violations of the rights to water and sanitation of indigenous peoples is evidence of historic patterns of colonialism and

⁶³ Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 41; E/C.12/2002/11, para. 53.

⁶⁴ Committee on Economic, Social and Cultural Rights, general comment No. 20, para. 8.

⁶⁵ A/HRC/21/42, para. 82.

⁶⁶ United States Court of Appeals, Eleventh Circuit, *Dowdell and Others v. City of Apopka, Florida*, 698 F.2d 1181, 28 February 1983.

⁶⁷ European Committee of Social Rights, *European Roma Rights Centre v. Portugal*, Complaint No. 61/2010 (30 June 2011).

systemic discrimination remaining unaddressed.⁶⁸ The Inter-American Court of Human Rights determined that denying an indigenous community access to ancestral lands denied them access to water and sanitation and violated the right to life.⁶⁹

58. While remedies have been provided in the context of discrimination on account of race or minority status, there are fewer examples of such remedies when discrimination is on other grounds, such as property or socio-economic status, including for those living in poverty, those residing in informal settlements, the homeless and similarly marginalized or vulnerable groups. Discrimination on any prohibited grounds is a violation of the rights to water and sanitation, and access to justice must be ensured for the full scope of prohibited discrimination.

2. Failure to provide reasonable accommodation and to meet particular requirements

59. Failure to provide reasonable accommodation for persons with disabilities has far-reaching effects and may amount to violations of the rights to water or sanitation. The Committee on the Rights of Persons with Disabilities raised concerns about water and sanitation service provision not taking into account the needs of persons with disabilities.⁷⁰ The Special Rapporteur is also concerned about the lack of reasonable accommodation in sanitation facilities for children with disabilities in schools, in extreme instances forcing parents to stay at school with their children to allow them to meet their sanitation needs.⁷¹ Moreover, inadequate facilities for menstrual hygiene management have been shown to prevent girls from attending school, as well as creating serious health consequences.⁷² People with health conditions also often require particular protection. The Colombian Constitutional Court found that the disconnection of water services to a woman with chronic kidney failure violated the right to life, and ordered the reinstatement of the service.⁷³

3. Failure to prevent and combat stigmatization and to take measures against discrimination in the private sphere

60. Discriminatory and stigmatizing practices frequently occur in the private sphere. States have an obligation to prevent and combat stigmatization and to protect against human rights abuses in the private sphere. Where States fail to adopt appropriate measures, this may amount to human rights violations. More directly, human rights are violated where States endorse, perpetuate and reinforce discriminatory and stigmatizing practices, for instance through the criminalization of homelessness or employing manual scavengers or sweepers.⁷⁴

61. Examples of violations include (a) lack of protection against denial of access to facilities; (b) lack of protection of health and dignity for sanitation workers; (c) lack of protection from violence when accessing facilities; and (d) lack of protection from harmful practices, in particular in the context of sanitation and menstrual hygiene.

⁶⁸ A/HRC/12/24/Add.1; A/HRC/18/33/Add.2.

⁶⁹ Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v Paraguay*, 17 June 2005.

⁷⁰ See for example CRPD/C/SLV/CO/1, para. 57.

⁷¹ A/HRC/18/33/Add.3, para. 42.

⁷² *Environment & Consumer Protection Foundation Vs. Delhi Administration* 2012 STPL(Web) 543 SC.

⁷³ *Corte Constitucional de Colombia, Flor Enid Jiménez de Correa c/ Empresas Públicas de Medellín*, 17 April 2007, T-270/07.

⁷⁴ A/HRC/21/42, para. 33.

62. People may be deliberately excluded from the use of existing facilities, for instance through societal rules preventing Dalits from using water fountains⁷⁵ or not allowing women and girls or other individuals to use an existing toilet in the household.⁷⁶ Inordinate amounts of time spent by women and girls carrying water have major impacts on access to paid employment and education. Measures to address such practices could seek to alleviate that burden, for instance by making water collection over long distances unnecessary by providing direct access, while challenging the stereotypes which lead to that task being assigned to women.

63. Sanitation workers frequently face serious health risks, stigmatization, violence and exploitation. In India, the Parliament adopted an act requiring that sanitation systems be overhauled so as to eliminate the need for manual scavengers and seeking to eradicate stigma, inter alia by arranging for alternative jobs.⁷⁷ The Supreme Court of India observed that “manual scavengers are considered as untouchables by other mainstream castes and are thrown into a vortex of severe social and economic exploitation”.⁷⁸ It held that the continuation of manual scavenging violated human rights and ordered the State to fully implement the new act and take appropriate action in response to any violations.⁷⁹

64. Women and girls are frequently subjected to unacceptable risks of violence, including sexual violence, in accessing water and sanitation facilities. Their right to personal security may be violated by failures to provide adequate protection from violence, including through appropriate design and placement of facilities with the participation of women.⁸⁰ Many other groups and individuals such as Dalits and lesbian, gay, bisexual, transgender and intersex individuals also face violence in accessing water and sanitation, often linked to deeply entrenched stigmatization.⁸¹

65. Many cultures have certain prescriptions for women’s and girls’ behaviour during menstruation which may amount to harmful traditional and cultural practices, violating not only the right to sanitation but, more broadly, women’s and girls’ human rights and gender equality. In Nepal, the Supreme Court issued an order to eliminate the practice of *chaupadi*, which forces menstruating women and girls to sleep in isolation from the rest of the family, in a hut or shed, with risks to their health and security. The Court declared that the practice was discriminatory and violated women’s rights. It ordered the Government to conduct a study on the impact of the practice, to create awareness and to take measures to eliminate the tradition.⁸²

⁷⁵ Ibid., para. 36.

⁷⁶ See Maggie Black and Ben Fawcett, *The Last Taboo: Opening the Door on the Global Sanitation Crisis*, pp. 84–85.

⁷⁷ “Stringent anti-manual scavenging bill passed”, *The Hindu*, September 8, 2013.

⁷⁸ Supreme Court of India, *Safai Karamchhari Andolan and Ors. v. Union Of India and Ors. (Writ Petition (C) No.583 of 2003)*, March 27, 2014, para. 2.

⁷⁹ Ibid., para. 15.

⁸⁰ Amnesty International, *Risking Rape to Reach a Toilet. Women’s Experiences in the Slums of Nairobi, Kenya* (2010).

⁸¹ A/HRC/21/42, para. 36.

⁸² *Dil Bahadur Bishwakarma v Government of Nepal, Supreme Court of Nepal*, Writ Petition 3303 of 2004, Judgement 2 May 2006; see also Kabita Pandey, “Judicial Education on the Convention on Elimination of Discrimination against Women in Nepal” in *Women’s Human Rights, CEDAW in International, Regional and National Law*, p. 425 (Anne Hellum, Henriette Sinding Aasen, eds., 2013), p. 425; E/C.12/NPL/CO/2, paras. 15 and 34.

4. Failure to monitor inequalities in access to water and sanitation and to collect disaggregated data for that purpose

66. Without collecting data on inequalities, States are unable to identify systemic discrimination and inequalities. The failure to collect data makes it more difficult, if not impossible, to hold States to account for a lack of progress. In the context of disability, article 31 of the Convention on the Rights of Persons with Disabilities explicitly obliges States to collect and disaggregate data to enable them to formulate appropriate policies. There is often a misconception that the collection of disaggregated data would be discriminatory as such. However, the contrary is true: disaggregated data are necessary in order to address inequalities.⁸³ Where States fail to take reasonable measures and to make monitoring part of their planning exercises, they may be violating human rights. In collecting such data, States must put in place appropriate mechanisms to safeguard the privacy and security of individuals and groups and prevent misuse of data. This includes repealing laws that criminalize people because of their identity, for instance on the basis of sexual orientation or gender identity, in order to avoid a particular population group being targeted and abused under the pretext of monitoring. Without such safeguards, being identified as a distinct group may be politically sensitive, reinforce stigma and result in grave risks to individuals and groups.

67. Violations of rights to non-discrimination and equality infuse other rights violations. What has become increasingly clear to the Special Rapporteur is that systemic and widespread denials of access to water and sanitation are first and foremost driven by patterns of discrimination, stigmatization and exclusion. Challenging violations of rights to water and sanitation invariably confronts endemic patterns of inequalities. More efforts are needed, in particular with regard to challenging discrimination faced by persons with disabilities, inequalities based on socioeconomic status, and discrimination and stigmatization deeply entrenched in society.

E. Violations of the obligation to ensure active, free and meaningful participation

68. Article 25 (a) of the International Covenant on Civil and Political Rights provides for the right to participate in public affairs. Participation must be active, free and meaningful. While it is often stressed that participation has significant instrumental value in ensuring more sustainable results, participation is a human right in itself, and non-compliance with the relevant human rights obligations may give rise to violations. Such violations may arise from direct denial of participation as well as indirect, by failure to take reasonable steps to facilitate participation, including by ensuring the right to access to information.

69. Courts have found that denying the right to participation constitutes a violation. The South African Constitutional Court developed the concept of “meaningful engagement” in the *51 Olivia Road* case⁸⁴, 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 taken up by courts in

⁸³ “Guidelines for the CERD-specific document to be submitted by States Parties” (CERD/C/2007/1), para. 11.

⁸⁴ Constitutional Court of South Africa, *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg and others*, CCT 24/07, para. 35.

other countries, for instance in Kenya.⁸⁵ In the *Beja* case, a South African court found that a denial of meaningful engagement and effective community participation in decision-making regarding the design and installation of toilets violated constitutional rights.⁸⁶ The Special Rapporteur recommends that increased attention be paid to the obligation to ensure participation.

F. Violations of extraterritorial obligations

70. Violations of extraterritorial obligations are a growing concern in relation to the rights to water and sanitation, for instance in the context of transboundary water resources, the activities of transnational corporations, or donor activities. The Maastricht Principles on Extraterritorial Obligations, adopted by 40 experts to clarify the extraterritorial obligations of States on the basis of existing international law, affirm that the obligations to respect, protect and fulfil extend extraterritorially and that States must ensure the right to a remedy.⁸⁷ Human rights obligations also apply to actions of States as members of international organizations.⁸⁸ The International Law Commission stated that a State member of an international organization would be breaking international law if it caused that organization to commit an act that would be illegal under international law for a State to carry out itself.⁸⁹

71. Extraterritorial violations may occur, for example, when (a) States fail to regulate activities of companies under their jurisdiction that cause violations abroad; (b) States contribute to human rights violations in the context of development cooperation activities, including by imposing conditions that undermine rights; (c) States adopt sanctions that negatively affect the realization of human rights in other countries; (d) States fail to respect human rights or restrict the ability of others to comply with their human rights obligations in the process of elaborating, applying and interpreting international trade and investment agreements; (e) States fail to prevent harm resulting from greenhouse gas emissions which contribute to climate change that have negative impacts on the realization of human rights;⁹⁰ and (f) water contamination or use causes human rights violations in a neighbouring country.

72. Treaty bodies have increasingly addressed violations of extraterritorial obligations. The Human Rights Committee has called for the regulation and monitoring of corporate activities abroad that may violate human rights and for measures to ensure access to remedies in the event of such violations.⁹¹ Both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have expressed concern about the denial by Israel of access to water and sanitation and about the destruction of infrastructure

⁸⁵ High Court of Embu, Kenya, *Ibrahim Sangor Osman and Others v. the Hon. Minister Of State for Provincial Administration & Internal Security and Others*, Constitutional Petition No. 2 of 2011 (3 November 2011).

⁸⁶ The High Court of South Africa (Western Cape High Court, Cape Town), *Beja and Others v. Premier of the Western Cape and Others*, (21332/10), 29 April 2011, para. 146 and note 38.

⁸⁷ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2012), Principle 37.

⁸⁸ *Ibid.*, Principle 15.

⁸⁹ International Law Commission, "Draft Articles on Responsibility of International Organizations with Commentaries" in Report of the International Law Commission on the work of its 63rd session (2011) (A/66/10), art. 61, para. 1.

⁹⁰ See A/HRC/10/61, para. 29.

⁹¹ CCPR/C/DEU/CO/6, para. 16.

in the Occupied Palestinian Territory.⁹² The Special Rapporteur recommends that increased attention be paid to violations of extraterritorial obligations.

IV. Access to justice

73. The purpose of a more focused consideration of violations of the rights to water and sanitation is to promote more concerted action to ensure access to justice. The Committee on Economic, Social and Cultural Rights points out that “all victims of violations of the right to water should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition”.⁹³

74. The Special Rapporteur emphasizes a remedial rather than punitive approach. While it is important in some cases to hold those responsible for violations accountable for their actions, the general focus should be on what needs to be done to remedy violations and on who is responsible for remedying violations, rather than on who is to blame. The Special Rapporteur emphasizes that initiatives to better identify and remedy violations of human rights should not be seen as adversarial or undermining of constructive dialogue. The rights and interests of rights holders must be the focus of remedying violations. As such, access to justice for violations of the rights to water and sanitation can serve to equalize power dynamics.

75. International mechanisms for identifying, adjudicating and remedying violations offer important opportunities for developing clearer understanding of violations and appropriate remedies. Inquiry mechanisms allow the treaty bodies to act at their own initiative and offer an innovative tool to address systemic violations of rights and situations where victims are unable to seek remedies. However, international bodies can only intervene in a few cases, when national remedies have been exhausted or are not available or effective, and the record of implementation of their decisions is not strong. Most of the work in identifying and remedying violations must be accomplished by domestic institutions. It is at the domestic level that laws and policies can be better influenced through civil society participation and be more context-specific, and where there is a better record of implementation of judicial decisions.

76. While courts in many jurisdictions are amenable to litigation challenging human rights violations, access to justice should not generally rely on litigation. States must ensure that water and sanitation services are provided within a context of clear rules. They must adopt measures to prevent human rights violations, for instance through carrying out human rights impact assessments. Where violations are being alleged, dispute and complaint mechanisms should be available with the aim of resolving issues quickly and efficiently. Where human rights violations are not adequately addressed, individuals must be able to proceed to court. Being able to turn to the courts – as a last resort – is an essential component of ensuring access to justice. Violations of the rights to water and sanitation have generally been dealt with more effectively in States where constitutional and legislative protections guarantee that those rights are directly or indirectly justiciable. In States where this is not yet the case, courts and governments should be guided by international developments and recognize the rights to water and sanitation as justiciable. Governments should promote the use of international law in interpreting domestic law.

⁹² CCPR/C/ISR/CO/3, para. 18; E/C.12/ISR/CO/3, para. 29.

⁹³ Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002) on the right to water, para. 55. See also Human Rights Council resolution 25/1, para. 5.

77. Violations of the human rights to water and sanitation are often complex and interrelated. For instance, victims of violations of the obligations to respect rights, such as those living in informal settlements, are often in precarious situations caused by violations of the obligation to fulfil rights. Many violations can be traced to unequal power relationships and systemically entrenched patterns of discrimination.

78. Given this context, the notion of restorative remedies for violations, whereby the status quo ante is restored, may fall short of addressing the underlying violations at the structural or systemic level. Consequently, transformative remedies, which aim not only to correct direct violations but also the underlying structural conditions, are required in order to provide comprehensive remedies to structural and systemic violations. Examples of such transformative remedies are participatory structural injunctions that require the State to adopt a plan to correct a structural violation with the meaningful participation of beneficiaries and report back to the court on progress made. This allows courts to supervise progress and make ancillary orders to ensure that both the process and outcomes are consistent with the rights to water and sanitation. As such, transformative remedies can move claimants further towards the full enjoyment of human rights.⁹⁴ Without such remedies, there is a risk that access to justice will be limited to those people who are in a position to seek remedies for themselves and will preclude claims in the public interest. States may need to ensure that their constitutional and legislative frameworks clearly give their judicial systems the responsibility to provide systemic remedies and to accept complaints in the public interest.

79. The Special Rapporteur has observed that it is too often forgotten that the defining role and purpose of courts and others involved in adjudicating human rights claims is to ensure that rights holders are afforded the full benefit of rights. If few or no claims are being heard addressing the most critical, wide-ranging and complex violations of the rights to water and sanitation, then this suggests that the justice system must be transformed. Many judicial systems give preference to claims based on negative obligations over those based on positive obligations, claims to immediately enforceable remedies over longer-term transformative ones, and claims affecting individuals or small groups over claims that require systemic changes. This preference can no longer be permitted to deny victims of human rights violations the remedies to which they are entitled. The consequences of denying access to justice for the most egregious violations are too severe to be contemplated. Courts, human rights institutions, governments and advocates must redefine justice and the role of courts in relation to what human rights require and ensure access to effective remedies.

V. Conclusions and recommendations

80. **The Special Rapporteur is encouraged to see advances in identifying, preventing and remedying violations of the human rights to water and sanitation. Nevertheless, the extent of continuing violations constitutes a major human rights crisis. It is imperative for States to implement review and adjudication procedures to identify violations, with the full participation of stakeholders, and to prioritize action to address violations. The Special Rapporteur has found that, while more attention needs to be paid to violations of the rights to water and sanitation in general, progress has not been equal across the full range of obligations or for all groups of rights holders. Access to justice for violations at a more structural or systemic level,**

⁹⁴ Sandy Liebenberg, *Socio-economic rights: adjudication under a transformative constitution* (Juta, 2010), pp. 424–438.

particularly in relation to the obligation to progressively realize the rights to water and sanitation, to avoid retrogressive measures and to achieve substantive equality, has lagged behind in comparison with access to justice for violations linked to the obligations to respect and to protect. Violations related to inequalities experienced by certain groups, such as people living in poverty, informal settlements, or rural and remote communities, or homeless people, have remained largely unchallenged in courts, despite their severity.

81. Furthermore, violations of the right to sanitation in general have not received the attention they deserve. Victims of violations of the right to sanitation are among the most stigmatized and marginalized in society, and there remain taboos preventing an open discussion about the indignities linked to unhygienic conditions. The Special Rapporteur encourages all actors to frame violations related to water and sanitation more explicitly as violations of the human rights to water and sanitation, in order to draw attention to the particularities of such violations and the deprivation and indignity they often cause.

82. To emphasize a comprehensive understanding of violations of the human rights to water and sanitation resulting from failure to meet any human rights obligation, the Special Rapporteur stresses that:

- (a) Violations may result from action or failure to act;
- (b) Violations may be deliberate and intentional or they may be unintended consequences of policies, programmes and other measures;
- (c) Violations may relate to failures to provide minimum essential levels or from failures to progressively realize human rights commensurate with maximum available resources;
- (d) Violations may result from retrogressive measures or from failures to make reasonable progress;
- (e) Violations may result from immediate deprivations or from failures to implement comprehensive plans and strategies to ensure full realization of rights in the long term;
- (f) Violations may be of an individual or of a structural and systemic nature;
- (g) Violations may result from direct action by the State or from the failure to regulate non-State actors;
- (h) Violations of the right to non-discrimination may result from de jure or de facto discrimination;
- (i) Violations of the obligation to achieve substantive equality may result from the failure to take positive measures necessary to address pre-existing inequality or to provide reasonable accommodation;
- (j) Violations may result from the failure to meet substantive or procedural obligations such as ensuring participation;
- (k) Violations may occur as a result of State conduct that has effects within a State's territory, or extraterritorially;
- (l) Violations may result from failure to ensure access to remedies.

83. The Special Rapporteur therefore focuses her recommendations on how to more effectively ensure that violations are identified, prevented and remedied, with an

emphasis on those areas which have been most neglected. She recommends that States:

- (a) Recognize the full range of violations of the rights to water and sanitation and ensure access to justice for all such violations;
- (b) Ensure that a comprehensive human rights framework is embedded in legislation, policy and practice with the aim of both preventing and remedying violations;
- (c) Ensure that international law and jurisprudence on the rights to water and sanitation are used in interpreting and applying domestic legislation, regulations and policies;
- (d) Ensure that the rights to water and sanitation are taken account of in administrative decisions interpreting legislation and exercising any discretion conferred by relevant legislation;
- (e) Raise awareness on economic, social and cultural rights and the human rights to water and sanitation in particular so that individuals know their rights and will be able to claim them in the case of violations;
- (f) Ensure that victims of violations are entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition, and that the legislative framework requires courts to provide both restorative and transformative remedies;
- (g) Ensure that judges, prosecutors and decision-makers have adequate human rights education and training, including on economic, social and cultural rights, by making training on those rights part of law school curricula and providing ongoing training;
- (h) Ensure that individuals and groups do not face barriers in access to justice, whether economic, physical, linguistic, cultural or other, and take measures to overcome such barriers, including by means of legal aid;
- (i) Ensure that national human rights institutions and other relevant bodies have an explicit mandate to: (i) identify and address violations of the rights to water and sanitation, adopting a comprehensive approach; (ii) receive complaints of violations of rights to water and sanitation; and (iii) require remedial and transformative action on violations of the rights to water and sanitation;
- (j) Provide comprehensive information in their periodic reports to treaty-monitoring bodies, the universal periodic review process and relevant regional mechanisms for the prevention of violations of the human rights to water and sanitation;
- (k) Ratify or otherwise accept all optional communications procedures, including the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights , the Optional Protocols to the International Covenant on Civil and Political Rights , the Optional Protocols to the Convention on the Rights of the Child, the Optional Protocol to the Convention on the Elimination of Discrimination against Women , and the Optional Protocol to the Convention on the Rights of Persons with Disabilities, including their inquiry mechanisms;
- (l) Ensure that civil society organizations working to address violations of the rights to water and sanitation are properly resourced, have access to relevant information and can participate in decision-making processes.

84. The Special Rapporteur recommends that the United Nations treaty-monitoring bodies and regional human rights mechanisms:

(a) Request that States provide information in their periodic reports on how they address the comprehensive range of violations of the rights to water and sanitation are addressed;

(b) Ensure that complaints procedures are applied so as to ensure access to justice, including both restorative and transformative remedies, for the comprehensive range of violations of the rights to water and sanitation,

85. The Special Rapporteur recommends that non-State actors comply with their responsibility to respect human rights, that they be held accountable for human rights abuses, allow for an independent investigation into allegations, establish complaint mechanisms and proactively engage with the State to detect, and find solutions to address existing and potential human rights abuses .

86. The Special Rapporteur encourages civil society organizations to support (strategic) litigation, in particular related to systemic and structural violations of the rights to water and sanitation linked to the obligations to progressively realize human rights, to use maximum available resources, to avoid unjustifiable retrogression, and to achieve substantive equality, including through preventing and combating stigmatization.

Annex

[English only]

Robust indicators are essential tools for revealing possible violations, assessments of available resources, and **implementing and monitoring targeted, evidence-based and time-bound policies and programmes**. The Special Rapporteur wishes to draw attention to the table of illustrative structural, process and outcome indicators that were identified in collaboration with the Office of the High Commissioner for Human Rights. She recommends that States develop and use contextually relevant indicators through participatory efforts and guided by the table of illustrative indicators. **The list is work in progress** and feedback is welcomed and may be submitted to the Human Rights Indicators Unit (hrindicators@ohchr.org) at the Office of the High Commissioner for Human Rights.

Table of illustrative indicators on the rights to water and sanitation (OHCHR draft 14/05/2014)

	Safety and Acceptability	Sufficiency and Continuity	Affordability	Physical Accessibility
Structural	<ul style="list-style-type: none"> • International human rights treaties relevant to the rights to water and sanitation ratified by the State • Date of entry into force and coverage of the rights to water and sanitation in the constitution or other form of superior law • Date of entry into force and coverage of law requiring service providers to ensure that all the persons in their service area have access to adequate water and sanitation, including access to information on water and sanitation issues • Time frame and coverage of national action plan(s) for universal access to water and sanitation, including within or in the immediate vicinity, of each household, health centre, educational institution and workplace, and for all population groups (e.g. informal settlements, homeless persons, indigenous peoples, nomadic and traveller communities, refugees, detainees, persons with disabilities) • Time frame and coverage of response plan of action during armed conflict, emergency situations and natural disasters ensuring accessibility to water and sanitation 	<ul style="list-style-type: none"> • Number of minimum litres of water per person, per day sufficient for personal and domestic use stipulated in State's regulations • Time frame and coverage of plan of action(s) on operation and maintenance of water and sanitation facilities 	<ul style="list-style-type: none"> • Date and entry into force and coverage of national action plan on affordability of water and sanitation services (e.g. pricing policies, technology choice, management systems, subsidies, cash transfers, or flexible payment schemes to low-income or disadvantaged households) 	<ul style="list-style-type: none"> • Time frame and coverage of national plan of action for physical accessibility to safe drinking water supply and to safe, secure and hygienic sanitation facilities (e.g. providing access to victims of natural disasters, and persons living in disaster-prone or arid areas or on small islands; removing architectural and informational barriers to a full range of disabilities)

Process	<ul style="list-style-type: none"> • Government expenditure on water and sanitation as a proportion of gross national income or total public expenditure • Net official development assistance for water and sanitation received or provided as a proportion of public expenditure on water and sanitation or gross national income • Proportion of complaints received on the rights to water and sanitation investigated and adjudicated by courts, the national human rights institution, human rights ombudsperson or other relevant mechanisms and the proportion of these responded to effectively by the Government • Proportion of targeted population reporting satisfaction with how involved they feel in decision-making affecting their access to adequate water and sanitation 	<ul style="list-style-type: none"> • Proportion of the water and sanitation budget spent on operating and maintenance costs • Proportion of total water devoted to household consumption compared to proportion of total water devoted to other uses 	<ul style="list-style-type: none"> • Proportion of households disconnected from the water supply due to bills not met within X working days • Proportion of households' requests for financial support to pay their water bill or sanitation costs met during the period 	<ul style="list-style-type: none"> • Proportion of schools, health centres, prisons and other institutions with access to safe drinking water, sanitation and hand-washing facilities (e.g. with facilities for persons with disabilities, older persons) • Proportion of sector performance data or reports publicly available according to plans
Outcome	<ul style="list-style-type: none"> • Proportion of population using drinking water which conforms to bacteriological standards (e.g. E. coli, arsenic, nitrate)* • Number of recorded deaths and incidence of disease (e.g. diarrhoea, cholera, arsenic) due to adulterated water source or lack of adequate sanitation* • Proportion of women and adolescent girls able to manage menstruation hygienically and with dignity (e.g. privacy for changing materials and for washing body, access to water and soap, disposal facilities) 	<ul style="list-style-type: none"> • Proportion of households who experienced disruptions in water supply more than X hours per year • Proportion of population using sanitation facilities with safely managed waste water and excreta (e.g. waste water related excreta transported through sewer network, septic tanks or latrine pit to treatment facility or collection site) 	<ul style="list-style-type: none"> • Proportion of households spending more than X % of expenditure or income on water and sanitation 	<ul style="list-style-type: none"> • Proportion of the population using improved drinking water sources and sanitation facilities* • Proportion of households in which the toilet or latrine is used by all members of household, (including men and women, boys and girls, older persons, persons with disabilities) whenever needed • Proportion of households taking more than X minutes on round trip time to go to water source, queuing time, collect the water, and come back to the household*

- Proportion of women or girls collecting water or practising open defecation outside immediate vicinity of the home, especially at night*
- Gini coefficient of household (and other relevant users) water consumption (number of litres per year)
- Gap (in percentage points) or ratio between the rates of coverage of sustainable access to safe drinking water source and sanitation facilities for the best-off group(s) and the worst-off group(s)

All indicators should be disaggregated by prohibited grounds of discrimination, as applicable and reflected in metadata sheets

* Millennium Development Goals or WHO/UNICEF Joint Monitoring Programme (JMP) for Water Supply and Sanitation related indicators.