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**PROMOCIÓN Y PROTECCIÓN DE TODOS LOS DERECHOS HUMANOS,
CIVILES, POLÍTICOS, ECONÓMICOS, SOCIALES Y CULTURALES,
INCLUIDO EL DERECHO AL DESARROLLO**

Información presentada por el Centro de Derechos Humanos de Noruega^{*}

Nota de la Secretaría

La Secretaría del Consejo de Derechos Humanos transmite adjunta la comunicación presentada por el Centro de Derechos Humanos de Noruega^{**}, que se reproduce a continuación de conformidad con el artículo 7 b) del reglamento que figura en el anexo de la resolución 5/1 del Consejo, según el cual la participación de las instituciones nacionales de derechos humanos se basará en las disposiciones y prácticas convenidas por la Comisión de Derechos Humanos, incluida la resolución 2005/74, de 20 de abril de 2005.

^{*} Institución nacional de derechos humanos acreditada como institución de categoría "A" por el Comité Internacional de Coordinación de las Instituciones Nacionales para la Promoción y Protección de los Derechos Humanos.

^{**} El texto se reproduce en el anexo como se recibió, en el idioma en que se presentó solamente.

Anexo

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**Working Paper, Socio-Economic Rights Programme
Norwegian Centre for Human Rights
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As we gazed in horror at it, we saw drains and sewers emptying their filthy contents into it; we saw a whole tier of doorless privies in the open road, open to men and women, built over it; we heard bucket after bucket of filth splash into it ... we asked if they did drink the water? The answer was, "They were obliged to drink the ditch, without it, they could beg a pailful or thief a pailful of water".

Henry Mayhew, *Morning Chronicle*, 24 September 1849

1. INTRODUCTION

Sanitation seems an unlikely bedfellow in the company of human rights and international law. The removal and treatment of human excreta is generally associated with the health sector, water utilities and general improvement of living standards.¹ Articulating a human right to sanitation naturally raises fears of human rights inflation and questions over whether recognition of another social and economic right would have any particular instrumental benefit.² The scale and impact of the 'global sanitation crisis' has nonetheless spurred a growing chorus of voices calling for recognition of sanitation as a human right. So much so that the UN Human Rights Council in 2006 set in motion a process to clarify human rights obligations related to sanitation as well as the more widely recognised right to water.³

1.1 Right to sanitation and development discourse

This drive for a human right to sanitation has principally come from inter-governmental and non-governmental *development* organisations.⁴ It is believed that promulgating sanitation in human rights terms, seeing the issue as one of 'justice not charity', can help in calling attention to the

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¹ As set out in Section 3, we define sanitation as access to, and use of, excreta and wastewater facilities and services that ensure privacy and dignity, ensuring a clean and healthy living environment for all.

² These question were raised for example some years earlier with the right to water: see S. Tully, 'A Human Right to Access Water? A Critique of General Comment No. 15', *Netherlands Quarterly of Human Rights*, Vol. 23, No. 1, 2005, pp. 35-63.

³ Human Rights Council, Decision 2/104, *Human rights and access to water*, 27 November 2006.

⁴ This has included for example the World Health Organisation, UN-Habitat and the NGO, Wateraid. The small independent human rights organisation Centre on Housing Rights and Evictions has worked with all these organisations on the issue.

plight of the estimated 2.5 billion people without access to adequate sanitation. The global toll in human development terms is significant. The absence of sanitation is responsible for pervasive disease and death, chronic and inescapable poverty and the creation of barriers to education and productive labour.⁵ These organisations have also highlighted additional instrumental benefits of a ‘human rights approach to sanitation’. This includes “holding to account those responsible” for facilitating access to sanitation, promoting “information sharing and genuine participation in decision-making”, giving attention to “vulnerable and marginalised groups”, providing “minimum” universal requirements and creating rights-friendly framework for reforming public policies and resource allocation.⁶

The rights-based approach is not alone in the sanitation field; the target-based Millennium Development Goals (MDGs) is currently ascendant in development thinking. An international target to “halve the proportion of people living without access to basic sanitation by 2015” was set in 2002 at the World Summit on Sustainable Development. The target has certainly heightened awareness on the issue but of all the MDG targets, it remains one of the most off-track.⁷ In Indonesia’s MDG Report for example, the Government acknowledged that sanitation was a low priority and the World Bank estimates that less than 1 per cent of the investment in sanitation needed to reach the sanitation target in Indonesia over the last years has been made.⁸ The poor progress on the target, amongst others, has strengthened calls for increasing a rights focus in the strategies for realisation of the MDG targets.⁹ Some supporters of the MDGs acknowledged early on that the MDGs framework was deficient in this regard.¹⁰

Some emphasise, however, that human rights approaches go further than merely adding extra tools to the development toolbox. A contextualised human rights based approach can also shed light on the underlying causes of development problems; if development is understood as fundamentally a political process then its success remains contingent on the balance of power relations:

Instead of focusing on creating an inventory of public goods or services that must be provided and then seeking to fill the deficit via foreign aid, the rights-based approach focuses on trying to identify the critical exclusionary mechanisms. What

⁵ COHRE, UN-HABITAT, WaterAid and SDC, *Sanitation: A human rights Imperative*, Geneva, 2008, p. 1, available at http://www.cohre.org/store/attachments/RWP%20-%20081229_sanitation_eng_web.pdf.

⁶ Ibid. p. 5.

⁷ United Nations, *The Millennium Development Goals Report* (New York: UN, 2008). At current rates of progress it will be missed globally by half a decade. In sub-Saharan Africa the MDG target will not be met until 2076.

⁸ *Economic impacts of Sanitation in Indonesia: A five country study conducted in Cambodia, Indonesia, Lao PDR, the Philippines and Vietnam under the Economics of Sanitation Initiative*, Research Report, August 2008, World Bank, p. 16.

⁹ See for example, OHCHR, *Claiming the MDGs: A Human Rights Approach* (Geneva: OHCHR, 2008); *Pathway to Gender Equality: CEDAW, Beijing and the MDGs* (New York: UNIFEM, 2004).

¹⁰ See R. Black and H. White, *Targeting Development: Critical Perspectives on the Millennium Development Goals* (London: Routledge, 2004).

are those systemic obstacles that are standing in the way of people's ability to access opportunity and improve their own lives?¹¹

It is notable that the key barrier in first emergence of 'modern' public sanitation systems was political. In 1849, Dr. John Snow identified that a cholera outbreak in London was caused by the seepage of sewerage pit into groundwater used for a local water pump at Albion Terrace, and not from contagion as was commonly believed.¹² The response was not only denialism from the medical community but resistance from the political class, hostile to the conclusion that the solution lay in significant State interference. The water pump was closed and the Public Health Act was enacted in 1852 but it took many years of campaigning, particularly by Edwin Chadwick, before the State engaged in establishing household water-borne sanitation systems.

1.2 Individual dignity discourse

The above justifications for recognising the right to sanitation are largely based on broad instrumental grounds; others have also emphasised that fundamental issues of individual human dignity and autonomy are at stake. The health implications of lack of sanitation are of course profound at the individual level; unclean water is responsible for the deaths of approximately 5000 children a day and the UNDP notes that diarrhoea has "killed more children than all the people lost to armed conflict since the Second World War".¹³ On the other hand, others have echoed issues of self-worth, privacy and equality when discussing the issue. The recently appointed UN Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation has stated that "being forced to defecate in public is an affront to human dignity".¹⁴

The discourse on personal dignity issues associated with sanitation appears to avoid an absolute minimum, however, and is contingent on social and economic factors, including the respective sanitation technologies available to others in a society. For example, in South Africa, the bucket system for sanitation in many black townships has endured since the apartheid era despite current government targets for its eradication. Statements by politicians on the targets have generally emphasised the personal dignity dimension: The President of South Africa stated that they were on course to "put an end to this *dehumanising* system" former Minister for Water Affairs and Forestry has acknowledged that the "It can only be described as *demeaning* to those who have been required to use this system" (emphasis added).¹⁵ The personal dignity dimension also has health consequences. UNICEF has noted the problems women agricultural workers face

¹¹ R. Offenheiser and S. Holcombe, 'Challenges and opportunities of Implementing a Rights-Based Approach to Development, an Oxfam Perspective', Paper presented at the Northern Relief and Development Conference, July 2-4, 2001, Balliol College, Oxford UK.

¹² *On the Mode of Communication of Cholera* (London: John Churchill, 1855).

¹³ *Human Development Report 1993, Millennium Development Goals: A compact among nations to end human poverty* (New York: Oxford University Press, 2003), p. 9.

¹⁴ Investing in sanitation is investing in human dignity, says UN expert, Press Release, 18 November 2008, available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/EDE19327FC1CFB1EC125750500585054?opendocument>.

¹⁵ Lindewe Hendriks.

(including damage to internal organs as they wait to defecate at nights in privacy).¹⁶ Girl children are also less likely to attend school if sanitation facilities are not available or are not separated by gender.

1.3 A right in international law?

This paper sets out to examine whether we can consider sanitation a right in international law, at least in international treaty law, and what its content might be. It is partly motivated by the OHCHR report which declined to come to a conclusive finding on the question but stated, with a mixture of positivism and normativism, that, “it is now time to consider access to safe drinking water and sanitation as a human right”.¹⁷ One of the reasons for this hesitancy was the current lack of clarity over the actual scope and content of the term ‘sanitation’ and associated adjectives such as ‘adequate’, ‘basic’ and ‘acceptable’.¹⁸ The report noted that detailed practical advice was required;¹⁹ and the formal task of clarification was given to the new UN Independent Expert on Human Rights Obligations related to Access to Safe Drinking Water and Sanitation.²⁰

However, one is conscious that the existentialist mechanics of identifying human rights is bounded neither by the field of international law or a particular methodology. Anne-Marie Benedicte states for instance that

‘natural scholars’ conceive of human rights as given; ‘deliberative scholars’ as agreed; ‘protest scholars’ as fought for; and ‘discourse scholars’ as talked about. The position of each school in regard to the origin, universality, possible realization, and legal embodiment of human rights is reviewed, as well as their faith, or lack of, in human rights. Quotations from academic texts illustrate how the four-school model cuts across the academic disciplines of philosophy, politics, law and anthropology (in a list which could be expanded).

¹⁶ UNICEF 2001.

¹⁷ Ibid., para. 66.

¹⁸ Ibid., paras. 18-19. In this regard, the OHCHR was taking into account a submission which pointed to the differences between the right to water and the right to sanitation and the need for clearer definition of the content of the right to sanitation: Aquafed, ‘Practitioner’s views on the right to water’, April 2007, s. 4.

¹⁹ Report of the United Nations High Commissioner for Human Rights 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, U.N. Doc. A/HRC/6/3, 16 August 2007, paras. 66 -67.

²⁰ Human Rights Council, *Human rights and access to safe drinking water and sanitation*, U.N. Doc. A/HRC/7/L.16, 20 March 2008. Catarina de Albuquerque was appointed in September 2008 as the Expert and is tasked with the following under the resolution: (a) To develop a dialogue with Governments and other actors to “identify, promote and exchange views on best practices related to access to safe drinking water and sanitation, and, in that regard, to prepare a compendium of best practices”;

(b) Undertake 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”;

(c) Make recommendations that could “help the realization of the Millennium Development Goals, in particular of Goal 7”; and

(d) Apply a “gender perspective, including through the identification of gender-specific vulnerabilities”;

We have already noted above some of the emerging discourse around the right to sanitation and there remains portentous space for a deeper treatment of the right to sanitation from different disciplinary and methodological perspectives. Taking a wide view is particularly important in the current international context where the UN Human Rights Council is essentially empowered to develop international human rights law outside the current boundaries. This paper will however largely be constricted to the legal questions but one needs to reach into other disciplines and approaches at times in order to try and resolve some of the more difficult questions thrown up by the subject.

2. AN INTERNATIONAL LEGAL BASIS FOR THE RIGHT TO SANITATION

2.1 An element of other rights

A range of international human rights and humanitarian law instruments explicitly protect and promote access to sanitation. Article 14(2)8h) of the Convention on the Elimination of All Forms of Discrimination against Women explicitly obliges States parties to ensure that women in rural areas have the right to “enjoy adequate living conditions, particularly in relation to housing, *sanitation*, electricity and water supply, transport and communications”. Under the Convention on the Rights of the Child, States parties are to ensure that all segments of society “are informed, have access to education and are supported in the use of basic knowledge of ... hygiene and *environmental sanitation*.”

Under Geneva Convention (III) relative to the Treatment of Prisoners of War, 1949, occupying powers are “bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics” and the article continues to specify in some detail the type of measures.²¹ The same treatment is required in relation to civilian internees under Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War.²² Water resources and infrastructure, which would arguably include sewage treatment plants and other sanitation facilities, must also be protected during armed conflict.²³

A number of social rights have also been interpreted by UN human rights treaty bodies to include *access* to sanitation. According to the Committee on Economic, Social and Cultural Rights (CESCR Committee), the right to housing includes facilities for “sanitation and washing facilities” and “site drainage”.²⁴ With regard to the right to health, the same Committee listed

²¹ “Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them. Also, apart from the baths and showers with which the camps shall be furnished, prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose.” (Article 29).

²² Article 89.

²³ See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, art 54; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, art 14.

²⁴ Committee on Economic, Social and Cultural Rights, *General Comment 4, The right to adequate housing*, (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), para. 8(b).

sanitation as one of the underlying determinants of health, and thus part of the right to health, on the basis of the drafting history of the Covenant and wide wording of the provision.²⁵ Sanitation is mentioned a number of times in the General Comment No. 14 on the Right to Health, particularly in the context of the availability, quality and accessibility elements of the right to health.

Sanitation was given equal attention in the CESCR Committee's General Comment No. 15 although it was still criticised as paltry by some experts at the Day of General Discussion that preceded its adoption.²⁶ The content of the right to water is said to include water for personal hygiene and sanitation and the Committee was anxious to emphasise that access to sanitation was both "fundamental for human dignity and privacy" and a "principal mechanisms for protecting the quality of drinking water supplies and resources".²⁷ The effective provision of sanitation was articulated as a clear State responsibility: "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."

This interplay between sanitation and various social rights is particularly visible in national jurisprudence. It is not well known that the first Indian public interest litigation on social rights case concerned sanitation. In the 1980 case of *Municipal Council, Ratlam v. Shri Vardhichand & Others*, the Supreme Court of India found that the failure of a municipality to provide toilets for informal settlements and drainage not only violated the Municipality Act but threatened human health and implicated human rights due to the assault on decency and dignity.²⁸ In the first reported cases that invoked the 2002 General Comment No. 15 on Right to Water, sanitation was at the forefront. Provincial and municipal authorities in Argentina were found to have violated the right to health and right to water by failing to prevent pollution of communal water sources, with the culprit being an under-maintained and over-stretched sewer-treatment plant. The Court ordered that:

[T]he municipality of Córdoba adopt all of the measures necessary relative to the functioning of the [facility], in order to minimise the environmental impact caused by it, until a permanent solution can be attained with respect to its functioning; and that the Provincial State assure the [plaintiffs] a provision of 200 daily litres of safe drinking water, until the appropriate public works be carried out to ensure the full access to the public water service, as per decree 529/94.

²⁵ Committee on Economic, Social and Cultural Rights, *General Comment 14, The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), para 4.

²⁶ See in particular comment by Audrey Chapman.

²⁷ Committee on Economic, Social and Cultural Rights, *General Comment 15, The right to water* (Twenty-ninth session, 2002), U.N. Doc. E/C.12/2002/11 (2003), para 29.

²⁸ (1981) SCR (1) 97; also available at: <http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=4495>. I am grateful for Justice Krishna Iyer to pointing out this fact to me.

2.2 Independent human right?

However, it is increasingly being asked whether sanitation might be better understood as a so-called freestanding or independent human right. The question seems reasonable in that virtually all governments have recognised in a least one political declaration that sanitation is one of the rights under the umbrella of the right to an adequate standard of living and the Office of the High Commissioner for Human Rights has been asked by the UN Human Rights Council to tackle this question as discussed in the Introduction.

On one hand, such a question borders on the semantic. If access to sanitation is an essential element of the right to an adequate standard of living or the right to health, is it so grand a step to speak of a right to sanitation? Craven notes that the European Court of Human Rights essentially came to accept that ‘access to a court’ can be articulated in ‘rights language’ as part of a right to fair trial on the basis of similar reasoning:²⁹

It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court.³⁰

On the other hand, such questions can excite controversy.³¹ The United States and Canada were particularly alarmed for example at the above-mentioned General Comment No. 15 on the Right to Water.³² In this document, the CESCR Committee found that:

Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living “including adequate food, clothing and housing”. The use of the word “including” indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.

²⁹ Matthew Craven, ‘Some Thoughts on the Emergent Right to Water’ in Eibe Riedel and Peter Rothen (eds), *The Human Right to Water* (Berlin: Berliner WissenschaftsVerlag, 2006), pp. 35-46, at 41.

³⁰ *Golder v. United Kingdom*, Judgment, Series A, No. 18 (1975) para. 35.

³¹ For example, see Stephen Tully, ‘A Human Right to Access Water? A Critique of General Comment No. 15’ *Netherlands Quarterly of Human Rights*, Vol. 23 (2005) pp. 35-63; Michael Dennis and David Stewart, ‘Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?’, *American Journal of International Law*, Vol. 98 (2004) pp. 462-515. See the response and debate: Malcolm Langford, ‘Ambition that overleaps itself? A Response to Stephen Tully’s ‘Critique’ of the General Comment on the Right to Water’ (2006) 26 *Netherlands Quarterly of Human Rights* 433, 433-459; Stephen Tully, ‘Flighty Purposes and Deeds: a Rejoinder to Malcolm Langford’ (2006) 26 *Netherlands Quarterly of Human Rights* 461, 461-472; Malcolm Langford, ‘Expectation of Plenty: response to Stephen Tully’ (2006) 26 *Netherlands Quarterly of Human Rights* 473, 473-479.

³² See, for example, Explanation of Vote, Statement Delivered by Joel Daniels, U.S. Delegation to the 61th Commission on Human Rights, 15 April 2005 (on file with author).

In 2003, the Canadian representative to the Human Rights Commission responded in the Human Rights Commission as follows (and interestingly thought that this General Comment also recognised a right to sanitation):

While accepting that governments owed a responsibility to their own people to provide access to a clean drinking water supply and sanitation, it did not agree that there was a “right” to drinking water and sanitation owed between states.³³

The debate in this area is also clouded though by a lack of exactitude. The question is often framed as whether the right to water or a right to sanitation should be recognised as ‘independent’ or ‘free-standing’ right.³⁴ This can imply that a human rights treaty body or the Human Rights Council is faced with the question of *creating* a new human right. This is not the approach of at least the CESCR Committee, although the Human Rights Council certainly has the mandate to expand the human rights corpus. The CESCR uses a language of derivation or what Craven calls ‘subordinated rights’. For instance, in the opening paragraph of General Comment No. 4 on the Right to Adequate Housing, the Committee states that the right to adequate housing is “derived from the right to an adequate standard of living”.

So, is there a human right to sanitation? The international recognition of right to sanitation as such is thin but not necessarily without punch. In 1992, the International Conference on Water and the Environment, in which States participated, identified four principles, with the fourth containing the statement that “it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price.” Two years later, 177 States at the 1994 Cairo Conference on Population and Development, endorsed a Programme of Action that recognises in Principle 2 that all individuals have the “right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and *sanitation*.” What is interesting about this particular formulation is that it precisely mirrors Article 11 of ICESCR but explicitly includes both water and sanitation. The later UN-Habitat Global Plan of Action (1996) then contains identical language to the Cairo Conference.³⁵ While the Johannesburg Declaration (2002) does not explicitly acknowledge the right to sanitation but affirms its fundamental connection with human dignity, the principle from which all human rights are said to derive.³⁶ More recently, in the ‘Message from Beppu’, a statement from 37 Asian-Pacific States contains a acknowledgment of “the people’s right to safe drinking water and basic sanitation as a basic human right.”

³³ Quoted in Craven (note _ above).

³⁴ Even the UN High Commissioner for Human Rights verges on this understanding, when she notes that a key open question is “whether access to safe drinking water is a right on its own or whether obligations in relation to access to safe drinking water and sanitation are derived from other human rights, such as the right to life, the right to health, the right to food or the right to an adequate standard of living.”

³⁵ UN-Habitat, The Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action (1996), see para. 11: “More people than ever are living in absolute poverty and without adequate shelter. Inadequate shelter and homelessness are growing plights in many countries, threatening standards of health, security and even life itself. Everyone has the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation, and to the continuous improvement of living conditions.”

³⁶ See Committee on Economic, Social and Cultural Rights, General Comment No. 4, paragraph 2.

Such State recognition in international declaratory standards would perhaps be sufficient for a human rights treaty body such as CESCR Committee to feel safe in concluding that the right to sanitation was part of the right to an adequate standard of living.³⁷ The right to sanitation can be derived in a similar fashion to the right to housing, food and water from Article 11(1). While it is difficult to compare the value of different rights, sanitation is certainly essential for an adequate standard of living both in terms of environmental health and personal dignity and comfort as shall be argued below. There is nothing in the *travaux préparatoire* to ICESCR to pose any obstacle to such an interpretation of Article 11.³⁸

The Committee, however, passed up such an opportunity in 2001. NGOs had proposed the Committee adopt a general comment on both right to water *and* sanitation but this was not taken up and in the Day of General Discussion experts, UN agencies and some States, there was some criticism of the lack of emphasis of sanitation in the draft general comment on right to water. COHRE emphasised in the discussion that sanitation was also a right under Article 11 of the Covenant and Committee members did ask questions about the right to sanitation. However, it was clear that the space for including sanitation as a right in the general comment was not possible.

Six years later the position may be changing within the Committee. In its General Comment No. 19 on Right to Social Security, adopted in late 2007, the Committee opens the door for such an interpretation. When discussing the coverage for certain social security benefits it uses the language of rights in relation to sanitation:

Family and child benefits, including cash benefits and social services, should be provided to families, without discrimination on prohibited grounds, and would ordinarily cover food, clothing, housing, water and sanitation, or other rights as appropriate.³⁹

This greater willingness to embrace the right to sanitation can possibly be explained by its enhanced stature within the UN human rights charter bodies and the Office of the High Commissioner for Human Rights. In 2001, a Special Rapporteur was appointed by the UN Sub-Commission on Human Rights, a body of experts under the former Commission, to report on the right of everyone to drinking water⁴⁰ and alter to develop guidelines for implementation. His guidelines begin by stating that “Considering that the right to drinking water and sanitation is unquestionably a human right” and goes on to state that “Everyone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the

³⁷ Consideration will also need to be given whether the right to sanitation can be derived under the right to health. While it may make logical sense, and the same was done with the right to water in the CESCR General Comment No. 15, the legal basis in both cases is more tenuous.

³⁸ See analysis in Langford, ‘Ambition that overleaps itself’ (n. __ above).

³⁹ Committee on Economic, Social and Cultural Rights, *General Comment 19, The right to social security* (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008), para 6.

⁴⁰ *Final report of the Special Rapporteur 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*, 14 July 2004, E/CN.4/Sub.2/2004/20.

environment.”⁴¹ In 2006, the newly formed Human Rights Council asked the Office of the High Commissioner for Human Rights to prepare a study on the scope and content of relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.⁴² The UN Commissioner acknowledged that it was an open debate on whether water and sanitation were human rights but forcefully concluded that she “believes that it is now time to consider access to safe drinking water and sanitation as a human right”.⁴³

2.3 A co-right with water?

What is interesting about both the guidelines and UNHCHR report is the use of a singular not a plural noun. Both refer to water and sanitation as *a* human right *not* human rights. This suggests a third way of looking at the question, i.e., beyond the binary question of is sanitation a right or not? Sanitation might be conceived as a twinned or co-right with water. Analogies can perhaps be made with the civil right to freedom of thought, conscience and religion - these three areas are sufficiently related and overlapping to be placed naturally placed together even though they have relatively distinct characteristics. Indeed, in the four instances of international recognition of the right to sanitation, it always follows the word ‘water’.

Some environmentalists express the concern though that the constant lumping of water and sanitation together in development (and now human rights discourse) promotes water-based solutions to sanitation. It is arguable that the two conceptually and practically fit together even if one promotes dry-based solutions to sanitation. We can analyse the links and differences between the two as follows. Water quality is largely dependent on the provision of sanitation (water-borne or dry), both water and sanitation services require good hygiene to be effective, and where sanitation is waterborne, infrastructure is often twinned. COHRE, UN-Habitat, SDC and Wateraid also list, however, a number of differences:

- Responsibility for provision of sanitation services is normally spread among many different departments and ministries, and is delivered by a wide range of service providers. Responsibility for safe and appropriate use of sanitation facilities rests with the individual.
- The timeframe for the delivery of sanitation services and particularly hygiene promotion tends to be longer.
- Due to the nature of their delivery, when water services fail, they tend to fail in a geographic area, sparking immediate public demand for improvement or replacement services. However, when sanitation services fail, they are more likely to fail by household (full pit or septic tank), so the public demand for improvement is more localised and therefore not as effective.

⁴¹ The guidelines are available at <http://www2.ohchr.org/english/issues/water/index.htm>.

⁴² See discussion in Introduction of paper.

⁴³ Available at: http://www2.ohchr.org/english/issues/water/docs/HRC_decision2-104.pdf.

- Where only a few people lack sanitation, all feel the health impact.

However, it is difficult to assess the weight of such differences. For instance, providing water can be complex if it must be pumped from a distance and if good quality dry toilets are available in a location. The timeframe for the delivery of sanitation services and particularly hygiene promotion tends to be longer but this can be because it is simply not prioritised. A manager at a South African local municipality recently commented that the directive from national government was to meet the water targets first and then concentrate on sanitation afterwards.⁴⁴

Thus, a third way of framing the debate is to ask whether our task is simply to recognise a long-lost twin. Not an identical twin but closer than any sibling human right. Recognising a human right to sanitation may not be so much trumpeting a new human right but making sure an already clearly recognised right to water (depending on your view) is properly articulated.

3. SCOPE OF THE RIGHT TO SANITATION

For those who followed the drafting of the General Comment on the Right to Water, it was clear that the most difficult issue was actually not legal recognition. Rather it was the legal scope of the right. Sanitation is no exception, but for different reasons.

In the case of the right to water, the issue was how does one delineate between fundamental and non-fundamental uses when water is ubiquitous in human life. The way out for the Committee was to ground its decision on one of the characteristic of human rights, namely universality. Those water uses that were of importance to everyone fell in the scope of the right.

3.1 Individual vs. collective rights

In the case of sanitation, the question raises the thorny human rights issue of individual rights vs. collective rights. Sanitation is frequently promoted by health and development practitioners and policymakers on the basis of its public health benefits. Human excreta is the leading cause of water pollution and a major cause of preventable illnesses that can lead to death. But how does this translate into human rights terms? It could imply that we are principally concerned not with a personal right to sanitation but rather a right for *all* people to have sanitation in order that *all* will be protected. Many also see ‘environmental sanitation’ as equally important – focusing not just on human excreta but developing sanitation systems that deal with all types of waste, and which demands not just a collection point of excreta, but also safe transport, treatment and disposal.⁴⁵

Sanitation thus possesses the features of a collective right. Are we thus wrong to see sanitation as part of a right to adequate standard of living which is largely individual in orientation? Is it better viewed as part of the right to environmental health (although that right has received little international treaty recognition although much recognition in national constitutional law and General Assembly declarations). Or, perhaps sanitation is merely a duty stemming from the right to health or water.

⁴⁴ Communication from local official, 17 February 2009.

⁴⁵ See WHO, *What is environmental sanitation?*, 2002.

International human rights treaty law is largely structured in individual terms and each right is usually premised on a direct connection with human dignity. We are arguably forced to primarily ask whether the denial of, or lack of access to, sanitation is a sufficient affront to human dignity? This question is further complicated in the case of sanitation as practitioners frequently express frustration with a lack of demand for sanitation, ‘people need to be educated’, ‘people need to be made aware’ etc. How does this fit with human rights? If human rights are meant to spring from universal and basic demands, do we need to be educated about them? Helped to demand them?

At first blush this might seem a rather fatal argument. Convincing someone of their right to water is largely unnecessary. But there are two ways of addressing this challenge. The first is that the denial or lack of individual access to sanitation is and of itself an affront to human dignity. A lack of sanitation raises issues of privacy, individual health, personal dignity and equality as we discussed in the Introduction. Thus the personal impact of lack of sanitation, whether mental or physical, and its impact on access to other human rights, appears sufficient. One also notices an equality dimension to the right. It is often demanded more vigorously as people become aware that *other* people have been able to access better sanitation. Education about sanitation is likewise not insignificant. The human rights movement has been dedicated much time to promoting human rights, making people aware of their right to vote, freely express themselves or form labour unions or demand housing. Human rights are not premised on a constant empirical assessment of whether all people are clamouring for them all the time – they usually borne from the recognition of the inhumanity of their denial. Much of current development practice on improving demand for sanitation also reflects this, being a process of sensitising people to the benefits of safe sanitation, generally from a perspective of increasing social standing and dignity, rather than health benefits.

A second approach is to downplay the theoretical difficulties of recognising a human right with inherent individual and collective characteristics; and acknowledge that a right with individual and collective dimensions is acceptable within the international framework. For example, Articles 8 and 13 ICESCR recognize collective rights. The former contains the ‘right of trade unions’ to establish federations and function freely and the latter grants ‘individuals and bodies’ the liberty from interference, although it is constructed more as a defence than a right. Indeed, there are many parallels between trade union rights and the broader civil right to freedom of association and a right to sanitation. If only one person has the right to association, and it is denied to the others, it is of little value. The utility of the right to freedom of association lies in the ability of all relevant individuals being able to exercise it and thus jointly organise, express their opinions and take collective actions. The cultural rights in Articles 1(a) and 3 also have strong collective overtones. Collective rights are also recognised in Article 27 of the ICCPR in relation to ethnic, religious and linguistic minorities.

Interestingly enough, the right to both a basic water supply and basic sanitation in Section 2 of the South African Water Services Act is framed in such an individual and collective fashion: “the right of access to a basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being”. Thus the purpose of the right to sanitation is to protect other people’s human health and well-being.

Similar language is used in the Sub-Commission guidelines, which arguably go further since it (what?) is to protect the environment generally, and not just in relation to human health.⁴⁶

3.2 Defining the right

The scope of the right to sanitation is perhaps much easier to define given the work already undertaken on this subject. One could start with the South African legislation, which attempts to operationalise the right to sanitation, or more accurately, access to sanitation services. They are defined as the, "collection, removal, disposal or purification of human excreta, domestic waste water, sewage and effluent resulting from this of water for commercial purposes".⁴⁷ This is a very broad definition. It includes environmental sanitation and essentially the right of companies to sanitation. Granting human rights to companies, as is done in the European Convention on Human Rights and Fundamental Freedoms (in relation to property, freedom of expression and to some extent the home) has been controversial.⁴⁸ However, the legislation refers to the right, not human right, to sanitation services so obviously there is less legislative restraint. Whether a human right to sanitation can be so broadly construed remains open to debate and is in many ways reminiscent of the debates around the scope of the right to water.

A human rights definition would also place greater emphasis on privacy, personal dignity and gender sensitivity although this could be articulated in the elements of the right. It is also notable that many national constitutions speak of hygiene⁴⁹ and it would be pertinent to ask whether hygiene should be included. It is already included under the right to water – but also has a clear position in respect to sanitation. Without good hygiene practice, both of handwashing after defecation, disposing safely of children's faeces and keeping the toilet clean, the health benefits (and arguably the benefits to dignity) are limited.

There are many definitions of sanitation, basic sanitation, improved sanitation and environmental sanitation, proposed by UN bodies, Water Supply and Sanitation Collaborative Council (WSSCC), Joint Monitoring Programme (JMP) of UNICEF and the World Health Organization (WHO), amongst others. This paper proposes the following definition, adapted from the definition developed by the Millennium Task Force:⁵⁰ namely that as *access to, and use of, excreta and wastewater facilities and services that ensure privacy and dignity, ensuring a clean and healthy living environment for all*. 'Facilities and services' should include the "collection, transport, treatment and disposal of human excreta, domestic wastewater and solid waste, and

⁴⁶ "Everyone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment."

⁴⁷ Reference?

⁴⁸ See M. Emberland, *The Human Rights of Companies* (Oxford: Oxford University Press, 2006).

⁴⁹ [Insert references]

⁵⁰ Access to, and use of, excreta and wastewater facilities and services that provide privacy while at the same time ensuring a clean and healthful living environment both at home and in the immediate neighbourhood of users.
[Insert reference]

associated hygiene promotion”⁵¹ to the extent demanded by the particular environmental conditions.

4. CONTENT OF THE RIGHT

4.1 What level of technology?

In defining the elements of economic, social and cultural rights, the UN system has largely avoided being specific about the type of economic or social system that is required for their realisation. Thus it has commented:

in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed inter alia in the preamble to the Covenant, is recognized and reflected in the system in question.⁵²

It has also avoided being too specific about the precise nature of the realisation of the right, tending towards use of criteria such as accessibility, quality and availability, although with some rights, such as housing, it has been slightly more specific.

In the case of the right to water, this reticence to overly prescribe was evident in the UN CESCR's reluctance to hold that the right to water meant piped water in the household; it stated that “Sufficient, safe and acceptable water must be accessible *within, or in the immediate vicinity*, of each household, educational institution and workplace” (emphasis added). Likewise, it did not prescribe the amount of water that should be provided, noting only that “The quantity of water available for each person should correspond to World Health Organization (WHO) guidelines.” A footnote refers to WHO and other literature which provides a range of amounts with different health consequences and shows that 50 litres per person per day should be regarded as a reasonable level in reducing significant health risks. The Committee notes that “Some individuals and groups may also require additional water due to health, climate, and work conditions” but at the same time the amount is conditional on a country's maximum available financial and water resources as per the wording of the ICESCR, Article 2(1).

Thus it has been left to individual government's and courts to provide more specificity⁵³ and it is interesting in the case of South Africa that a High Court found that a an absolute minimum of 25

⁵¹ Quoted from the definition for sanitation used by the UN Water Task Force for the International Year of Sanitation, 2008.

⁵² General Comment No. 3 (note _ above), para. 8.

⁵³ See generally debate between Melvin Woodhouse and Malcolm Langford, 'Crossfire: There is no human right to water for livelihoods', *Waterlines* 2009 ;Vol. 28, No. 1 pp. 5-12.

litres was acceptable but that the Johannesburg City has the capacity to provide 50 litres.⁵⁴ The Supreme Court of Appeal then reduced that amount to 42 litres⁵⁵ and the case is now on appeal to the Constitutional Court. In Argentina, courts have regularly awarded 200 litres per person per day to be delivered to litigants until proper piped water services were provided.⁵⁶

In the case of sanitation, the key flashpoint is the level of technology. Does everyone have the right to a flush toilet or a dry toilet with equivalent effect? Are ventilated pit latrines or community toilets acceptable in any case or only when there is insufficient resources? These questions are the subject of a growing debate. Many development agencies favour the use of VIPs. It means lower water demand and maintenance and no need for cost-recovery and revenue collection. However, some question the appropriateness of 'dry systems' for humid environments where, in fact, faecal matter does not easily dry. A further problem with VIPs is that they need to be emptied regularly, which often does not happen. In South Africa, Kathy Eales notes that –

Many VIPs are now full and unusable. In many areas, VIPS are now called full-ups. Some pits were too small, or were fully sealed.... South Africa's household sanitation policy is grossly inadequate. It speaks primarily to dry systems, and does not clarify roles and responsibilities around what to do when pits are full. National government under-estimated the scale of technical support required.⁵⁷

This suggests, leaving apart the person dignity issue, that such systems are *not* necessarily more affordable, and the key issue is prioritisation.

Thus a key issue in articulating a right to sanitation at the international level remains how much should be prescribed in terms of technology and how much should be left to progressive realisation and national interpretation.

4.2 Elements of the right

If one was to emulate the CESCR Committee's approach, particularly the right to water, then one can tease out a number elements of the right. It is interesting to note again in the South African context that no distinction is drawn between water and sanitation supply. They are lumped together as 'water services'. 'Water authorities' are thus burdened with a range of obligations with respect to them, even where sanitation services are not water-based sewerage services. On-site sanitation services are seldom the responsibility of water and sewerage service providers. However, some aspects of water provision obviously require greater articulation, particularly in relation to protection and allocation of water resources.

⁵⁴ *Mazibuko et al v City of Johannesburg et al*, High Court of South Africa (Witwatersrand Local Division) 30 April 2008 Case No. 06/13865. See discussion in 'Global Precedent' or 'Reasonable No More?': The Mazibuko Case. *Journal of Water Law* 2008 ;Vol. 19. pp. 73-78.

⁵⁵ *City of Johannesburg v L Mazibuko* (489/08) [2009] ZASCA 20 (25 March 2009).

⁵⁶ See discussion in

⁵⁷ Amisi, B., Bond, P., Khumalo, D. and Nojiyeza, S., "The neoliberal loo" (18 February 2008): <http://www.ukzn.ac.za/ccs/default.asp?2,40,5,1514>. Accessed 15 October 2008.

The Sub-Commission Guidelines on the realization of the right to safe drinking water and sanitation already provide some guidance on a number of criteria.⁵⁸ Namely that sanitation must be safe, physically accessible, affordable and culturally acceptable. COHRE, UN-Habitat, SDC and Wateraid have attempted to articulate the content of each element as follows:

Safe: Everyone is entitled to sanitation that is safe, adequate and conducive to the protection of public health and the environment.⁵⁹ This means the toilet must be hygienic and that there is no risk of collapse. It must be able to effectively prevent human, animal and insect contact with excreta. Toilets must ensure privacy and water points should be positioned to enable use for personal hygiene, including menstrual hygiene, and anal and genital cleansing. Ensuring safe sanitation requires adequate hygiene promotion and education.⁶⁰

Excreta and wastewater need be removed and/or disposed of safely. It is also important that the right to health of sanitation workers is protected, and therefore workers who transport, treat and dispose of waste must be able to do this without risk to their health.

Each person has not only a right to sanitation facilities for their own use, but also a right to be protected from excreta and wastewater produced by others. Therefore, no person can fully exercise the right to sanitation, or other related rights, such as health or water, unless people in their locality also have access to, and use, toilets and the attendant safe collection, treatment and disposal of excreta.

Physically accessible: Sanitation must be accessible within, or in the immediate vicinity, of each household, health or educational institution, public places and the workplace.⁶¹ This means that toilets must be available for use at all times of the day or night, along with associated services such as sewerage or septic tank or pit exhaustion. Toilets must be situated in a location where physical security can be guaranteed.⁶² The path to the toilet must be designed so as to prevent accidents and protected to reduce the chance of attack from animals or people, particularly to women and children, who are most at risk. Sanitation facilities should be

⁵⁸ United Nations 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, (2006) UN Doc. A/HRC/Sub.1/58/L11, adopting the Draft Guidelines for the realization of the right to drinking water and sanitation (2005), UN Doc. E/CN.4/Sub.2/2005/25, section 1.3.

⁵⁹ Sub-Commission Guidelines, s. 1.2.

⁶⁰ Sub-Commission Guidelines, s. 5.2: “States should promote hygienic use of water and sanitation services.”

⁶¹ General Comment No. 15, paras. 12(c)(i), 29, Sub-Commission Guidelines s. 1.3(a).

⁶² Sub-Commission Guidelines, s. 1.3 (c).

designed to take account of the needs of women and children,⁶³ persons with disabilities,⁶⁴ as well as those of elderly persons.

Affordable: Sanitation services, including construction, emptying and treatment of faecal matter, must be available at a price that everyone can afford without compromising their ability to acquire other basic goods and services, including food, housing, health services and education.⁶⁵ In urban areas, a connection to the sewerage system will almost always be the cheapest and most convenient option for the user. However, as with water connections, often the price of a connection to the sewerage system will be prohibitive. Governments should provide subsidies where necessary for the emptying of septic tanks or pit latrines and the safe transport, transport, treatment and disposal of excreta. Governments should also provide assistance to households unable to afford soap for hygiene practices, and sanitary towels for women.

Culturally acceptable: Sanitation must be of a culturally acceptable quality.⁶⁶ In many cultures, use of toilets is a highly sensitive subject and the construction, positioning and conditions for use will need to be taken into account in planning services. In most cultures, it will be necessary to separate women's and men's use of toilets where public toilets are being constructed, (or boys' and girls' facilities in schools) to ensure privacy and dignity. Care needs to be taken that good menstrual hygiene can be practiced. Many cultures and religions require that washing facilities be available for cleaning of anal and genital areas after the use of a toilet. Manual emptying of pit latrines is generally culturally unacceptable and often dangerous, so mechanised alternatives that limit contact with faeces should be used.

This articulation of the elements of the right is seminal given the lack of attention to it in the literature. And I restrict myself to a few comments. First, under safety, a right to protection from excreta of others is expressed, which raises the collective dimensions earlier discussed. In essence, such a formulation evokes aspects of a collective right to environmental health – which in the context of the ICESCR is expressed more subtly as the obligation to ensure environmental hygiene in Article 12(2) - and thus suggests the right should also be derived from Article 12 of ICESCR. (The right to environmental health is recognised though in numerous national constitutions). In using rights language to express this element of the right to sanitation, one is inescapably making sanitation a collective right. This suggests that each individual is entitled to make the claim on the behalf of others. This requires some consideration and perhaps examination of the jurisprudence and scholarship on the right to freedom of association and the extent to which the denial of the right to one person is a violation of the rights of all others seeking the same right.

⁶³ Sub-Commission Guidelines, s. 5.3, General Comment No. 15, para. 29.

⁶⁴ OHCHR Report, para. 25.

⁶⁵ Sub-Commission Guidelines, s. 1.3(d).

⁶⁶ Sub-Commission Guidelines, para. 1.3 (b).

Second, the inclusion of a reference to sanitation workers under safety is understandable from a contextual perspective but should be perhaps included somewhere else in any formal articulation of the right to sanitation. One could also mention the relevant worker's rights under Articles 6 and 7 of ICESCR in this connection. However, one might keep such a formulation under 'safety' if it were to be expanded to situations where individuals themselves must remove human excreta – from their own household sanitation facility or that of the community's. Self-removal is often the reality for many people without adequate sanitation and is also promoted in various community sanitation solutions promoted by donor agencies. NGOs have raised questions over the safety of some of the methods proposed. Thus the rights of those expected to remove excreta could be expressed more broadly and would thus more comfortably fall under the heading of safety.

Third, under the heading of physical accessibility, the definition addresses the location of sanitation facilities in the same manner as General Comment No. 15 on the Right to Water by speaking of them being in the 'immediate vicinity' of the household. While this is somewhat uncontroversial there is a question as to whether one should be stricter in the case of sanitation. Due to concerns over personal dignity and freedom from harassment, can one more clearly state that it should be ultimately in the household once a country's resources permit?

Fourth, no mention is made of the types of end-technologies that should be used. While the analogous issue of quantities of water was avoided in the General Comment No. 15 on the Right to Water at least there was a reference to WHO standard and associated literature on the topic. Therefore, it is recommended that the issue be addressed in some form. This could be done in any formal document by commenting on the definition of facilities and services and to what extent it requires more advanced forms of sanitation. Comment also needs to be made on the interdependence with other rights, particularly housing, in this regard. In a number of developing countries, great strides have been made in providing a basic level of sanitation, often through bio latrines or block toilets, to large informal settlements. However, progressive realisation of the right is hampered due to the lack of foreseeable in situ slum upgrading or resettlement. One practical solution to this problem lies in the ASB's successful replication of the well-known Orangi Pilot Project (OPP). Households organised to provide a low-cost, small-bore solution for the tertiary level reticulation of sewage while the government was lobbied to implement the secondary and primary (trunk) sewerage lines leading from the settlement to sewerage treatment plants.⁶⁷

Fifth, it is questionable whether issues of gender equality and difference should be addressed under cultural acceptability. The latter is premised on the principle of relativity while the former is not. Perhaps there needs to be some separate articulation of the gender issues involved or placement of these comments under physical accessibility.

Obviously other human rights principles and cross-cutting obligations in the ICESCR are relevant and COHRE, UN-Habitat, SDC and Wateraid additionally state that:

⁶⁷ A. Hassan, *Working with Communities* (Karachi: City Press, 2001), pp. 1-42, 159-166.

Sanitation should be ensured in a **non-discriminatory manner** and include **vulnerable and marginalised groups**.⁶⁸ There must be no distinction based on prohibited grounds such as race, gender, health status or colour that leads to unequal access to sanitation. Non-discrimination also includes proactive measures to ensure that the particular needs of vulnerable and marginalised groups are met. According to the OHCHR Report, priority in allocating limited public resources should be given to those without access or who face discrimination in accessing sanitation.⁶⁹ A particular example of discrimination in the delivery of services is where informal settlements do not receive services due to their lack of legal status. The lack of delivery to such settlements is particularly discriminatory against the vulnerable and marginalised groups who are most in need of assistance to access sanitation services.

Further to this, all people have the **right to participate** in decision-making processes that may affect their access to sanitation and must be given **full and equal access to information** concerning sanitation.⁷⁰ Seldom are women and children consulted on their needs relating to sanitation, but these are the groups hardest hit by a lack of sanitation services.

In terms of **accountability**, people who are denied their right to sanitation should have access to effective judicial or other appropriate remedies, for example courts, regulatory agencies or human rights commissions.⁷¹

These principles are well known and are particularly important for the effective realisation of a right to sanitation. The experience of Porto Alegre particularly demonstrates the power of participation in budgeting when it comes to sanitation. After a decade in which more than 40000 community and NGO residents played a direct role in budget formulation, the improvement in sanitation access registered the highest proportionate increase. Home water supply rose from 78 to 99 per cent; sewage collection from 46 per cent to almost 83 per cent, and garbage collection reached all residences.

4.3 Obligations

The scope of the possible corresponding State obligations will be addressed in a revision of this paper. However, there is obviously a CESCER template for such an approach that could be explored in particular, the duties of progressive realisation and minimum core, the principle of non-retrogression and the categorical obligations of respect, protect and fulfil. The issues of progressive realisation and minimum core have been touched on above and I will restrict myself to two comments.

⁶⁸ ICESCR, Art. 2 (2), Sub-Commission Guidelines, s. 3.

⁶⁹ OHCHR Report, para. 24.

⁷⁰ Sub-Commission Guidelines, s. 8.1.-8.3.

⁷¹ Sub-Commission Guidelines, s. 9.

First, the obligation to protect needs close attention and not just the matter of privatisation. Many individuals and communities are dependent on third parties for access to sanitation, e.g. tenants, farmworkers and farmdwellers, mining workers and their families, school children, hospital patients etc. Sanitation schemes for such groups are often not developed or sufficient controls are not in place for regulating sanitation subsidies that may flow to the third parties for providing on-site sanitation for others on their land.

Second, in examining the maximum available resources available for sanitation consideration needs to be given to the health impacts of providing sanitation. Provision of sanitation improves economic growth and health service costs and thus governments should be required to factor in these positive externalities in assessing resource availability as opposed to the commonly cited negative externalities.

5. CONCLUSION

This paper indicates that the legal arguments for a right to sanitation are stronger than previously thought. Almost all countries have at some point signed a declaration that gives support to the right. This is not sufficient to argue that the right to sanitation is part of international customary law but it does give some support to the argument that the right could be derived from Article 11 of the International Covenant on Economic, Social and Cultural Rights, particularly as many of the declarations do precisely that. Obviously the CESCR could be called to adopt such an interpretation, and it seems to have opened the door to doing so. Ideally, the UN Human Rights Council and/or General Assembly would take such a step in order to remove any lingering doubt that an element of normativism is involved. This would also satisfy Philip Alston's institutional test for the recognition of human rights in international law – whether the right has been recognised by the General Assembly.⁷²

⁷² P Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control', A.J.I.L. Vol. 78 (1984), pp. 607-
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