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# **TURNING THE TIDE ENGENDERING THE HUMAN RIGHT TO WATER AND SANITATION**

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## Chapter 2

### *Turning the Tide: Engendering the Human Right to Water and Sanitation*

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#### **1. WATER AS A HUMAN RIGHTS ISSUE: SOUTHERN AND EASTERN AFRICAN PERSPECTIVES ON GENDER AND WATER GOVERNANCE**

The observance of human rights, including socio-economic rights, participation rights and non-discrimination rights, is critical to good water governance. International human rights norms demand that priority be given to water and sanitation for vulnerable groups such as the very poor, displaced, disabled and elderly, and for women and children within all these groups. Gender-equal participation in water governance is, in human rights theory, seen as one of the most important mechanisms to realize the right to water and sanitation. If implemented, these human rights have the potential to combat poverty, promote health and food security, and ease the caring and household burdens that hamper the realization of African women's enjoyment of a wide range of social and economic rights.

The human right to water and sanitation is receiving increasing attention, and its normative content is becoming clarified through international human rights scholarship and statements from a range of UN institutions.<sup>1</sup> Through national and local studies from southern and eastern Africa, this book explores how the right to water and sanitation is respected, protected and fulfilled by international, national and local actors

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1 There is a growing body of legal literature addressing the human right to water, see McCaffrey, 1992; Gleick, 1996, 1998; Salman and McInerney-Lankford, 2004; Filmer-Wilson, 2005; Riedel and Rothen, 2006; Cahill-Ripley, 2011; Winkler, 2012; Windfuhr, 2013; Bulto, 2014; Langford and Russel (2015 forthcoming).

involved in water governance. Water governance, in a narrow sense, consists of the exercise of state authority through national institutions, laws and policies in order to provide access to water and sanitation. However, the studies presented in this book provide a picture of the multiplicity of norms that are applied by different co-existing and overlapping national and local institutions that in practice govern water. These are national and local government bodies, international and national development agencies, humanitarian organizations, non-governmental organizations (NGOs), local communities and families. Together, these constitute 'plural water governance' in the broad sense defined in Chapter 1 (Franks and Cleaver, 2007).

This plurality of co-existing, interacting and sometimes conflicting norms and institutions pose challenges regarding the interpretation and implementation of the human right to water and sanitation. Inequality in access to water supply and water resources tend to disproportionately affect poor and marginalized women, men and children and is due in part to prevailing cultural, gendered and socio-political norms (HLPE 2015, 26). The overall aim of this chapter is to set out a human rights framework that addresses some of the challenges that plural water governance poses from a gender perspective. Two lines of inquiry follow from this aim. Firstly, while the right to water and sanitation is a human issue, its interpretation must, as pointed out in Chapter 1, be 'engendered' to respond to the concerns and experiences of socially and economically marginalized women in different social, cultural and economic contexts (Fredman, 2013). Given the legal pluralities that have a bearing on water related rights and duties, this requires a dual perspective of women as members of a group that both controls and holds water and land collectively, and as individual citizens with a right to equality and protection against discrimination. Secondly, the implications that the plurality of norms, actors and institutions involved in water governance have for the interpretation and the realization of both rights and duties must be considered. Insofar as duties are concerned, the multifaceted character of water governance complicates the question of attendant responsibilities: which actors hold human rights obligations, and how can specific actors be held accountable for the outcomes?

Against this background, this chapter sets out a human rights framework that addresses the rights of individuals and groups and the corresponding obligations of the actual duty bearers. Three rights form the centre of attention: the right to water and sanitation, the right to partici-

pation, and the right to equality and non-discrimination.

The chapter unfolds in ten sections.<sup>2</sup> Following the introduction in Section 1 an ‘engendered’, integrated and contextual approach to the human right to water and sanitation is presented as the methodological point of departure for the analysis in Section 2. Section 3 shows how the location of water at the intersection of environmental concerns and human needs, and its multiple uses for drinking, health and food production, have shaped its path towards being considered a human right. The chapter proceeds by presenting key elements of the right to adequate, available and affordable water (Section 4), and the right to sanitation (Section 5). Section 6 turns to the content of state duties, focusing on the duty to respect and protect the right to water in contexts of plural water governance, while Section 7 highlights *duties* associated with non-discrimination. The right to participation in water governance is discussed in Section 8. In Section 9, the obligations of international development actors are outlined. By way of conclusion Section 10 points to the contextualization of the right to water may as the pathway for looking beyond water for drinking purposes and including water for livelihood – life, food and health.

## **2. TOWARDS AN ‘ENGENDERED’, INTEGRATED AND CONTEXTUAL APPROACH**

The human right to water and sanitation arguably reflects the growing recognition of the significance of social and economic rights in addressing poor urban and rural women’s basic concerns as providers of food and care for young, sick and elderly family members. Overall, this right enhances the degree to which international law responds to the concerns of socially and economically marginalized women.<sup>3</sup>

Furthermore, the human right to water and sanitation illustrates the indivisibility and interrelatedness of human rights. Superseding the divides among civil, political, social and economic rights, it is closely related to the rights to life, health, food, livelihood and equality, and is embed-

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2 Sections 2, 3 4,6, 7, and 8 are based on Anne Hellum’s article ‘Engendering the human right to water and sanitation’, forthcoming in Langford and Russel (forthcoming 2015). Sections 3 and 5 are based on a draft by Patricia Kameri-Mbote and Sections 5 and 9 on a draft by Ingunn Ikdahl. The authors have commented and contributed to all the sections.

3 As the principal forms of oppression against large groups of women operate in the socio-economic domain, feminist scholars have argued that international law, by according priority to civil and political rights, has little to offer women, see Charlesworth et al. (1991).

ded in the ICESCR, the CEDAW and the CRC.<sup>4</sup> Feminist social rights scholars, such as Dianne Otto (2001), have emphasized the potential of the concept of indivisibility of human rights as a principle that can assist in protecting and promoting women's social and economic entitlements. Otto sees the indivisibility principle, embedded in a number of declarations, as:

*...a response to the gendered hierarchies and exclusions of human rights law itself. The appeal of the idea of indivisibility is that it suggests an organizing principle that highlights interconnections, interdependencies, and holism in the increasingly fragmented paradigm of human rights. (Otto, 2001: 66)*

The indivisibility of socio-economic rights is especially important for poor African women's rights to sufficient water for domestic and livelihood uses. Water-dependent gardening, cropping, livestock, brick-making, crafts and small-scale enterprises are, as shown in this book, the mainstays of their diversified livelihoods (Chapter 1). In this context, a right to water is also a prerequisite for the realization of the rights to food, health and livelihood.

However, the indivisibility of the rights associated with water and sanitation is not fully recognized. A pertinent example is that while Article 11 of the ICESCR, stating the right to an adequate living standard, is a key foundation for the right to water, the UN General Assembly Resolution 64/292 on the Human Right to Water and Sanitation<sup>5</sup> remains silent on water for broader livelihood needs, thus apparently limiting the right to merely sanitation, clean drinking water, and water for domestic and personal use. This interpretation does not sit well with the holistic way in which southern and eastern African women manage water from different sources for multiple uses: water is not only necessary for domestic uses and sanitation, but also for growing, preparing, and selling food and other products that are vital for family welfare and food security. The multifaceted character of community-based water rights, which constitute the lifeline for many poor rural and peri-urban families and women within them, calls into question the strict division between water for domestic and for productive uses underlying the UN General Assembly Resolution (2010).

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4 International Covenant on Economic, Social and Cultural Rights, Convention to Eliminate all Forms of Discrimination against Women, Committee on the Rights of the Child.

5 UN General Assembly Resolution 64/292 on the Human Right to Water and Sanitation (3 August 2010) A/RES/64/292.

The question of which specific types of water use are covered by the right is examined in further detail below. But at a general level it also points to the question of whether the human right to water and sanitation is merely 'extended to women' or whether it is truly 'engendered', in line with the distinction drawn in Sandra Fredman's approach to social and economic rights:

*As a start it is necessary to recognize the distinctive nature of women's experience of poverty and disadvantage. This suggests that it is not sufficient simply to extend socio-economic rights women. Instead, socio-economic rights need to be recast in the light of the demands of substantive gender equality. Substantive gender equality goes beyond treating women in the same way as men and requires transformative measures. This in turn entails reconceptualizing the rights themselves.* (Fredman, 2013: 218)

In order to contribute to an 'engendered' interpretation of the right to water and sanitation that responds to the way in which southern and eastern African women access and use water, this chapter takes a contextual approach to human rights. The case studies inform both the legal problems we address and the interpretations we provide. In its General Comments, the Committee on Economic, Social and Cultural Rights (CESCR) has acknowledged the importance of cultural contexts in defining the content of rights.<sup>6</sup> In sub-Saharan Africa, where appropriation of land and water for commercial purposes is escalating, poor rural and peri-urban communities' customary uses of land and water are endangered.<sup>7</sup> This has severe consequences for African women's crucial role in the food security of households: women produce between 60 and 80% of food crops.<sup>8</sup> These developments underscore the need for context-sensitive interpretations of the right to an adequate standard of living, as found in Article 11 of the ICESCR, including the right to food and water for personal, domestic and broader livelihood uses.

The recognition of the indivisibility of rights and the need for 'engenderment' of rights further calls for an integrated approach to the different

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6 See for example CESCR General Comment No. 4, The right to adequate housing (1991), E/1992/23, annex III.

7 See the Final Study of the Human Rights Council Advisory Committee on Rural Women and the Right to Food, A/HRC/22/72 (2012) and the Report of the Special Rapporteur on the Right to Food, A/HRC/13/33 (2009).

8 See Final study of the Human Rights Council Advisory Committee on Rural Women and the Right to Food, A/HRC/22/72 (2012).

parts of the human rights system. Rather than looking at the human right to water under article 11 of the ICESCR in isolation, this chapter includes the regulatory framework offered by CEDAW and the Protocol to the African Charter on the Rights of Women (the Maputo Protocol).<sup>9</sup> The added value of these instruments is that they take a gender-specific approach (Farha, 2008: 553; Holtmaat, 2013; Hellum and Aasen, 2013: 634). CEDAW Article 14 (1) addresses the social and economic rights of rural women and obliges states to ‘take into account the particular problems faced by rural women’ as well as the ‘significant roles that rural women play in the economic survival of their families.’ Furthermore, CEDAW and the Maputo Protocol address the gender stereotypes that underlie rural and peri-urban women’s and girls’ disproportionate responsibility for domestic chores, including fetching and securing safe water for domestic, personal and livelihood uses. Article 5(a) of the CEDAW and Article 2.2 of the Maputo Protocol place an obligation on State Parties to take all appropriate measures to eradicate gender stereotypes embedded in norms, beliefs or practices. As gender-specific instruments seeking to transform asymmetrical gender relations, these instruments constitute an important supplement to the international water rights discourse, which takes a gender-neutral and symmetrical approach to social and economic rights in general and to the human right to water and sanitation in particular.

### **3. BACKGROUND: FROM THE STOCKHOLM AND DUBLIN PRINCIPLES TO THE HUMAN RIGHT TO WATER AND SANITATION**

Water not only has multiple uses such as drinking, health and production of nutritious food but is also located at the intersection of environment and human needs. These intersections form the broader international policy context that has shaped the path towards water’s being considered a human right.

The international environmental discourse has a long-term history of recognizing the relationship among environment, human needs, and equality. A foundational document is the Stockholm Declaration of 1972,<sup>10</sup> which provides, in Principle 1, that:

*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of*

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9 The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 11 July 2003, hereinafter ‘the Maputo Protocol’.

10 Declaration of the United Nations Conference on the Human Environment, adopted June 16, 1972, hereinafter The Stockholm Declaration.

*dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.*

To support the realization of this principle, the Declaration called for an end to segregation, discrimination, colonialism, and other forms of oppression. Principles 2 and 3 proceed to underscore both that ‘the natural resources of the earth, including the air, water, land, flora and fauna... must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate’<sup>11</sup> and that ‘the capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved.’<sup>12</sup>

The Stockholm Declaration sowed the seeds for the concept of sustainable development. As subsequent international agreements<sup>13</sup> have elaborated on this concept, they have continued to attend to the relationship between environmental protection, livelihood needs, equality and human rights.<sup>14</sup>

In a similar vein, the international water policy discourse contains recognition of the range of needs and concerns that must be balanced. Principle No. 4 of the Dublin Principles<sup>15</sup> states that ‘water has an economic value in all its competing uses, and should be recognized as an economic

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11 Stockholm Declaration, Principle 2.

12 Stockholm Declaration, Principle 3.

13 World Charter for Nature, adopted in UN General Assembly Resolution 37/7 (28 October 1982) A/RES/37/7; Our Common Future, report by the Brundtland Commission on Environment and Development 1987 A/42/427; and the Rio Declaration on Environment and Development, adopted at the UN Conference on Environment and Development (June 14, 1992).

14 The principle of sustainable development seeks to resolve tensions between eco-centric and anthropocentric approaches to natural resource management. Approaches that seek the preservation of environmental resources for their own sake have been termed eco-centric (Goulder and Kennedy, 1996). Approaches that value the maintenance of environmental resources on the basis of their contribution to human satisfaction and welfare have been termed anthropocentric (Cobb, 1988).

15 The Dublin Statement on Water and Sustainable Development (hereinafter The Dublin Principles) was adopted at the International Conference on Water and the Environment (ICWE) in Dublin, Ireland 26-31 January 1992. The conference was attended by 500 participants, including government-designated experts. The Dublin Statement on Water and Sustainable Development was commended to the world leaders assembled at the UN Conference on Environment and Development in Rio de Janeiro in June 1992, see Report of the United Nations Conference on Environment and Development (UNCED), A/CONF 151/26.

good,' but, it continues, 'within this principle, it is vital to recognize the basic right of all human beings to have access to clean water and sanitation at an affordable price.' Taking account of the close relationship among water, gender and sustainable development, a common reference point is Principle No. 3 of the Dublin Principles, which states that 'Women play a central part in the provision, management, and safeguarding of water.'

In practice, democratization, decentralization, good governance, gender equality and sustainable water management have taken the stage alongside economic considerations in international and national water laws and policies informed by the Dublin Principles and by the Integrated Water Resources Management (IWRM) approach.

With the adoption of the Millennium Development Goals (MDGs) in 2000, water for the poor moved to centre stage in international and national development policies. Sanitation was added as a target of the MDGs in 2002. States agreed to halve by 2015 the proportion of people without sustainable access to safe drinking water *and* basic sanitation.<sup>16</sup> We are now in 2015, and many African countries are yet to meet these targets. Not surprisingly, water and sanitation for all are included in the proposed Sustainable Development Goals (SDGs) for the post-2015 period.<sup>17</sup> While the MDGs and the proposed SDGs also include targets on water, sanitation and gender equality, they have been criticized for the lack of explicit links to human rights. However, they have been complemented by the rights-based approach to development in general, and the development of the human right to water in particular.<sup>18</sup>

The human right to water has evolved through piecemeal international

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16 See the UN General Assembly Resolution 55/2, the United Nations Millennium Declaration (18 September 2000), A/RES/55/2.

17 See the Report of the Open Working Group of the General Assembly on Sustainable Development Goals, (12 August 2014), A/68/970.

18 In order to integrate human rights into development planning, the Secretary-General of the UN called for mainstreaming of human rights across the entire UN system in 1997. As a follow up, in 1998, the United Nations Development Programme issued a policy paper entitled 'Integrating human rights with sustainable development' (UNDP, 1998), in which it views human rights and sustainable development as being inextricably linked. In a statement on poverty of 10 May 2001, the UN Committee on Economic, Social and Cultural Rights considered poverty as a multi-dimensional denial of human rights and strongly advocated a human rights approach to poverty reduction (CESCR statement, Poverty and the International Covenant on Economic, Social and Cultural Rights, (May 10, 2001) E/C.12/2001/10).

law-making over time, through dynamic interpretation by UN human rights treaty bodies such as the Committee on Economic, Social and Cultural Rights, and by analysis from UN special mechanisms such as the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation. The importance of water for human rights is now recognized in a wide range of international Conventions, declarations and other standards. Some elements of the right to water are given explicit recognition in various treaties. The Convention on the Rights of the Child (CRC) Article 24 gives the child a right to clean drinking water as an element of the right to health. Article 14.2 h of the Convention on the Elimination of All Forms of Discrimination against Women states that rural women have a right to ‘enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.’ In Africa, the most recent manifestation of the human right to water is Article 15a of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. Addressing food security issues, this provision obliges contracting states to take all appropriate measures to ‘provide women with access to clean drinking water, sources of domestic fuel, land and the means of producing nutritious food.’

Although water is not explicitly mentioned in the International Covenant on Economic, Social and Cultural Rights, the CESCR, in its General Comment No.15 (2002), elaborated the content of the human right to water, with foundations in several of the covenant’s articles.<sup>19</sup> Water’s centrality for basic needs led the Committee to approach the human right to water as an element of the right to an adequate standard of living in Article 11.1. This article establishes the right to an adequate standard of living, ‘including adequate food, clothing and housing.’<sup>20</sup> According to the dynamic interpretation of the Committee, the term ‘including’ indicates that the catalogue of rights encompassing the right to livelihood is not exhaustive. It must be adapted to changing social and economic concerns, such as the global water crisis. Moreover, the Committee emphasizes the interdependence between access to water and the right to health in Article 12.1, the right to food in Article 11.1 and the right to life and

19 CESCR General Comment No. 15, The right to water (2002), E/C.12/2002/11, hereinafter CESCR GC 15. See also CESCR General Comment No. 14, The right to the highest attainable standard of health (2000), E/C.12/2000/4.

20 CESCR GC 15, see also CESCR General Comment No. 6, The Economic, Social and Cultural Rights of Older Persons (1995), E/1996/22, paras 5 and 32.

human dignity enshrined in the International Bill of Human Rights. In principle, this focus on indivisibility could lead to considering all types of water use under the right to water, as long as they are significant for livelihood, health and life.

In 2006, the right to sanitation was included in the Guidelines for the Realization of the Right to Drinking Water and Sanitation, adopted by the UN Sub-Commission on the Protection and Promotion of Human Rights.<sup>21</sup> In 2007, the question of the ambit of the right to water was again brought up when the UN Human Rights Council appointed an Independent Expert (from 2011 Special Rapporteur) on the issue of 'human rights obligations related to access to safe drinking water and sanitation.'<sup>22</sup> While the mandate thus supported the recognition of a right to sanitation, it demonstrated a more narrow approach to the types of water use included in the human rights protection. The UN General Assembly Resolution 64/292 on the Human Right to Water and Sanitation was adopted in 2010, and despite its general title the resolution focused on drinking water, while remaining silent on the right to water for broader livelihood needs. The sharp distinction between water for domestic and for productive water use has been understood as an attempt to protect the right to water for basic personal and domestic needs against commercial agriculture, which is one of the largest water users (Windfuhr, 2013). It has also been seen as reflecting efforts to balance the right to water against the concerns of the environment (Tulley, 2005).

However, other strands of international legal development have retained a broad approach to the scope of the right, encompassing a wider range of uses of water. In February 2012, the HRC Advisory Committee presented its 'Final study on the Advancement of the Rights of Peasants and Other People Working in Rural Areas' to the Human

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21 The guidelines were adopted by the Sub-Commission in its Resolution 2006/10, Promotion of the Realization of the Right to Drinking Water and Sanitation (24 August 2006) A/HRC/Sub.1/58/L.11. The full text of these guidelines is found in 'The Realization of the Right to Drinking Water and Sanitation, Report of the Special Rapporteur, El Hadji Guissé' (2005), E/CN.4/Sub.2/2005/25, July 2005). Hereinafter, 'the UN Sub-Commission Guidelines.'

22 Human Rights Council Resolution 7/22 on Human Rights and Access to Safe Drinking Water and Sanitation (2008), A/HRC/RES/7/22.

Rights Council.<sup>23</sup> The report of the Advisory Committee takes steps to recognize and to strengthen the protection of a wider right to livelihood, encompassing both the right to land and the right to water. The failure of states to harness water resources for both irrigation and drinking water (for people and livestock) is seen by the Advisory Committee as a key factor explaining the vulnerability of people working in rural areas.<sup>24</sup> Annexed to the report is the Advisory Committee's proposal for a Declaration on the Rights of Peasants and Other People Working in Rural Areas, which recognizes the rights enshrined in existing international instruments but also articulates new rights of peasants and other people working in rural areas, such as the rights to land, seeds, and the means of production, including water for livelihood production.

Overall, the very existence of the human right to water and sanitation is no longer contested. While the question of which types of water use can claim human rights protection remains an unsolved issue in the international debates, the legal foundations from which the right has emerged form the point of departure for analysis of this question in the next part of this chapter.

#### **4. THE RIGHT TO WATER: ADEQUATE, AVAILABLE, ACCESSIBLE, SAFE AND AFFORDABLE**

What does the human right to water entail? As noted above, the multiple legal bases for the right to water imply that an integrated approach, emphasizing the role of water for a range of rights embedded in different international and regional instruments, is key to delineating the constituent elements of the right. However, to structure the analysis, we make use of the analytical framework provided in CESCR General Comment No. 15.

The latter presents several elements of the normative content of the right to water.<sup>25</sup> The Committee emphasizes that water must be *adequate for human dignity, life and health*. The adequacy should not be interpreted

23 See The Final Study of the Human Rights Council Advisory Committee on the Advancement of the Rights of Peasants and Other People Working in Rural Areas (2012), A/HRC/19/75, paras 23 and 24. The Advisory Committee was mandated by the Human Rights Council to undertake a study on ways and means to further advance the rights of people working in rural areas, Human Rights Council Resolutions on The Right to Food, No. 13/4 (2010, A/HRC/RES/13/4) and No. 16/27 (2011, A/HRC/RES/16/27).

24 The Final Study of the Human Rights Council Advisory Committee on the Advancement of the Rights of Peasants and Other People Working in Rural Areas (2012), A/HRC/19/75, paras 31 and 35.

25 CESCR GC 15 paras 10-16.

ed narrowly, and the factors of availability, quality and accessibility must always be part of the assessment of adequacy.<sup>26</sup> Furthermore, enjoyment of water shall be without discrimination and in line with the principle of equality.<sup>27</sup>

This section analyses the elements of adequacy, availability, quality, and physical and economic accessibility from a contextual and 'engenderment' perspective. The non-discrimination component is elaborated in more detail in Section 7.

#### **4.1 Adequate water for what? Personal, domestic and livelihood uses**

Concerning the right to adequate water, a key question from the perspective of rural and peri-urban African women is whether the right to water should be defined narrowly, covering only water for personal and domestic use, or whether water for livelihood uses such as food production in kitchen gardens should be included. As noted above, this has been a contested question.

The CESCR General Comment No. 15 is itself ambiguous. It repeatedly uses the term 'water for personal and domestic use,' defined as water that is necessary for drinking, personal sanitation, washing of clothes, food preparation, and personal and household hygiene.<sup>28</sup> The amount necessary to satisfy personal and domestic needs will, according to the Committee, vary with climatic conditions as well as individual health conditions, such as people living with HIV/AIDS and pregnant and lactating women.<sup>29</sup> While it is difficult to convert these varying needs into general standards, the World Health Organization has held that 20-25 litres per person per day constitute the absolute minimum. The right thus clearly extends beyond the right to 'safe drinking water', which was the focus of the UN General Assembly's Resolution 64/292.

However, while the CESCR General Comment No. 15 states that priority in the allocation of water must be given to such personal and domestic uses, it also demonstrates a wider understanding. Priority should *also* be given to water resources required to prevent malnutrition, starvation and disease.<sup>30</sup> The scope and extent of the human right to water is thus defined through its link to the right to life, the right to food, and the

26 Ibid. paras 11-12.

27 Ibid. paras 13-16.

28 Ibid. para. 2.

29 Ibid. para. 12a.

30 Ibid. para. 6.

right to health. Along the same lines, the Committee argues that priority must be given to water required to meet the core obligations of *each* of the Covenant rights (emphasis ours).<sup>31</sup>

Further elaborating the indivisibility of the right to water, the right to adequate food, and the principles of non-discrimination and equality, the CESCR Committee placed particular emphasis upon access by disadvantaged and marginalized farmers: 'Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology.'<sup>32</sup>

The UN Sub-Commission Guidelines (2006) take a similarly ambiguous approach. A statement demanding priority to essential personal and domestic uses of water is accompanied by the statement that 'marginalized or disadvantaged farmers and other vulnerable groups should be given priority to water resources for their basic needs' in order to realize the 'right to adequate nutrition and the right to earn a living through work.'<sup>33</sup>

Some human rights scholars have argued for a strict distinction between rights, emphasizing that water for growing family food in kitchen gardens should be considered as a form of farming, and as such covered by the right to food and not by the right to water (Winkler, 2012: 129-31). However, other scholars disagree on the basis of both practical and legal arguments (Cullet, 2009:194; Hellum, 2007b: 297, 301; Langford, 2009). As shown by the case studies in this book, a sharply defined contrast between domestic and productive water uses does not respond to the integrated way in which poor rural and peri-urban southern and eastern African women use water for a multiplicity of purposes, ranging from drinking and washing to the watering of vegetables (Chapter 1). Access to water resources enables African women to play a crucial role in the food security of households: women are estimated to contribute up to 80% of labour for food production (FAO, 2004). Furthermore, access to water for livelihood uses enables women to raise money for school fees and medicine, and is thus vital for the fulfillment of children's rights to education and health.

Excluding water for livelihood uses from the right to water is inconsistent with the CESCR Committee's own view, presented in General Comment No. 15, that the rights to life, food and health form the basis

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31 CESCR GC 15 para 6.

32 Ibid. para 7.

33 The Sub-Commission Guidelines 4.3.

for establishing the very existence and content of the right to water. Similarly, in its General Comment No. 14 on the right to health, the CESCR explicitly included access to water as a necessary condition for a healthy life.<sup>34</sup>

The indivisibility of rights is also a dominant argument in the Right to Food Guidelines that were adopted by FAO in 2004.<sup>35</sup> Seeing the right to life, food, health and water as indivisible, Section 8 of the Right to Food Guidelines includes improved, non-discriminatory and secure access to water resources as one of its central obligations towards ensuring secure food production for livelihood. In striking a balance between conflicting water uses – particularly between large agricultural companies and poor small-scale farmers – these guidelines require that the situation of vulnerable groups be considered, in order to ensure that they have secure access to productive resources, most importantly water, to grow food for livelihood needs (Windfuhr, 2013). According to Guideline 8.6 of the Right to Food Guidelines, states must ensure women's access to productive resources, including credit, land and water. In a similar vein, the report on 'Women's right and the right to food' submitted by the HRC Special Rapporteur on the Right to Food<sup>36</sup> argues that states are required to enhance women's access to productive resources through their food security strategies.

Relatedly, Article 24 of the CRC links the right to health, clean water, and nutritious food, establishing a State duty 'To combat disease and malnutrition, including within the framework of primary health care, through inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.' An inclusive interpretation of domestic and personal use, which includes water for broader livelihood uses, would therefore be in line with the rights of vulnerable groups of rural children.

At a regional level, women's role in food security is linked to the right to water when the Maputo Protocol Article 15 obliges contracting states to take all appropriate measures to 'provide women with access to clean

34 CESCR GC 14 para. 4.

35 The Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, adopted by the FAO in 2004 (FAO 2005).

36 Report submitted to the UN Human Rights Council by the Special Rapporteur on the Right to Food, Olivier De Schutter, Women's Rights and the Right to Food, (24 December 2012). A/HRC/22/50.

drinking water, sources of domestic fuel, land and the means of producing nutritious food.' The Southern African Development Community (SADC) regional water policy of 2005 goes a long way in recognizing the need to prioritize water for sanitation, domestic and livelihood needs, so as to promote food security and poverty prevention.<sup>37</sup>

A sharp distinction between water for domestic and for productive purposes is particularly problematic in relation to Article 14 of CEDAW. This article addresses the disadvantages experienced by rural women in accessing water, land, and food. Article 14(1) obliges states to 'take into account the particular problems faced by rural women' as well as the 'significant roles that rural women play in the economic survival of their families.' Article 14(2) provides that rural women have a right to 'enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications' on an equal basis with men. Furthermore, the CEDAW Committee, in its General Recommendation No. 21, states that women's domestic work should be put on an equal footing with productive work.<sup>38</sup> Applying this principle to the right to adequate water, the right should encompass rural and peri-urban women's integrated livelihood strategies and the way in which they use water for both domestic and productive purposes. The wording of Article 14(2)(h), which links 'water supply' to 'the right to adequate living conditions', must be seen as entailing a broad definition of the right to water which includes water to produce food or other items that are necessary to prevent poverty, starvation and malnutrition.<sup>39</sup>

37 Southern African Development Community (SADC) Regional Water Policy, August 2005.

38 CEDAW General Recommendation No. 21, Equality in Marriage and Family Relations (1994), paras. 11-12, 32. See also CEDAW General Recommendation No 17, Measurement and Quantification of the Unremunerated Domestic Activities of Women and their Recognition in the GNP, (1991).

39 The CEDAW Committee has not addressed the human right to water and sanitation in any of its general recommendations or in its reporting guidelines. In its concluding remarks to States Reports, it asks States to provide information on the issue. On the basis of Article 14 in the Convention, the Committee regularly refers to the holistic relationship between women's right to participation and their right to development in terms of access to resources, such as land, water, credit and health services (Hellum, 2015). The Committee's concluding observations are nonetheless of a general character. Most of the time, the Committee simply reiterates the formulations in Article 14(2)(h) of CEDAW. The CEDAW Committee has, since 2013, been working on a general comment on the rights of rural women.

On the basis of the indivisibility of the right to life, the right to food, the right to health and the right to equality, as well as the duty to take into consideration the concerns of vulnerable groups, embedded in the ICESCR, CEDAW, CRC and the Maputo Protocol, a sharp division between water for domestic and productive uses should therefore be avoided. 'Adequate water' should be interpreted to encompass water necessary to prevent malnutrition, starvation and disease. As the countries whose experiences are discussed in this book seek to frame and implement the right to water, they will thus have to balance it against the right to a healthy environment, the right to health, and the right to food. This broader contextualization of the right to water may be the pathway to looking beyond water for drinking purposes and including water for livelihood – life, food and health.

#### **4.2 Accessible and safe water**

The right to physically accessible and safe water is a key concern in Africa, where people spend 40 billion hours every year just walking to collect water, and women and girls carry two-thirds of this burden (UNICEF, 2012). For water to be considered physically 'accessible', there must be water infrastructure that ensures access to sufficient quantities of water. Access to water services must be guaranteed in households, schools, hospitals, work places and public places.<sup>40</sup> It has been argued that the water source should not be further than 1,000 meters away from the household, which means 30 minutes collection time. Yet this cannot be applied automatically: It has to be taken into consideration that individual collection time will vary with gender, age and health. To make water accessible for the elderly or people with disabilities, specific measures must be put in place. Water sources must also be located in places where women can safely access water without the risk of rape or sexual abuse.

In line with the interdependence between water and health, the CESCR in General Comment No. 15 states that water must be of such a quality that it does not pose a threat to human health.<sup>41</sup> Again, differences between individuals and groups must be considered: the Committee refers to the World Health Organization's Guidelines for Drinking Water

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40 CESCR GC 15 para. 12 (c).

41 Ibid. para. 12 (b).

Quality (WHO, 2011), which defines safe drinking water as ‘water that does not represent any significant risk to health over a lifetime of consumption, including different sensitivities that may occur between life stages.’

### 4.3 Affordable water

The provision of water that is affordable for the poor poses a major challenge for post-colonial states that inherited water infrastructures designed to serve the needs of the male-dominated white settler economy. In line with the aim of greater racial justice and in order to bring black commercial farmers and industrialists on board, the Integrated Water Resource Management (IWRM) policy became the dominant template for water reform in post-colonial Africa in the 1990s. Privatization, decentralization, and demand management became the main modalities for laws and policies. The user-pays principle was, in many countries, adopted without due consideration of the situation of poor water users.

The case studies in this volume show how women within the most vulnerable and marginalized groups, including poor women, farmworker women and displaced women, are resorting to unsafe water because they cannot afford to pay water fees (Chapters 4, 8, 11 and 13). A related research observation is how the customary norms, which oblige the community members to share clean drinking water with those in need, have been weakened through the introduction of a decentralized water governance model which, on the basis of the user pay principle, requires membership fees (Chapter 9). While decentralized water governance has, in some instances, led to improved access to water for those who can pay, the research shows that it has also led to a situation in which poor community members who are unable to pay are excluded and have to resort to unsafe common water resources.

According to CESCR General Comment No. 15, water cannot be considered accessible unless it is also *economically* accessible, i.e. affordable: ‘Water, and water facilities and services must be affordable for all. The direct and indirect costs and changes associated with securing water must be affordable and must not compromise or threaten the realization of other Covenant rights.’<sup>42</sup> The Committee went on to opine that governments must therefore adopt the necessary measures to ensure that water is affordable, for example through appropriate pricing policies such as free or low-cost water.<sup>43</sup> Water pricing policies should be based on the equity

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42 CESCR GC 15, para. 12 (c) (ii).

43 Ibid., para. 27 (b).

principle, ensuring that water and sanitation services are ‘affordable for all, including socially disadvantaged groups’ and that ‘poorer households should not be disproportionately burdened with water expenses compared to richer households’.<sup>44</sup> In the same vein the Committee emphasized that ‘The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights.’<sup>45</sup> Most importantly, General Comment 15 establishes an immediate obligation to ‘ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease.’<sup>46</sup> Thus, under no circumstances shall an individual be deprived of the minimum essential level of water.

The same argument is emphasized in the UN Sub-Commission Guidelines, which indicate that water and sanitation services ‘should be supplied at a price that everyone can afford without compromising their ability to acquire other basic goods and services.’<sup>47</sup> To realize this, the guidelines suggest cross-subsidies from high-income users and state subsidization for poor areas. Establishing that a person’s ability to pay should be taken into account before reducing access, the Guidelines conclude that ‘No one should be deprived of the minimum essential amount of water or access to basic sanitation facilities.’<sup>48</sup>

Thus, although the state can exercise some choice in its pricing policies, the right to water is not fulfilled in a situation where individuals, for reasons beyond their control, such as poverty and discrimination, are unable to pay and therefore cannot access water. At the very minimum, questions of affordability for different disadvantaged groups must be given close attention in policy-making processes where systems for payment for water are an issue. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups.

## **5. THE HUMAN RIGHT TO SANITATION**

The absence of sanitation facilities threatens people’s health and dignity. Despite the progress made in providing improved sanitation globally and the notable increase in the number of people who have sanitation

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44 Ibid., para. 26.

45 Ibid., para. 12 (c) (ii).

46 Ibid., para. 37 (a).

47 UN Sub-Commission Guidelines Section 1.3(d).

48 Ibid. Section 6.4.

services, over 2.5 billion people lack access to adequate sanitation and one billion people still practice open defecation.<sup>49</sup> The areas studied in this book illustrate that for women across southern and eastern Africa, limited access to adequate sanitation facilities is frequent, and has direct consequences for health and physical safety. Farmworker women are, as shown in Chapter 4 and Chapter 13, on the bottom of both the national and local hierarchy.

While access to sanitation facilities is an urgent concern for many groups of women, this does not necessarily translate into infrastructure investments or policies. The case study from Mathare, Kenya (Chapter 5), demonstrates that for residents in informal settlements, sanitation was experienced as a most pressing need, even above water and housing improvement. However, this local prioritization was not reflected in similar levels of attention or investments by donors or official programmes. In Zimbabwe, access to sanitation facilities has dropped dramatically over the last years, but the new Water Policy does not set out a minimum level of sanitation access in the way it does concerning access to water for domestic use (Chapters 10 and 11).

Although the human right to sanitation has received less attention than the right to water, its existence is now widely recognized and has solid basis in international legal documents. It is also increasingly recognized in national constitutions, including in Kenya.<sup>50</sup> The right to sanitation is not directly addressed in the Zimbabwean Constitution of 2012 but it is implicit in the right 'to an environment that is not harmful to their health for well-being.'<sup>51</sup> The Malawian Constitution does not address the right to sanitation.

Sanitation is mentioned explicitly in CEDAW Article 14(2) h with water supply as elements of the right of rural women to equal enjoyment of adequate living conditions. While the International Covenant on Economic, Social and Cultural Rights does not mention sanitation explicitly, it is highly relevant for the right to an adequate standard of living, as established in Article 11, as well as for the right to health found in Article 12. Giving explicit support to this argument, CESCR General Comment No. 15 finds that the right to health and the right to adequate housing imply that states have an obligation to 'progressively extend safe

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49 Data from the Human Rights Council Resolution 27/7 on The Human Right to Safe Drinking Water and Sanitation (2014), A/HRC/RES/27/7.

50 Article 43 (1) (b), Constitution of Kenya, 2010, see also Winkler 2012, p. 173.

51 Section 73 (1) (a), Constitution of Zimbabwe.

sanitation services, particularly to rural and deprived urban areas.<sup>52</sup> The Committee further emphasizes that ‘access to adequate sanitation’ is fundamental for human dignity and privacy, as well as a mechanism for protecting the quality of water resources.<sup>53</sup> To ‘ensure access to adequate sanitation’ is mentioned specifically as an element of the immediate core obligation of states to take measures to prevent, treat and control diseases linked to water.<sup>54</sup>

The right to sanitation was included in the UN Sub-Commission Guidelines (2005), where Article 1.2 states that ‘Everyone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment.’ Sanitation was also explicitly included in the mandate when the Human Rights Council appointed its Independent Expert in 2007 (from 2011 Special Rapporteur) on the right to water, and her first report was devoted to the theme.<sup>55</sup> Moreover, in 2010, sanitation was recognized as a human right in resolutions by both the Human Rights Council<sup>56</sup> and the General Assembly.<sup>57</sup>

However, the more specific content of the right is still less developed. While CESCR General Comment No. 15 refers to ‘adequate’ and ‘safe’ sanitation services, it neither defines these two terms nor clarifies whether they carry different human rights’ obligations.<sup>58</sup> In her 2009 report, the Independent Expert draws on the concepts employed by the CESCR Committee in their analysis of the right to water<sup>59</sup> when she stresses that

*States must ensure without discrimination that everyone has physical and economic access to sanitation, in all spheres of life, which is safe,*

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52 CESCR GC 15 para. 29.

53 Ibid.

54 Ibid., para. 37(i).

55 Human Rights Council Resolution 7/22 (2008); Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque (2009), A/HRC/12/24.

56 Human Rights Council Resolution 15/9 on Human Rights and Access to Safe Drinking Water and Sanitation (2010) A/HRC/RES/15/9.

57 General Assembly Resolution 64/292 on the Human Right to Water and Sanitation (2010).

58 ‘Personal sanitation’, in CESCR GC 15 para. 12.a, is merely defined as ‘disposal of human excreta.’

59 See Section 4 above.

*hygienic, secure, socially and culturally acceptable, provides privacy and ensures dignity.*<sup>60</sup>

This statement was reiterated by the CESCR in its 2010 Statement on the Right to Sanitation.<sup>61</sup>

The principles of equality and non-discrimination apply also to the right to sanitation, as explicitly stated by the CESCR in the context of the ‘obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, *taking into account the needs of women and children*’ (emphasis ours).<sup>62</sup> For the right to sanitation to be both non-discriminatory and ‘engendered’, a key concern is to ensure that facilities satisfy gender-differentiated needs. A contextual and integrated approach to human rights points to several themes that require attention.

The case studies in this book demonstrate that lack of sanitation facilities is a widespread phenomenon, experienced by poor urban women as well as rural farmworker women (Chapters 4 and 13). The requirement that sanitation services must be *available* has been stated as requiring ‘a sufficient number of sanitation facilities (with associated services) within, or in the immediate vicinity, of each household, health or educational institution, public institutions and places, and the workplace.’ In practice, sanitation facilities are central to ensuring women’s equal access to public services and the related human rights. As pointed out by a number of studies, young girls are less likely to attend school if suitable sanitation facilities are lacking (Stewart, 2007). It has been estimated that about half of the girls in sub-Saharan Africa who drop out of primary school do so because of lack of adequate water and

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60 Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque (2009), A/HRC/12/24, para. 63.

61 CESCR Statement (2010), The Right to Sanitation, E/C.12/2010/1, para. 8. Similar concepts were included in the Sub-Commission Guidelines, where guideline 1.3 stressed that both water and sanitation services must be physically accessible, of sufficient and culturally acceptable quality, in a location where physical security can be guaranteed, and affordable.

62 CESCR GC, 15 para. 29. A similar call for non-discrimination is also found in the Human Rights Council in Resolution 27/7 (2014) on The Human Right to Safe Drinking Water and Sanitation, when it calls upon states ‘to identify patterns of failure to respect, protect or fulfil the human right to safe drinking water and sanitation for all persons without discrimination and to address their structural causes in policymaking and budgeting within a broader framework, while undertaking holistic planning aimed at achieving sustainable universal access’.

sanitation facilities (UNICEF, 2005). Recognizing that seemingly gender-neutral facilities often overlook socially-constructed gender differences related to sanitation and hygiene, the CESCR emphasized in its statement on the right to sanitation that ‘...girls do not go to school in many parts of the world for lack of toilets, or lack of separate toilets for them.’<sup>63</sup>

Furthermore, lack of sex-segregated toilets in hospitals may discourage women from seeking treatment there,<sup>64</sup> and workplaces lacking sanitation facilities affect women, in particular during menstruation and pregnancy.<sup>65</sup> To consider the *quality* of sanitation facilities, women’s need for menstrual hygiene and mechanisms for disposal of menstrual products must be taken into consideration.<sup>66</sup> Human Rights Council Resolution 27/7 points at the relationship between lack of access to adequate water and sanitation services, ‘including menstrual hygiene management, and the widespread stigma associated with menstruation,’ and gender equality and the human rights of women.<sup>67</sup>

The requirement that facilities be *physically accessible* calls for attention to the need to provide security for women who are vulnerable to attacks and violations in secluded areas. In the case study from Mathare, Kenya, women’s access to toilets at night is inhibited, either due to insecurity or because they are simply locked (Chapter 5). Rural women without access to sanitation may choose to defecate in the open under the cover of darkness in order to ensure a minimum of privacy, but at considerable risk to their physical security.<sup>68</sup> According to the Independent Expert, the location of sanitation facilities must ensure minimal risks to the phys-

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63 CESCR statement (2010), Statement on the Right to Sanitation, 19 November 2010, E/C.12/2010/1, para. 5.

64 Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque (2009), A/HRC/12/24, para. 23. For a similar argument, see Ali (2007).

65 Ibid., para. 38.

66 Ibid., para. 72.

67 Human Rights Council Resolution 27/7 (2014). The Special Rapporteurs on torture and on the right to education have also specifically referred to the sanitary needs of menstruating women as relevant to their mandates, see references in Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque (2009), A/HRC/12/24, paras 51-52.

68 Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque (2009), A/HRC/12/24, paras 43-44.

ical security of users, and the facilities should be constructed in a way that minimizes the risk of attack, 'particularly for women and children.'<sup>69</sup> Ensuring that toilets are open and the roads lit at night in poor urban settlements is one measure to achieve this.

The case studies from Mathare and Harare's high-density areas (Chapters 5 and 11) further document the lack of toilets allowing access for women with disabilities. To design facilities that are *physically accessible* for everyone requires attention to the practicalities of physical access and use for a wide range of users, such as 'children, persons with disabilities, elderly persons, pregnant women, parents accompanying children, chronically ill people and those accompanying them.'<sup>70</sup>

In Zimbabwe, water cut-offs due to lack of payment also have implications for the sanitary conditions for urban women (Chapter 11). The Independent Expert has drawn explicit attention to this theme, holding that 'Water disconnections resulting from an inability to pay also impact on waterborne sanitation, and this must be taken into consideration before disconnecting the water supply.'<sup>71</sup> The right to sanitation demands that access to sanitation facilities be *affordable* for all people, and a range of technical and financial mechanisms can support the realization of this goal.<sup>72</sup>

Sanitation should be approached as a right closely related to the rights to non-discrimination; to physical security, to human dignity and protection against gender violence; and to education, health and work. The indivisibility of human rights is thus a key argument to develop an 'engendered' interpretation of the right to sanitation. Furthermore, access to sanitation facilities is not only a right in itself, but also a central element of ensuring women's equal enjoyment of other human rights. Thus, a contextual and integrated approach to human rights calls for more sustained attention to the *sanitation* dimension of development and infrastructure projects, on an equal footing with water.

## **6. THE DUTY TO RESPECT AND PROTECT THE RIGHT TO WATER AND SANITATION IN THE CONTEXT OF PLURAL WATER GOVERNANCE**

While the previous sections outlined the *rights* to water and sanitation, the goal towards which all actors must strive, this section further details

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69 Ibid., para. 75, see also Sub-Commission Guidelines section 3.1.

70 Ibid., para. 76, see also para. 73.

71 Ibid., para. 77.

72 Ibid., paras 78-79.

the *duties* of states as to how they must act to realize this goal. While all aspects of the right may not be capable of immediate fulfilment, states do have immediate obligations to act, or refrain from acting (Fredman, 2006: 77). A first immediate obligation, cutting across all activities, is to ensure that the right is exercised without discrimination.<sup>73</sup> A second is to take deliberate, concrete and targeted steps towards full realization.<sup>74</sup> According to some authors, the provision of a minimum essential level of the right ('the core obligation') is also an immediate obligation (Winkler, 2012: 117-25).

In presenting these steps, this section makes use of the generally recognized tripartite framework of types of obligations, distinguishing among the obligations to respect, to protect, and to fulfil the right(s) in question.<sup>75</sup> In short, the obligation to *respect* implies that the state refrain from interfering directly or indirectly with the enjoyment of the right to water.<sup>76</sup> *Protecting* the right requires the state to prevent third parties from interfering with the enjoyment of the right.<sup>77</sup> *Fulfilling* the right refers to the state's positive action to ensure that the right to water can be enjoyed fully, and can be disaggregated into obligations to facilitate, to promote, and to provide.<sup>78</sup>

The complex nature of water governance gives rise to particular questions for all three levels of obligations, as the multitude of actors and the plural and interacting normative orders at play must be recognized and considered. As demonstrated by the case studies, the duties to respect and protect raise particularly pressing questions of interpretation in the context of plural water governance.

### **6.1 The duty to respect**

The obligation to respect, demanding that the state refrain from interfering with the enjoyment of the right to water, has important implications for how the state deals with customary and informal water management. In southern and eastern Africa, land tenure and access to related natural resources, such as water, have for centuries been regulated by local com-

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73 ICESCR articles 2.2 and 3, see also CESCR GC 15, para. 17.

74 ICESCR article 2.1, see also CESCR GC 15, paras 17-18.

75 This analytical framework was originally proposed by Henry Shue (1980) and further developed by Asbjørn Eide (1984). It has been applied in several general comments from the CESCR Committee since GC 12 (1999) on the right to food, so also GC 15 on the right to water.

76 CESCR GC 15, paras. 21-22.

77 Ibid, paras. 23-24.

78 Ibid, paras. 25-29.

munity-based arrangements (Hodgson, 2004). These informal water governance regimes, which have co-existed with the received western water laws since the colonial period, often recognize a right to clean drinking water and a broad right to livelihood in terms of access to land and water that is necessary for livelihood. Access to these resources enables African women to play a crucial role in the food security of households.

The local practices and norms that govern water access, use, and control constitute a dynamic and responsive form of law, often referred to as 'living customary law.' As shown in this book, local water rights often lack formal legal recognition and are not integrated and protected by the laws and policies that frame the national water governance systems. Rural communities' use of and control over water sources is often threatened by large-scale development and industrialization initiatives that are using national permit and licensing systems to garner water resources without due attention to local users. They often form part of larger deals between national governments and national and international investors in the growing drinking water or agro-food-energy businesses. The downside of these deals is that they often result in uncompensated loss of livelihood resources for poor and marginalized groups: so-called 'land and water grabbing.'

According to the CDESCR, the obligation to *respect* the human right to water includes a duty to refrain from interfering arbitrarily with customary or traditional arrangements for water allocation, unlawfully polluting water, or destroying water services and infrastructure as a punitive measure.<sup>79</sup> In articulating the content of the right to food, and taking note of the duty in Article 1(2) of the ICDESCR, which provides that people cannot 'be deprived of their means of subsistence', the CDESCR has also opined that States Parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.<sup>80</sup> This implies a duty to respect traditional water uses.

## 6.2 The duty to protect

Recognizing the role of customary or local/informal water management for access to water in practice will also have implications for the duty to *protect*, i.e. ensuring that third parties do not interfere. The obligation to protect, as part of all human rights treaties and conventions, requires State Parties to put in place laws and policies that protect the enjoyment of the human right to water and sanitation against third parties.

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<sup>79</sup> CDESCR GC 15, para. 21.

<sup>80</sup> *Ibid*, para. 7.

State Parties thus have a duty to prevent third parties, whether individuals, groups, corporations or other agents, from interfering with the right to water and sanitation. One example of a statement to this effect is found in the UN Sub-Commission's Guidelines: 'States should enact and implement legislation to protect access by persons to traditional water sources in rural areas.'<sup>81</sup>

Moreover, the obligation to protect is important when water service provision is privatized. As also noted by the CRC Committee, privatisation or outsourcing does not exempt the state from its responsibility.<sup>82</sup> An effective regulatory system must be established, including independent monitoring, genuine public participation, and imposition of penalties for non-compliance.<sup>83</sup> In a similar manner, decentralization of control over water and sanitation is not *per se* a violation of human rights. However, safeguards may be necessary to avoid negative effects on the enjoyment of the right to water, including discrimination in access and participation. States Parties are thus under an obligation to prevent both formal and informal private water service operators and providers from compromising the right to safe and affordable water. Where the state privatizes the provision of water services, it must ensure that regulatory systems, including independent monitoring, public participation, and penalties for non-compliance, are put in place.<sup>84</sup>

## **7. THE DUTY TO MAKE WATER AND SANITATION ACCESSIBLE WITHOUT DISCRIMINATION**

Human rights demand that attention be given to how different groups of women experience marginalization and rights' violations, which is linked not only to sex/gender but also to other aspects of their identities. The case studies presented in this book demonstrate that, although poor and marginalized women should, from a human and constitutional rights perspective, be given priority, they often find themselves at the bottom of the

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81 Sub Commission Guidelines, section 3.4.

82 CRC General Comment No. 16 on State Obligations regarding the Impact of the Business Sector on Human Rights (2013), CRC/C/GC/16, para. 33, see also CESCR GC 15, para. 48.

83 CESCR GC 15, para. 24. See also Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2011a), A/66/255, para. 36, and Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque (2010a), A/HRC/15/31.

84 CESCR GC 15, paras 23-24

water hierarchy.

Water and sanitation services should be made accessible to everyone without discrimination, and this is an immediate duty of states. For the human right to water and sanitation to be 'engendered', it must be interpreted so that it can contribute to substantive equality for women and girls in different social, economic and cultural contexts. The human right to water and sanitation thus needs to be infused with protection against direct, indirect, structural and intersectional discrimination.

CESCR General Comment No. 15 states that 'whereas the right to water applies to everyone, States Parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right.'<sup>85</sup> The CESCR has addressed discrimination in relation to the right to water in light of Article 2(2) of the ICESCR: discrimination on the grounds of sex, 'which has the intention or effect of nullifying or impairing enjoyment or exercise of the right to water,' is said to contravene the Covenant.<sup>86</sup> The importance of eliminating substantive inequality was further articulated in CESCR General Comment No. 20 on Non-Discrimination.<sup>87</sup> It states that states have a duty to immediately adopt measures necessary to prevent, diminish and eliminate the conditions and attitudes that cause or perpetuate substantive or de facto discrimination. By way of example, it provides that 'ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl-children and persons living in informal settlements and rural areas.'<sup>88</sup>

### **7.1 Direct discrimination**

Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or women, and these distinctions cannot be justified objectively.<sup>89</sup> While direct discrimination may be explicit in laws and guidelines, legislative amendment is not always sufficient to remove it from practice. Direct discrimination is often related to gender stereotypes embedded in social, religious or cultural notions of how men and women are expected

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85 CESCR GC 15, para. 16. See also the Sub Commission Guidelines.

86 *Ibid*, para. 13.

87 CESCR GC No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) (2009), E/C.12/GC/20.

88 *Ibid* 20, para. 8.

89 CESCR GC No. 16 (2005) Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights (2005), E/C.12/2005/3.

to behave. Thus, the duty to remove direct discrimination is intimately linked to the duty to combat structural discrimination (7.3).

## **7.2 Indirect discrimination**

Indirect discrimination occurs when a law, policy or programme does not appear discriminatory on its face, but has a discriminatory effect when implemented. It can often stem from the uneasy relationship between gender-neutral laws and the gendered uses of land and water in practice (Kameri-Mbote, 2013; Hellum, 2015). Inappropriate resource allocation can lead to discrimination that may not be overt (Ik Dahl et al., 2005).

Injustices deriving from the gendered division of labour and gendered uses of land and water must be addressed. Article 14.1 of the CEDAW states that: ‘States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetarized sectors of the economy.’ CESCR General Comment No. 15 indicates that investment should not disproportionately favour expensive water supply services and facilities that are only available to a small fraction of the population.<sup>90</sup> This can occur, for example, when water infrastructure is located so that it can be used in men’s agricultural production, but is out of reach for women’s kitchen gardens.

Thus, indirect discrimination may occur when policies, programmes, and plans for improvements and investments in water, by overlooking the gendered character of land and water uses, leave in place or exacerbate existing gender inequalities. Water policies and practices that appear at face value to be gender neutral need to be scrutinized with a view to ensuring that women’s water uses, such as watering of kitchen gardens, are considered on an equal footing with irrigated agriculture, which is often controlled by men. Agricultural water supply services often exclusively target large-scale irrigation. This may result in a disproportionate share of resources and efforts being devoted to a small fraction of male commercial farmers.

Gender mapping of agriculture is therefore an important means to ensure that male and female land and water uses receive the same level of attention and consideration. It is a method that focuses on distinctions among three types of farming systems: (i) male farming systems, where most production sub-units are managed by men, but often with major contributions by women; (ii) female farming systems, where most pro-

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<sup>90</sup> CESCR GC 15, para.14.

duction sub-units are managed by women; and (iii) separate male/female systems, where similar proportions of production sub-units are managed by men and women (Van Koppen, 2011).

### 7.3 Gender stereotypes, systemic discrimination and cultural change

Due to the gendered division of labour, women and girls, in large parts of Africa, spend far more time fetching water than do men and boys. Such practices are often underpinned by gender stereotypes embedded in customary or religious norms and beliefs. Gender stereotypes, according to Cook and Cusack (2010: 1), degrade women when they assign them subservient roles in society. Prejudices about women's inferiority generate disrespect and devaluation of women.

The duty to address negative gender stereotypes is found in several conventions. Article 5(a) of CEDAW places an obligation on States Parties to 'take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.' In a similar vein, Article 2.2 in the Maputo Protocol requires that 'States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.'

While the ICESCR contains no similar regulation of gender stereotypes, the CESCR has developed an understanding of gender discrimination that also encompasses practices and cultural attitudes that create and uphold gendered hierarchies. The Committee has defined *systemic* discrimination as follows: 'legal rules, policies and practices or predominant cultural attitudes in either the public or the private sector which create relative advantages for some groups and disadvantage for others.'<sup>91</sup> To come to grips with systemic discrimination, states must take proactive measures.

The Special Rapporteur on the Right to Food has also highlighted the relationship between structural causes of discrimination and gender division of work. To break the cycle of discrimination requires 'that the

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91 CESCR GC 20, para. 12.

structural causes of *de facto* discrimination be addressed. In particular, measures should be taken to relieve women of the burden imposed on them by the duties they assume in the “care” economy.<sup>92</sup> In his view, this requires ‘the right combination of measures that recognize the specific obstacles women face (particularly time, poverty and restricted mobility resulting from their role in the “care” economy) and measures that seek to transform the existing gender division of roles by redistributing tasks both within the household and in other spheres.’<sup>93</sup>

Water and sanitation policies need to adopt the transformative approach embedded in CEDAW Article 5(a) and the Maputo Protocol Article 2.2, as well as the duty to combat systemic/structural discrimination. This implies that policies which seek to accommodate the specific needs of women, for example by protecting community-based water management practices, should also seek to subvert traditional gendered norms placing on women and girls the duty to fetch and manage water for domestic use.

Changing gender stereotypes and societal structures will require close and nuanced attention to the local dynamics of cultural change. Recognizing that the universal principle of equality could be achieved through different means the CEDAW Committee has gradually developed a jurisprudence that accommodates different cultural traditions with the aim of achieving substantive, rather than just formal, equality. In its concluding comments to State Parties, the CEDAW Committee encourages them to see culture as something that can be changed (Holtmaat, 2013). One example is the concluding observations to Malawi’s sixth report, where the Committee urged

*... the State party to view culture as a dynamic dimension of the country’s life and social fabric, subject to many influences over time and therefore to change. It recommends that the State party adopt without delay a comprehensive strategy, including clear goals and time-tables, to modify or eliminate negative cultural practices and stereotypes which are harmful to, and discriminate against, women and to promote women’s full enjoyment of their human rights in conformity with articles 2(f) and 5(a) of the Convention.*<sup>94</sup>

A second example of how the CEDAW Committee views the state’s responsibility for changing culture is found in its recommendations in

92 Special Rapporteur on the Right to Food (2012), A/HRC/22/50, para. 39.

93 Ibid, para. 42.

94 CEDAW/C/MWI/CO/6, para. 21.

an individual complaints case in which customary inheritance law in Tanzania was found to constitute a violation of the Convention.<sup>95</sup> The Committee does not merely request the state to amend the formal legal framework: recognizing the relationship among discriminatory customs, gender stereotypes and discriminatory attitudes about the roles and responsibilities of women (s. 7.5), it also recommends that the state seek to encourage dialogue ‘between civil society and women’s organizations and local authorities, including with traditional leaders at the district level’ as a path to induce change in practice.<sup>96</sup>

Seeing culture as contested and dynamic, the UN Special Rapporteur in the Field of Cultural Rights emphasizes that ‘the critical issue, from the human rights perspective, is not whether and how religion, culture and tradition prevail over women’s human rights, but how to arrive at a point at which women own both their culture (and religion and tradition) and their human rights.’<sup>97</sup> The report of the Special Rapporteur thus ‘proposes to shift the paradigm from one that views culture merely as an obstacle to women’s rights to one that seeks to ensure equal enjoyment of cultures’ rights; such an approach also constitutes a critical tool for the realization of all their human rights.’<sup>98</sup> It calls for a strategy addressing not only the restrictive impact of custom, culture and religion on women’s human rights, but also women’s agency to assert their right to culture in spaces where customary and religious norms are interpreted and applied, so as to empower women as agents of political, legal, cultural and legal change.

This approach resonates with the overall findings of the national and local level case studies presented in this book. From a grounded gender perspective, the research uncovers the complex and conflicting legal situations that the interplay among international, national, and local norms and institutions governing water gives rise to. In Chapter 1 it points to the need for a human rights based approach to water that considers how legal plurality in some situations may be a resource that facilitates poor and marginalized women’s access to water, while in other situations it may produce and reinforce intersecting gendered and classed forms of exclusion.

95 CEDAW Committee (2015) Communication No. 48/2013, CEDAW/C/60/D/48/2013.

96 CEDAW Committee (2015) Communication No. 48/2013, CEDAW/C/60/D/48/2013, section 9.b(v).

97 Report of the Special Rapporteur in the Field of Cultural Rights (2012), A/67/287, para. 4.

98 Ibid, para. 5.

## 7.4 Intersectional discrimination

As shown by the studies presented in this book, the poorest and most vulnerable women (such as displaced women, farmworker women, and poor widows looking after HIV orphans) are at the bottom of the water hierarchy, contrary to international and constitutional priority principles. The duty of a state to combat discrimination goes beyond considering sex/gender alone. Intersecting vulnerabilities related to gender, class, health and disability may result in intersectional discrimination: that is, discrimination that cannot be ascribed to a cause.

The CEDAW Committee has defined intersectionality in the following manner:

*Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men. States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures.<sup>99</sup>*

Addressing the multiple disadvantages experienced by rural women, including the poor, elderly and disabled, Article 14 of the CEDAW Convention sets out an intersectional approach to gender discrimination (Banda, 2012: 359). The CEDAW Committee has also drawn attention to the particular disadvantages experienced by vulnerable groups of women in accessing water and sanitation. It highlighted the situation of elderly rural women in General Recommendation No. 27:

*In many countries the majority of older women live in rural areas where access to services is made more difficult due to their age and poverty levels. Many older women receive irregular, insufficient or no remittances from their migrant worker children. Denial of their rights*

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99 CEDAW General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (2010), CEDAW/C/GC/28.

*to water, food and housing is part of the everyday lives of many poor, rural older women.*<sup>100</sup>

In its concluding observations to the report of the Kenyan State, the Committee expressed worries regarding the situation of both rural women and refugee women residing in urban slums, and urged the State to:

*Ensure effective policing in the slums and informal settlements and to address the issue of gender-based and other forms of violence, inter alia by urgently providing sanitation facilities in the immediate vicinity of each household.*<sup>101</sup>

The CESCR has emphasized the importance of recognizing the experience of ‘social groups that are vulnerable and have suffered and continue to suffer marginalization,’ as well as intersectionality, in order to fully combat discrimination.<sup>102</sup> In General Comment No. 15, the CESCR repeatedly demands attention to marginalized groups, thus also recognizing the multiple types of vulnerabilities experienced by poor women in enjoying the right to water and sanitation:

*States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced people, migrant workers, prisoners and detainees.*<sup>103</sup>

## **8. THE RIGHT TO EQUAL, FREE AND MEANINGFUL PARTICIPATION IN WATER GOVERNANCE**

Participation is a human rights principle which is important in order to ensure that livelihood resources like land, water, food, health and housing are managed and distributed by institutions that are representative and accountable. International human rights and development discourse assumes that women’s participation may be one of the most successful mechanisms for more gender-sensitive consideration of demands for water and sanitation at the international, national and local level.

The right to participation is enshrined in Article 25 of the International Covenant on Civil and Political Rights (ICCPR). Articles 7 and

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100 CEDAW General Recommendation No. 27 on older women and protection of their human rights (2010) CEDAW/C/GC/27, para. 24.

101 CEDAW/C/KEN/CO/7, para 42(b).

102 CESCR GC 20, para. 27.

103 CESCR GC 15, para. 18.

14 (2) of the CEDAW guarantee women equal right to participation at all levels of government. The right to equal participation of persons with disabilities is specified in Article 29 of CRPD. Children's rights to participate and to express their views are embedded in Article 12 of CRC. Participation is also a key element in the human rights based approach to development.<sup>104</sup>

The principle of participation requires that all relevant stakeholders must be enabled to take part in the decision-making process and have the opportunity to express their demands (Filmer-Wilson, 2005: 233; Winkler, 2012: 220-21). The UN Sub-Commission Guidelines on the Promotion of the Realization of the Right to Drinking Water and Sanitation specify several dimensions of participatory rights. Emphasizing the equal rights to participate of all individuals, these guidelines state that 'Everyone has the right to participate in decision-making processes that affect their right to water and sanitation. Special efforts must be made to ensure the equitable representation in decision-making of vulnerable groups and sections of the population that have traditionally been marginalized, in particular women.'<sup>105</sup> The guidelines also draw attention to the rights of communities as groups: 'Communities have the right to determine what type of water and sanitation services they require and how those services should be managed and, where possible, to choose and manage their own services with assistance from the State.'<sup>106</sup>

As women are the day-to-day managers of water and sanitation, their participation is recognized by international policy makers as contributing to more just, effective and locally appropriate uses of resources. The need to ensure women's participation is found across a range of documents. The Dublin Principles, which provided the international blueprint for water reform in southern and eastern Africa (as elsewhere in the world) during the 1990s, took the close relationship among water, gender, and sustainable development into account. The gender dimension of sustainable water management was anchored in Principle 3: 'Women play a central part in the provision, management, and safeguarding of water'. Although the Dublin Principles made no explicit reference to CEDAW, this recognition of women's role as local water managers shares the foundational argument of Article 14.2(a) in CEDAW, which obliges State Parties to

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104 On the human rights-based approach to development and women's land rights in Southern and Eastern Africa, see Ikdahl et al. (2005).

105 UN Sub-Commission Guidelines, section 8.1.

106 Ibid. section 2.

ensure that rural women have a right to participate in the elaboration and implementation of development planning at all levels, as well as a right to participate in all community activities. Furthermore, CESCR General Comment No. 15 on the human right to water emphasizes the need to ensure that 'Women are not excluded from decision-making processes concerning water resources and entitlements. The disproportionate burden women bear in the collection of water should be alleviated.'<sup>107</sup>

The duty to ensure women's participation is also strongly emphasized in human rights documents at a regional level in Africa. Article 9.1.c of the Maputo Protocol obliges the states to take specific positive action to ensure that 'women are equal partners with men at all levels of development and implementation of state policies and development programs.' According to Article 9.2, States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.' Seeing participation rights as part and parcel of the right to sustainable development, the Maputo Protocol Article 19.c obliges states to take all appropriate measures to 'Ensure participation of women at all levels in the conceptualization, decision-making, implementation and evaluation of policies and programs.' In the SADC (1997), heads of state or government laid the political foundation for the implementation of women's participation rights by committing themselves to take measures to ensure 30% representation of women in all political decision-making structures by 2005.

The CEDAW Committee has not yet addressed the human right to water and sanitation in any depth in its general recommendations or in its reporting guidelines.<sup>108</sup> However, in its examination of State reports, the Committee regularly uses Article 14.2(h) of the Convention as a point of departure for urging states to take measures to ensure women's right to participation and their right to development in terms of access to resources, such as land, water, credit and health services. The following recommendation has been made in its concluding comments to states such as Mozambique,<sup>109</sup> South Africa<sup>110</sup> and Kenya:<sup>111</sup>

*That the State party take measures to increase and strengthen the par-*

107 CESCR GC 15, para. 16.

108 The CEDAW Committee is, as we write, working on a general recommendation on rural women.

109 CEDAW/C/MOZ/CO/2, para. 41.

110 CEDAW/C/ZAF/CO, para. 38.

111 CEDAW/C/KEN/CO/7, para. 42(a).

*ticipation of women in designing and implementing local development plans, and pay special attention to the needs of rural women, particularly women heads of household, ensuring that they participate in decision-making processes and have improved access to health, education, clean water and sanitation services, fertile land and income-generation projects.*

In a similar vein, the Sub-Commission Guidelines state that special efforts must be made to ensure equitable representation in decision-making processes that affect the right to water and sanitation.<sup>112</sup>

The Human Rights Council's Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation pointed out that, as the most disadvantaged generally tend to have less ability to voice their opinions and needs, decision-making processes that do not ensure meaningful participation by these groups and individuals will further impair the use and sustainability of decisions aimed at ensuring access to water and sanitation.<sup>113</sup> Thus, participation is not only a right in itself; by shedding light on different situations and views, it may strengthen the likelihood of achieving a water supply and governance that are consistent with human rights.

The right to participation extends to all levels of decision-making, whether policy-making processes at national level or day-to-day decision-making locally in water user groups and other local institutions. It also applies in emergencies, requiring states and donors to involve local water users in decisions regarding drilling of boreholes and maintenance systems.

From a human rights perspective, participation has to be 'active, free and meaningful.'<sup>114</sup> Meaningful participation requires knowledge about decision-making processes, as well as the laws and policies to be made. Clearly, education and information are important measures for ensuring that the right to participation results in actual empowerment.

The Sub-Commission guidelines link the right to participation with the right to information: 'Everyone should be given equal access to full and transparent information concerning water, sanitation and the envi-

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112 The Sub-Commission Guidelines, para. 8.1.

113 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2013), A/HRC/24/44, para. 49.

114 UN General Assembly Resolution 41/128, Declaration on the Right to Development (4 December 1986), A/RES/41/128, art. 2(3).

ronment.<sup>115</sup> This adds an explicit equality dimension to the CESCR's emphasis on information accessibility, 'the right to seek, receive and impart information concerning water issues,' as a dimension of adequacy.<sup>116</sup>

The HRC Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation has further detailed the relationship between participation and transparency:

*True participation requires meaningful opportunities to freely and actively influence decisions, not mere superficial consultation or information sharing [...]. Such a process entails providing information through multiple channels, enabling participation in transparent and inclusive processes, ensuring that funds are appropriately spent on interventions that are needed and strengthening the capacities of individuals and civil society to engage.*<sup>117</sup>

To ensure that women's participation is active, free, and meaningful, merely counting the number of women present at meetings will, as shown by the research presented in this book, not suffice (Chapters 8, 9 and 12). In practice, customary norms that have developed outside the realm of the national laws, policies, and institutions are often based on a gender hierarchy that reflects the gendered division of labour, resources and power within the community. These norms often assign women an inferior position in the community's governance of water, and have a spillover effect on women's participation in local institutions that are part of the national water governance system. Thus, without an 'empowerment' component addressing water-related gender stereotypes as well as women's agency to assert their social, economic, civil and political rights and their capacity to hold water service providers accountable, there is a danger that the concerns of women will continue to be neglected in both local and national water governance.

## **9. THE OBLIGATIONS OF INTERNATIONAL DEVELOPMENT ACTORS**

The case studies in this book demonstrate the wide range of actors, local, national and international, who are involved in water governance. As noted already, the state in which actions take place ('the home state') has a human rights obligation to *protect* people's enjoyment of the human right to water and sanitation against third parties. However, to some extent,

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115 The Sub-Commission Guidelines, para. 8.3.

116 CESCR GC 15, para. 12(c)(iv).

117 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2013), A/HRC/24/44, para. 76.

international actors may also themselves be duty-bearers.

### **9.1 International actors as duty-bearers**

International actors include the international finance institutions (the World Bank and the African Development Bank), international organizations such as the UN agencies (UNICEF, UNDP), international NGOs, and states involved in bi- and multilateral development co-operation. Their involvement takes different forms, ranging from funding state activities to hands-on activities run by the donors themselves. Donors may take part in reform and policy design initiatives at the national level, or be involved in local-level drilling of boreholes, setting up local water user groups, or other types of support to local level activities.

While most of these actors have subscribed to a human rights-based approach to development as a principle guiding their activities, the basis for establishing the *legal* obligations of actors other than the 'home state' differs. NGOs are rarely understood as capable of holding international legal obligations. Although the international financial institutions frequently mention the instrumental role of human rights for their efforts to promote development, they have been reluctant to see themselves as *bound* by human rights, but rather see themselves as facilitating their members' work to realize rights. However, some authors have emphasized that at least some obligations may also be held by these institutions (Skogly, 2003). The UN's purpose of promoting human rights, as embodied, for instance, in the UN Charter Article 55, provides a stronger basis for endowing the UN specialized agencies with obligations. Furthermore, UNICEF is explicitly mandated by the United Nations General Assembly to advocate for the protection of children's rights, which include the rights to water and sanitation.

Recognizing the limits of focusing solely on the nation-state, the CESCR frequently outlines the obligations of international development actors in its general comments. Concerning the right to water in particular, the Committee recommends that UN agencies and other international organizations concerned with water should co-operate effectively with States Parties in relation to the implementation of the right to water. The Committee also recommends that the international financial institutions (IFIs), notably the International Monetary Fund, the World Bank and the African Development Bank, should take into account the right to water in their lending policies, credit agreements, structural adjustment

programmes, and other development projects.<sup>118</sup>

In a similar vein, the UN General Assembly has stressed the important role of international co-operation and technical assistance in the field of drinking water and sanitation, and ‘urges development partners to adopt a human rights-based approach when designing and implementing development programmes in support of national initiatives and plans of action related to the right to safe drinking water and sanitation.’<sup>119</sup> The HRC Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation has argued that donor policies must integrate the human rights to water and to sanitation, and support national priorities in this field as well as targets to reduce disparities in access.<sup>120</sup>

However, the clearest basis for legal obligations is found with donor states that have themselves ratified the human rights conventions. The International Law Commission Draft Articles on State Responsibility of States for Internationally Wrongful Acts specify when a conduct, consisting of an action or omission, is attributable to the State – even outside its territory.<sup>121</sup> The ‘extra-territorial’ obligations of states concerning social and economic rights have received considerable interest over the last decade. This is visible in the analyses from various UN bodies and mechanisms,<sup>122</sup> as well as in the rapidly growing body of academic literature on the topic (Coomans and Kamminga, 2004; Skogly, 2006; Salomon et al.,

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118 CESCR GC 15, para. 60.

119 UN General Assembly Resolution 68/157 on The Human Right to Water and Sanitation (18 December 2013), A/RES/68/157 para. 10. See, similarly, Human Rights Council Resolution 24/18 on The Human Right to Safe Drinking Water and Sanitation (27 September 2013), A/HRC/RES/24/18, para. 15, which make reference to states, specialized agencies of the UN system and international and development partners, and donor agencies.

120 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2011b), A/HRC/18/33, para. 62.

121 International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-Third Session (2001), A/56/10.

122 This includes many of the documents referred to earlier in this chapter, stemming from treaty bodies such as the CEDAW Committee, the Committee on the Rights of the Child and the CESCR, the resolutions from the General Assembly and the Human Rights Council (HRC), and reports from special rapporteurs, including the HRC Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation. See also The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted by a gathering of experts in international law and human rights (final version 29 February 2012).

2007; Gibney and Skogly, 2010; Coomans and Künneman, 2012; and Langford, et al., 2013).

The CEDAW Committee has pointed out that State Parties are responsible for all their actions affecting human rights, ‘regardless of whether the affected persons are in their territory.’<sup>123</sup> The CESCR has emphasized that ‘International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards, and sustainable and culturally appropriate.’<sup>124</sup> In its General Comment No. 15 on the right to water, this Committee devotes several paragraphs to the State’s obligations to respect the enjoyment of the right in other countries,<sup>125</sup> to prevent its own citizens and companies from violating the right in other countries,<sup>126</sup> and to facilitate realization of the right to water in other countries.<sup>127</sup> It emphasizes that in emergency assistance and disaster relief, priority should be given to Covenant rights, including the provision of adequate water.<sup>128</sup>

National donors operating in Kenya, Malawi and Zimbabwe, notably GIZ, DFID, SIDA, DANIDA, AusAid and NORAD,<sup>129</sup> have adopted human rights-based approaches to the water sector. Yet, in many donor-funded interventions, such as consultancy reports or service provision programmes, cost recovery overrides the concerns of poor water users. In Zimbabwe, for example, the Multi Donor Analytical Trust Fund co-ordinated by the World Bank has, in its assistance to the formation of a new national water policy, failed to look into what the state obligation to provide affordable water requires (Chapter 10). In Malawi, where the water sector relies heavily on donor support, most NGOs that are involved in water sector provision through contracts with government are unaware of, or disregard, poor users’ right to affordable water (Chapter 7). While donors supported Malawi’s draft Water and Sanitation Bill in 1999, most of them advocated an economic approach to water provision, with loan conditionalities from the international finance institutions de-

123 CEDAW GR 28, para. 12.

124 CESCR GC 15, para. 34.

125 Ibid., para. 31.

126 Ibid., para. 33.

127 Ibid., para. 34.

128 Ibid., para. 34.

129 German Society for International Co-operation, Dept. of International Development (UK), Swedish International Development Co-operation Agency, Danish International Development Agency, Australian Aid, Norwegian Agency for Development Co-operation.

manding that subsidies be removed and pricing mechanisms be put in place, with the aim of channelling water use to ‘the most productive economic sectors.’ However, in Kenya, donors have in recent years played a more positive role in promoting a human rights based approach, with a pro-poor focus, in the draft water policy (Chapter 3, see also Munguti et al., 2007).

The starting point is that the donor state remains responsible for its conduct, even when it takes place outside its territory. Even though activities must follow the laws and regulations of the home state, and may also require this state’s recognition or acceptance, project design and implementation often resides primarily with a donor. The donor state must thus ensure that it refrains from conduct that nullifies or impairs the enjoyment of rights.<sup>130</sup> Donor states must also ensure that they observe the right to participate in decision-making, as well as principles of transparency and accountability.<sup>131</sup> In practice, donors frequently co-operate closely with NGOs or consultants. Projects may be implemented through contracting with private (profit- or non-profit) parties. It is important to note that the responsibility remains with the donor state as long as such third parties act under its direction or control.<sup>132</sup>

## **9.2 Accessibility without discrimination: Responsibilities of donors when selecting target groups and areas**

In practice, the Millennium Development Goals (MDGs) provide an important framework for the prioritization of development assistance. Concrete targets and indicators are intended to ensure that efforts are directed to specific areas deemed to be of great concern. Water and sanitation are included as Target 7.c: ‘To halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation.’<sup>133</sup> It seems likely that this has aided in maintaining the attention of both states and donors to this field, and the water element of this target was reportedly met five years ahead of schedule. However, the structure of the targets and the use of indicators have also met with criticism for lack of comprehensiveness, for not providing incentives to move further when the target is reached, and for their blind spots regarding

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130 The Maastricht Principles, principle 20.

131 Ibid., principle 32(c).

132 Ibid., principles 11 and 12(a). For further details, see De Schutter et al. (2012) pp. 1110-111.

133 See <http://www.un.org/millenniumgoals/environ.shtml> for updated information about the progress towards this target.

the most vulnerable, inequality and discrimination.<sup>134</sup> The latter point is a key concern when it comes to the realization of women's human right to water and sanitation. It is expected that the proposed Sustainable Development Goals (SDGs), which are to replace the MDGs post-2015, will address these shortcomings.

In contrast to the MDGs, the human right to water and sanitation demands that actors focus on the most vulnerable groups. In its statements on the role of non-state actors, including international organizations, in the realization of the right to water, the CESCR found that 'Priority in the provision of aid, distribution and management of water and water facilities should be given to the most vulnerable or marginalized groups of the population.'<sup>135</sup> The HRC Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation has stated that donor policies should support national priorities with specific strategies to address discrimination and reach the most disadvantaged.<sup>136</sup> This must form the foundation for later moves to higher levels of service.<sup>137</sup>

Even if the minimum level of water access has been achieved, neither women nor vulnerable groups should experience discrimination in access to water and facilities.<sup>138</sup> The CESCR Committee has made the general statement that: 'States Parties should also ensure that they refrain from discriminatory practices in international co-operation and assistance and take steps to ensure that all actors under their jurisdiction do likewise.'<sup>139</sup> Multiple and intersectional discrimination 'merits particular consideration and remedying,'<sup>140</sup> which would to the protection of women who experience discrimination that is also linked to factors such as ethnic origin, property, political and other opinions, disability, age, marital status,

134 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2012b), A/67/270, see e.g. paras 17-23 and 31-38. See also Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque (2010b), A/65/254.

135 CESCR GC, 15 para. 60. See also GC 14 on the right to health, paras 40 and 64-65.

136 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2011b), A/HRC/18/33, para. 80(f).

137 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2011a), A/66/255, para. 41.

138 CESCR GC 15, para. 37(b), the Sub-Commission Guidelines paras. 3.1-3.3, and generally the Maastricht Principles, principle 32(c).

139 CESCR GC 20, para.14

140 *Ibid.*, para.17.

sexual orientation and gender identity, health status, and economic and social situation.<sup>141</sup>

The Special Rapporteur has specified that ‘states *and donors* must vigorously promote non-discrimination in their water and sanitation programmes and policies, looking to eliminate disparities in access based on, *inter alia*, race, colour, ethnic origin, religion, gender, economic status or citizenship.’<sup>142</sup> She has further specified that ‘the consideration of equality needs to guide decision-making processes’ for maintenance and rehabilitation, as well as for the expansion of services.<sup>143</sup>

The case studies in this volume draw attention to groups of women who are particularly disadvantaged in enjoying the right to water and sanitation, such as women in informal settlements, displaced women, women farm workers and women engaged in subsistence agriculture.<sup>144</sup> As donor involvement is inherently limited, donors will in practice have to make decisions as to which areas and groups to target. However, the immediate obligation of non-discrimination and the obligation to focus on the most vulnerable and marginalized groups imply that this selection cannot be done randomly. Donors must systematically identify differences in needs, as illustrated when the CRC Committee argues that CRC Article 24.4 *requires* donor states to ‘identify the major health problems affecting children, pregnant women and mothers in recipient countries and to address them in accordance with the priorities and principles established by article 24.’<sup>145</sup> Donors must seek to identify the situations of different groups

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141 CESCR GC 15, paras 13-16. See also CESCR GC 20, paras 18-35 for a discussion of a range of prohibited grounds of discrimination in the context of economic, social and cultural rights.

142 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2011a), A/66/255, para. 41 (my italization).

143 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2013), A/HRC/24/44, para. 67.

144 See CESCR GC 15, para. 16 and the Sub-Commission Guidelines paras 3.2-3.3 for examples of individuals and groups that should receive particular attention and active support from states. The Sub-Commission Guidelines further emphasize that farmers and other vulnerable groups should be given priority in access to water resources in order to realize the right to adequate nutrition and the right to earn a living through work, Sub-Commission Guidelines para. 4.3.

145 CRC General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (2013), CRC/C/GC/15, para.87.

of women and whether their current water access is adequate. Decisions and priorities on which areas and groups to target must be justifiable given the foundational principles, including the emphasis on basic access, attention to vulnerable and marginalized groups, and non-discrimination. Other considerations, such as links to politics, do not exempt the donor from these principles.

The political, economic and humanitarian crisis in Zimbabwe, which culminated in outbreaks of cholera and typhoid in 2008, illustrates the complex considerations that donors need to take into account when they provide humanitarian assistance in the context of diplomatic isolation (Chapter 10). The study of A1 resettlement farms in Mazowe Catchment in Zimbabwe (Chapter 13) shows how displaced farmworker women's urgent need for clean water and sanitation was neglected by both the national government and international humanitarian actors in a situation where 200,000 farm workers and their families who had been evicted from commercial farms had lost access to housing, food, water and sanitation. International donors were unwilling to provide humanitarian assistance to those living on former commercial farms because the farms were taken illegally and without compensation for their former owners. From a human rights perspective the donors were, regardless of the political situation, under an obligation to consider the basic needs of the most vulnerable and marginalized groups living on the former commercial farms such as the displaced farm worker families and their children.

The limited nature of donor involvement in water and sanitation service delivery concerns also the dimension of time. The HRC Special Rapporteur has pointed out that this can create challenges to sustainability and accountability: 'While providing immediate access is important, it is equally central to guarantee long-term operation and maintenance and to plan with government and communities for phased exits and local ownerships.'<sup>146</sup> Thus, donors should plan for the continuation of non-discrimination after their exit. Efforts to include women as beneficiaries and participants should not be limited to special measures during the start-up of local processes; they should be designed to facilitate enduring equality when government or community take over. Again, the need to address structural discrimination and gender stereotypes (as addressed in Section 6) will be central to this end.

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146 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2013), A/HRC/24/44, para. 42.

### 9.3 Attention, affordability and accountability: Responsibilities of donors in policy processes

In addition to supporting and implementing concrete projects at the local level, donors may influence national law and policy-making through funding of various forms of expertise. These may include a range of activities, such as budget support (with or without conditionality), funding of and participation in processes of preparing policy and legislative reform, and provision of consultants and technical advice. Such support for reform will facilitate the realization of the human right to water and sanitation – with ensuing obligations for the donor. Donors in the water sector in Kenya have, for instance, invested in the policy and legal reforms required to implement the 2010 Kenyan Constitution, which provides for the right to water and sanitation and thus complements the State's initiatives.

The human rights literature on the right to water has drawn attention to how different policy choices may have negative effects on the realization of the right unless mitigating measures are in place. As noted in Section 4.3 of this chapter, the introduction of user fees, water meters or privatization may jeopardize the right to water, unless adequate safeguards are put in place. As shown in the national case studies compiled in this book (Chapters 3, 7, and 10), donors are frequently found to promote cost-recovery and emphasize economic efficiency. However, this carries the risk of violating the right to affordable water for disadvantaged groups.<sup>147</sup> To avoid violations of the right to water, policies based on the 'user pays' principles must include measures to mitigate such effects.

The actual negative *effects* on individuals' enjoyment of the human right to water may be difficult to attribute to the donor state, as decisions regarding the home state policies, laws and regulations ultimately fall under the home state's jurisdiction.<sup>148</sup> Questions such as how to establish cau-

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147 CESCR GC 15, para. 27.

148 Furthermore, national planning processes that are entirely externally-driven are problematic. The Special Rapporteur has pointed out that such reforms can circumvent democratic procedures and result in merely cosmetic strategies and plans. However, she emphasizes, donors and development partners may play a significant role, for example to 'facilitate coordination and support capacity-building and institutional strengthening, including at the local level,' see Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2011b), A/HRC/18/33, paras 43, 51 and 83(e). The recent water reform in Kenya is mentioned as an example of clear designation of responsibilities when donors are involved, para. 44.

sality between a state's actions and the human rights violation, and how to divide responsibilities between the domestic state and other states, have been subject to legal debate (Langford et al., 2013).

However, the donor holds not only obligations of *result*, but also obligations of *conduct*. Donors may, as demonstrated by the national case studies from Kenya, Malawi, and Zimbabwe in this book (Chapters 3, 7 and 10), exercise considerable influence on policy processes by promoting particular policy options, by providing technical advice and staff, or simply by participating in decisions regarding which themes to pursue in analyses, what type of competence to draw on, and what type of information to be collected. Thus, donors are in a position to affect whether processes consider the potential human rights effects of different policy choices. Donors' participation in reform processes must be understood as constituting a human rights-relevant activity in itself, capable of strengthening or weakening the realization of rights. The deeper the donor state's involvement is, the stronger is the responsibility to ensure that such involvement is consistent with human rights.

A donor state's support to and participation in policy processes may place it in a position where it has obligations to fulfil the right to water. Correspondingly, when donors are aware that their influence on reform processes may impinge on the right to water, they are at risk of violating their obligations. While the balancing of considerations is primarily a home state responsibility, donors may 'aid or assist' violations if they promote particular policies/options without taking steps to ensure that corresponding human rights concerns are addressed. Donors must ensure that they do not promote policies that jeopardize the realization of the human right to water, including women's equal enjoyment of this right. If they have knowledge of such risks, as they have been pointed out, for example, in human rights documents and literature, they must simultaneously promote steps to safeguard against such effects.

For water policies and plans of action to promote the human right to water, it is crucial that human rights and gender dimensions be made visible and subject to analysis. Donors involved in such processes should seek to ensure that all aspects of the right to water and sanitation: adequacy, availability, safety, physical and economic accessibility, and non-discrimination are included. The specific requirements will depend upon the mode and degree of involvement. However, when the general human rights norms are juxtaposed with the specific concerns raised in the case studies of this book, the following elements emerge as crucial to consider

when donors influence water policy processes:

- Which themes are analysed? To ensure that the right to water is considered in sufficient depth, themes such as non-discrimination and the situation of vulnerable groups must be considered alongside economics and engineering. Furthermore, the role of water in the realization of other rights such as those to health and livelihood implies that the full range of water uses, both domestic and productive, in urban and rural areas, should be considered. Consequently, donors who play a role in the selection of topics for further analysis, background papers, consultancies, etc, should strive to include these themes.<sup>149</sup>
- Which data are collected? If data collection does not include factors such as gender and socio-economic status as variables, the impact on the situation of different groups will be difficult to assess. Donors should seek to ensure that data collection is tailored to enable human rights analyses, so to avoid decisions that end up benefitting already privileged groups. Furthermore, such data are also important to monitor the implementation of the right.<sup>150</sup> In order to monitor non-discrimination adequately, it is not sufficient to simply count the numbers of women present at meetings or sitting in water user groups.
- What kinds of competence are available in the process? Different types of competence may shed light on different questions. An economist may suggest a tariff model without considering the question of economic accessibility, while an engineer may suggest a location for boreholes without

149 Germany presents their involvement in the Kenyan water sector reform as an example of how the donor's human rights based approach successfully contributed to shifting attention towards access for the poor in informal settlements (GTZ, 2009: 7).

150 The Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2013), A/HRC/24/44, commends the use of 'ex ante and ex post human rights assessments' when policies that might have a detrimental effect on the human rights to water and sanitation are adopted, as tools to discharge the obligation to monitor the implementation of the right to water and sanitation, para. 81. The same report further commends donors advocating monitoring the sustainability of water and sanitation interventions, and points out that they must be complemented with equality criteria to ensure that all in society benefit, para. 80.

considering availability for the varying water uses and needs of different groups. Where donors support reform processes through providing staff or consultants, they should consider whether competence on rights and gender needs to be included alongside other types of competence.

Finally, donors involved in water reform processes may exercise both positive and negative influence on whether the decision-making at national level satisfies requirements as to participation, transparency and accountability.<sup>151</sup> Donors may, as demonstrated by the national case study from Zimbabwe (Chapter 10), contribute to the violation of this set of rights by actively requesting secrecy about the processes, or by passively neglecting to share information and facilitate participation. To fulfil their human rights obligations, donors should promote transparency. Even if ongoing discussions may require some parts of information to be withheld, there should be sufficient information available about the process, its themes, options and available budgets<sup>152</sup> to allow individuals as well as organisations to voice their views and seek to influence the process. Transparency and information-sharing will help making it visible whether concerns about human rights and gender inequality are included in the processes, and can also assist the rights-holders in holding decision-makers accountable for the results.

## **10. CONCLUSION**

The indivisibility of socio-economic rights, particularly the right to an adequate living standard in terms of land, water, health and food, is especially important for poor African women's livelihoods. Taking a contextual, integrated and engendered approach to human rights, this chapter has developed a framework for analysing both what it takes for the right to water and sanitation to be considered realized and the duties of the home state and other development actors in moving towards this objective.

Most importantly, international and national water laws and policies should, in line with local practices, norms and values, recognize water as a part of the right to livelihood in terms of food and health. This proposed broader notion of a right to water for livelihood is important in that it overcomes the disjunction between customary and statutory

151 See Section 8 of this chapter.

152 The Special Rapporteur has highlighted that transparent budgeting 'fosters accountability and public participation,' Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2013), A/HRC/24/44, para. 69.

law and provides an opportunity to include food security and poverty prevention in the development of gender-sensitive water laws and policies. Equally important is the need for an 'empowerment' component addressing water-related gender stereotypes as well as women's agency to assert their social, economic, civil and political rights, and their power and capacity to hold water service providers and duty bearers accountable.

As southern and eastern African countries seek to frame and implement the right to water and sanitation, they will have to balance it with the right to gender equality, the right to a healthy environment, the right to health and the right to food embedded in both regional treaties and national constitutions. This broader contextualization of the right to water may be the pathway for looking beyond water for drinking purposes and including water for livelihood – life, food and health.