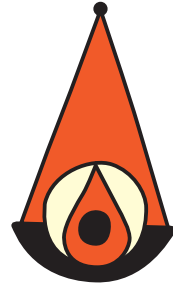




**Justice**



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REALISING THE HUMAN RIGHTS TO WATER AND SANITATION:  
A HANDBOOK BY THE UN SPECIAL RAPPORTEUR  
CATARINA DE ALBUQUERQUE

## **Access to justice for violations of the human rights to water and sanitation**

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Realising the human rights to water and sanitation:  
A Handbook by the UN Special Rapporteur  
Catarina de Albuquerque

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The Water and Waste Services Regulation Authority



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# 01.

## What is access to justice?

States have an obligation to realise the human rights to water and sanitation, and can be held accountable for this. The right to access to justice is central to putting this fundamental principle into practice.

The human right to access to justice means that individuals have the right to bring alleged violations of human rights before independent and impartial bodies. The decisions of these bodies must be based on standards of fairness and justice, and the remedies they decide on must be effective. Where necessary, people must be able to seek redress before a court or tribunal, although other bodies, including administrative bodies, may offer effective remedies and be able to settle disputes. States have discretion as to how they structure their domestic legal and judicial system to ensure access to justice<sup>1</sup>, which is often also referred to as the right to a remedy.<sup>2</sup> In this Handbook, these terms will be used interchangeably.

The right to a remedy also has a preventative purpose. That the human rights to water and sanitation can be enforced, and that authorities can be held accountable if they don't comply, is an incentive for States to observe their obligations to realise these rights. Access to justice in a particular case is not only about remedying one specific human rights violation, but also about preventing such violations from recurring by addressing the underlying structural causes of violations.

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This booklet starts by clarifying the legal foundations of access to justice, and continues with a brief discussion on the justiciability (the capacity to be decided by a court) of economic, social and cultural rights, and an outline of States' human rights obligations in ensuring access to justice. Seeking a remedy for a specific violation can involve different institutions and mechanisms, ranging from administrative bodies or other quasi-judicial mechanisms to courts at national, regional and international levels.

Finally, this booklet considers the barriers people often face when seeking justice and outlines the key principles that States must follow in guaranteeing people the right to a remedy for violations of the human rights to water and sanitation.

## 1.1. Legal foundations

The right to a remedy is explicitly guaranteed in many human rights treaties, for example, article 2 of the International Covenant on Civil and Political Rights (ICCPR):

[...] any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

"[...] any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedies.

[...] the competent authorities shall enforce such remedies when granted.

The human rights to water and sanitation are components of the human right to an adequate standard of living, enshrined in article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). While the Covenant itself contains no provision on the right to a remedy, the Committee on Economic, Social and Cultural Rights (CESCR) has consistently recognised the right to an effective remedy for economic, social and cultural rights.<sup>3</sup>

CESCR's General Comment No. 15 on the right to water states that "any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels", and "all victims of violations of the right to water should be entitled to adequate reparation".<sup>4</sup>

The principles clarified in General Comment No. 15 on the right to water apply equally to the human right to sanitation.<sup>5</sup>

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## 1.2. The justiciability of the human rights to water and sanitation

Justiciability means that human rights can be legally enforced through the court system. The justiciability of economic, social and cultural rights, including the human rights to water and sanitation, has been challenged in the past, but today this debate has become largely irrelevant. Many economic, social and cultural rights cases have been decided by national judicial and quasi-judicial institutions, and their number is growing exponentially. At the international level, the question was finally resolved with the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), which entered into force in 2013.<sup>6</sup> This Optional Protocol establishes a complaint mechanism that allows individuals or groups to file formal complaints with the CESCR, alleging that States have violated their economic, social and cultural rights.

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JUSTICIABILITY  
MEANS THAT  
HUMAN RIGHTS  
CAN BE LEGALLY  
ENFORCED BY THE  
COURT SYSTEM

It has been argued that economic, social and cultural rights are not justiciable because cases involving these rights often challenge policy decisions about the allocation of resources, and that this would cause courts to exceed their competence and violate the separation of powers between the judiciary, the executive and the legislative functions of the State.<sup>7</sup> However, the role of the judiciary includes ensuring that human rights are upheld. When settling claims for economic, social and cultural rights, courts do not themselves re-arrange budgets or adopt policies; their role is to determine whether government decisions are in line with human rights, and to oblige government to adopt measures to meet their human rights obligations.

The question is therefore not whether economic, social and cultural rights are justiciable and courts have a role to play in their enforcement, but rather how courts can best fulfil that role in a meaningful way.

**States must ensure that economic, social and cultural rights – including the human rights to water and sanitation – are effectively justiciable at international, regional, national and sub-national levels.**

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## 1.3. The dimensions of access to justice

All aspects of economic, social and cultural rights and the corresponding State obligations are justiciable. Where State fail to comply with any of its human rights obligations, whether by failing to use the maximum available resources for the realisation of the human rights to water and sanitation or by deliberate actions (for example, by polluting water sources), it has committed violations of these rights.<sup>8</sup>

This section discusses the obligations to respect, protect and fulfil the human rights to water and sanitation, putting particular emphasis on equality, non-discrimination and participation, and also examines extraterritorial obligations. All of these dimensions can and must be fully addressed by courts and other human rights bodies. The following section gives guidance on how courts can do this and presents a number of cases in which courts have successfully adjudicated on the human rights to water and sanitation.

### 1.3.1. The obligation to respect

The obligation to respect the human rights to water and sanitation requires that States do not take actions that deprive people of their existing access to water and sanitation. This obligation is of immediate effect and is not tied to the duty of progressive realisation or the availability of resources. Common violations of the obligation to respect these rights include disconnections from the water supply when people are unable to pay, and the pollution or depletion of water resources.

National courts and international bodies have held in many cases that disconnections from the water supply violate the obligation to respect the human right to water. (see Services, pp.40-42)

The Court of Appeal of Botswana interpreted national constitutional provisions by using General Comment No. 15 on the right to water and the 2010 UN General Assembly resolution on the right to water and sanitation. It found that preventing a community of Bushmen from accessing their traditional boreholes amounted to inhuman and degrading treatment.<sup>9</sup>

Bulgaria was found by the UN Human Rights Committee to have violated the right to home and family, and the rights to life and non-discrimination, by allowing the Municipality of Sofia to disconnect the water supply of a Roma community. The Committee issued interim measures requiring the authorities to reconnect the water supply.<sup>10</sup>

In Argentina, a court considered the situation of impoverished neighbourhoods in Córdoba, where wells had been contaminated with faecal and other matter from a water treatment plant overflowing with untreated sewage.<sup>11</sup> The Court ordered the municipality to take urgent measures to address the situation, including the provision of 200 litres of safe water per household per day until a permanent solution was found.

**States must ensure that legal protections and mechanisms are in place to enable individuals and groups to gain access to justice in cases where State actions violate their obligation to respect the human rights to water and sanitation, by directly or indirectly interfering with their enjoyment.**

### 1.3.2. The obligation to protect

The obligation to protect the human rights to water and sanitation means that the State must put mechanisms in place to prevent violations by non-State actors. 'Non-State actors' could mean businesses, international organisations, civil society organisations or individuals. Where non-State actors are involved in the provision of water and sanitation services, their role comes with human rights responsibilities. Other private actors may also have an impact on the human rights to water and sanitation through industrial or agricultural activities. As with the obligation to respect, the obligation to protect is generally considered to be of immediate effect and is not subject to progressive realisation.

Violations of the obligation to protect can occur in the context of service provision when States fail to protect access to water and sanitation services. This usually stems from a lack of adequate regulation. A violation may also be the result of service providers excluding certain settlements from the service contract, or failing to protect water resources or infrastructure from pollution, for example, when States do not regulate industrial discharge. Non-State actors have a responsibility to respect human rights and to exercise due diligence to avoid human rights abuses, and this is independent of the State's obligation to protect human rights.<sup>12</sup>

The obligation to protect also means that States must ensure that non-State service providers do not disconnect people from their water supply if they are unable to pay.

(see Services, pp.40-42)

In Argentina, the court prohibited a private company from disconnecting households from the water supply due to non-payment, on the basis of the International Covenant on Economic, Social and Cultural Rights (article 11) and other human rights instruments.<sup>13</sup>

The Greek Council of State recently blocked the planned privatisation of the Athens Water and Sewerage Company, arguing that it could put public health at risk because of uncertainty as to whether the quality and affordability of the services can be safeguarded.<sup>14</sup>

In the case of *Sardinal*, the Constitutional Chamber of the Costa Rican Supreme Court ordered the authorities to stop the construction of a pipeline destined to bring water to tourist resorts until an assessment was carried out that would show whether the amount of water withdrawn by the pipeline would deprive the local population of water for personal and domestic uses, which must get priority allocation.<sup>15</sup>

The African Commission on Human and Peoples' Rights found violations of the rights to life and to health, among others, because of the failure of the Nigerian government to monitor the impact of oil operations that were polluting water in the Niger Delta.<sup>16</sup>

**States must have the legal mechanisms in place to ensure that the obligation to protect the human rights to water and sanitation is justiciable, by enabling individuals and groups to challenge situations in which non-State actors interfere with the complainants' enjoyment of the human rights to water and sanitation or that of future generations.**

### 1.3.3. The obligation to fulfil

The obligation to fulfil the human rights to water and sanitation means that States are obliged to progressively realise rights by prioritising essential levels of access for all, using ‘maximum available resources’. States have the obligation to progressively realise the rights to water and sanitation by ensuring access to sufficient, safe, acceptable, accessible, and affordable services. (see Introduction, pp.33-36)

Where individuals or groups allege a violation of these obligations, judicial and quasi-judicial mechanisms must be available to review any of the measures adopted by the State for conformity with the human rights to water and sanitation. State measures include:

- adopting legislation and regulations (see Frameworks);
- adopting policies, strategies and plans of action (see Services);
- raising, allocating and using the maximum available resources (see Financing); and
- prioritising basic needs, where necessary through direct provision of services. (see Introduction, pp.33-36)

Courts and other bodies have a role to play in assessing whether States are meeting their human rights obligations. It is not their role to dictate alternative policies, budgets or other measures, but to review the existing ones and order the government to revise them if necessary. In such cases, courts and other bodies should critically evaluate policies and other measures on the basis of the evidence:

- provided by claimants on the actual effects of policies on their enjoyment of their rights;
- provided by governments about available resources and competing needs.

Courts can then pass independent judgement on whether policies and programmes are consistent with human rights obligations.

With regard to immediate obligations, courts have held that a minimum essential provision of services must be made available immediately.

The Constitutional Court of Colombia held that the authorities had to connect households to water and sewerage and to ensure a sufficient daily amount of water<sup>17</sup>

The Supreme Court of India dealt with a lack of basic sanitation in more desperate circumstances in a case where people living in informal settlements collectively complained that the cesspits used for sanitation were overflowing and causing serious health concerns. The Court ordered the municipality to construct a sufficient number of public latrines and to provide daily water and de-sludging services.<sup>18</sup>

**States must make sure that the obligation to fulfil the human rights to water and sanitation is justiciable, by ensuring that legal mechanisms are in place that will enable affected individuals and groups to challenge any failures by governments to adopt reasonable measures and strategies before judicial and/or quasi-judicial bodies.**

---

## **Retrogressive measures**

A measure is called retrogressive if it takes backward steps with respect to the human rights to water and sanitation. Such a measure is only acceptable in exceptional circumstances.<sup>19</sup> The Committee on Economic, Social and Cultural Rights has stated that the burden of proof rests with the State, which must show that:

- the adoption of any retrogressive measure is based on the most careful consideration of alternatives;
- that disadvantaged groups have been prioritised;
- that any such measures can be justified by reference to other human rights that rely on water for their realisation; and
- that full use was made of available resources.<sup>20</sup>

The Committee has expressed concern about policy choices that are deliberately retrogressive, in particular in the context of austerity measures.<sup>21</sup> Some actions and failures to act may have a retrogressive effect, even if they're not deliberately retrogressive. The failure by States to ensure operation and maintenance, for example may cause services to fail. Even where retrogression is not deliberate, the human rights framework obliges States to assess the impacts of their policies carefully, and to adjust them as soon as they become aware that these might lead to retrogression.<sup>22</sup>

**States must carefully assess whether their policies and other measures will lead or are leading to retrogression, and adapt and reform them accordingly.**

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THE PROHIBITION  
OF DISCRIMINATION  
ALLOWS FOR  
DIFFERENTIAL  
TREATMENT AND  
OTHER MEASURES  
DESIGNED TO  
ELIMINATE SYSTEMIC  
DISCRIMINATION

### 1.3.4. Non-discrimination and equality

The prohibition of discrimination is of immediate effect. Positive measures and programmes to ensure equality may require targeted resources and infrastructure development, and may take time. The two major human rights treaties include a non-exhaustive list of the prohibited grounds for discrimination.<sup>23</sup> The Committee on Economic, Social and Cultural Rights has included guidance on the prohibition of discrimination in General Comments No. 15 on the right to water and No. 20 on non-discrimination.<sup>24</sup>

The prohibition of discrimination allows for, and in many circumstances requires, differential treatment and other measures designed to eliminate systemic discrimination. This covers States and other actors, including private companies, when they adopt measures to address attitudes that cause or perpetuate discrimination. The Convention on the Rights of Persons with Disabilities explicitly recognises that a failure to provide reasonable accommodation to ensure access for persons with disabilities constitutes discrimination.<sup>25</sup>

Violations of the right to equality and non-discrimination may occur where States:

- fail to prevent and combat discrimination and stigmatisation;
- exclude certain individuals or groups from services or facilities;
- fail to take the appropriate steps to achieve equality;
- fail to address systemic patterns of inequalities.

States also have an obligation to ensure that other entities, including non-State service providers, do not discriminate against particular individuals or groups, or exclude them from using facilities.

Courts have successfully adjudicated non-discrimination in the provision of water and the requirement to prioritise access for marginalised groups in order to remedy systemic discrimination.

In a case in the United States, a predominantly African-American neighbourhood had no access to piped water and groundwater was heavily contaminated, whereas the predominantly white neighbouring areas were all connected to the water supply system. The Court concluded that “there is only one explanation for the fifty years of conduct [by the public authorities]: racial discrimination”.<sup>26</sup>

Violations of the human rights to water and sanitation of indigenous peoples are evidence of patterns of systemic discrimination.

.....

The European Committee of Social Rights ordered Portugal to take remedial action to improve the situation with regard to housing and water for Roma people.<sup>27</sup>

The Inter-American Court of Human Rights determined that denying the people of an indigenous community access to their ancestral lands denied them access to water and sanitation and violated their right to life.<sup>28</sup>

While the stigmatisation of particular cultural practices is often deeply entrenched in society and requires a multi-pronged response, courts can play a role in challenging and condemning such practices and requiring the government to adopt measures to act on eliminating them.

In Nepal, a public interest litigation initiative was launched to challenge the practice of 'chhaupadi' (the isolation of women and girls during menstruation). The Supreme Court of Nepal outlawed the practice in 2006 and a law was subsequently passed banning it.<sup>29</sup>

Long-term stigmatisation is impossible to remedy through a single judgment or law and therefore States must commit to long-term strategies and plans for public education and engagement to prevent and respond to stigmatisation.<sup>30</sup>

Sanitation workers frequently face stigmatisation, serious health risks, violence and exploitation.

The Indian parliament adopted an Act requiring that sanitation systems be overhauled to eliminate the need for 'manual scavengers', who clean dry toilets by hand. The Act sought to eradicate stigma, in part by arranging for alternative jobs for these workers.<sup>31</sup> The Supreme Court of India observed that, "manual scavengers are considered as untouchables by other mainstream castes and are thrown into a vortex of severe social and economic exploitation".<sup>32</sup> It held that the continuation of manual scavenging violates human rights, and ordered the State to implement the new Act fully and take appropriate action in response to any violations.<sup>33</sup>

.....

STATES MUST  
COMMIT TO  
LONG-TERM  
STRATEGIES AND  
PLANS FOR PUBLIC  
EDUCATION AND  
ENGAGEMENT  
TO PREVENT AND  
RESPOND TO  
STIGMATISATION

**States must**

- ensure that courts and other relevant bodies can provide effective remedies to end discrimination and bring about substantive equality;
  - adopt positive measures to ensure an end to discriminatory practices.
- .....



### 1.3.5. Participation

Participation is not only a human right in itself, but participation in decision-making by the people who will be affected is invaluable, as this leads to decisions that are more likely to be sustainable. States may be committing a violation if they deny people the opportunity to participate.

The South African Constitutional Court developed the concept of “meaningful engagement” in the *51 Olivia Road* case, finding that rights holders have a right to participate in decisions affecting the enjoyment of social rights, including the development of plans. The Court found that the City of Johannesburg had made no effort to engage with the affected residents and hence did not meet these obligations.<sup>34</sup>

This concept of meaningful engagement has since been taken up by courts in other countries, including Kenya and South Africa.<sup>35</sup>

In *Beja v. Western Cape* the High Court of the Western Cape in South Africa found that a denial of meaningful engagement and effective community participation in decision-making regarding the design and installation of toilets violated constitutional rights. The Court held that “[t]he legal obligation to reasonably engage the local community in matters relating to the provision of access to adequate housing, which includes reasonable access to toilet facilities in order to treat residents ‘with respect and care for their dignity’, was not taken into account when the City decided to install [...] unenclosed toilets.” The Court further found the City of Cape Town to be in violation of Section 152(1)(e) of the South African Constitution, “which provides for public involvement in the sphere of local government”, by requiring it to “provide democratic and accountable government for local communities; and encourage the involvement of communities and community organisations in the matters of local government”.<sup>36</sup>

**States must ensure that alleged violations of the right to participation are justiciable.**



### 1.3.6. Violations of extraterritorial obligations

States' human rights obligations do not stop at their national borders, but extend beyond them. The Maastricht Principles on Extraterritorial Obligations of States, adopted in 2011 by forty experts in international law and human rights, clarify the extraterritorial obligations of States on the basis of existing international law.<sup>37</sup> They affirm that the obligations to respect, to protect and to fulfil all extend extraterritorially.<sup>38</sup> The Principles also demand that a "prompt, accessible and effective remedy before an independent authority, including, where necessary, recourse to a judicial authority, for violations of ESC [economic, social and cultural] rights" be established.<sup>39</sup>

The following fictional scenarios illustrate situations in which extraterritorial obligations are relevant to the human rights to water and sanitation:

- **Development assistance:** Angistan provides development assistance to Anomia for agricultural projects. These projects contribute to violations of the human right to water in Anomia, decreasing the availability of water sources and causing pollution. Angistan must ensure – as part of its own obligations under international human rights law – that such development cooperation with other countries produces results that are compliant with human rights standards and principles.<sup>40</sup>
- **Economic sanctions:** Arualand has imposed economic sanctions on Reyemeunistan that include banning the export of goods to Reyemeunistan that are essential for the delivery of services, such as chlorine needed to ensure water safety. Arualand must ensure that these sanctions do not lead to violations of the human rights of people living in Reyemeunistan through the collapse or partial collapse of water and sanitation services.
- **International business:** Company RETROP Inc. is based in Nolnaho, and also has business interests in Elieth. As a result of the operations of Company RETROP Inc. in Eleith, violations of the human rights to water and sanitation occur. As part of its duty to protect human rights, Nolnaho – where Company RETROP, Inc. is based – must ensure that companies under its jurisdiction are controlled in so that they cannot commit human rights abuses in Eleith or any other country.<sup>41</sup>
- **Investment agreements:** Akodamia and Aramland have concluded a bilateral investment agreement that protects the rights of investors in both countries. Both parties must ensure that such an investment agreement is formulated and interpreted in a way that integrates human rights. An Akodamian investor in Aramland expects to realise profits from its investments in water and sanitation service delivery, which may restrict Aramland's ability to set and regulate tariffs for service provision. However, under its human rights obligations Aramland must still ensure that water and sanitation services remain affordable for all, including poor people.
- **International watercourses:** Foarland uses a water resource that extends beyond its border with Leirum. International water law obliges States to equitable and reasonable use and to avoid causing significant harm in other countries.<sup>42</sup> Foarland must also consider the human rights, including the right to water, of the population of Leirum. It must ensure that its own use of the resource does not compromise the ability of Leirum to ensure sufficient and safe water for its own population.<sup>43</sup>

# EXTRATERRITORIAL OBLIGATIONS



KERKALBO-OCEAN



Norsco River

LEIRUM

FOARLAND

ANOMIA

AKODAMIA

ARAMLAND





ANGISTAN

ARUALAND

REYEMEUNISTAN

ELEITH

retrop

N

Human rights obligations also apply to the actions of States as members of international organisations.<sup>44</sup> A member State of a UN agency, regional organisation or international financial institution is breaking international law if it causes the organisation to commit an act that, under international law, would be illegal for a State to carry out itself.<sup>45</sup> Further, a regional organisation must not impose the privatisation of water service delivery in any country without allowing for active, free and meaningful public participation and debate on the decision.

To gain access to justice, people can turn to courts and other bodies in their own country. They can also bring claims before judicial or quasi-judicial bodies in another country where the alleged violation originates (extraterritorial claims). Such claims could also be brought before regional and international institutions

Case law in the context of extraterritorial obligations is rare, but UN treaty bodies have increasingly addressed violations of extraterritorial obligations. The Human Rights Committee has called for the regulation and monitoring of corporate activities abroad that may violate human rights, and for access to remedies in the event of such violations.<sup>46</sup> In another context, both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have expressed concern about Israel's denial of access to water and sanitation to Palestinians, and destruction of Palestinian infrastructure.<sup>47</sup>

The UN Convention on the Law of the Non-Navigational Uses of International Watercourses entered into force in August 2014.<sup>48</sup> This Convention governs the use of water resources that flow through more than one country, and its basic principles, such as the equitable and reasonable use of water resources and the obligation not to cause harm, reflect customary international water law.<sup>49</sup> Article 32 of the Watercourse Convention, entitled "Non-discrimination", deals with access to judicial or other procedures. It

stipulates that States shall not discriminate on the basis of nationality or residence in giving individuals access to judicial or other procedures, or to a right to claim compensation or other relief. In other words, an individual from one country who feels her or his rights have been violated by a second country should be able to bring a claim in the second country, even if she or he is neither a national nor a resident.

#### States must

- **comply with their extraterritorial obligations as reflected in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.**

#### States should

- **ratify the Convention on the Law of the Non-Navigational Uses of International Watercourses;**
- **ratify the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, and its Protocol on Water and Health<sup>50</sup>;**
- **implement Concluding Observations and other guidance by UN treaty bodies for the regulation and monitoring of corporate activities abroad that may violate human rights, and ensure access to remedies when violations occur<sup>51</sup>;**
- **implement Concluding Observations by UN treaty bodies relating to international assistance and cooperation.**

## 1.4. Addressing systemic violations

Although the right to individual litigation over economic social and cultural rights is an important guarantee against State violations and failures, it risks only benefitting the few people who have access to justice. Such cases may not lead to the necessary structural reform to the legislative, regulatory or policy frameworks to ensure progressive realisation of the human rights to water and sanitation for all, and to eliminate inequalities. If they do not address and correct systemic violations, courts will be unable to provide remedies for some of the most widespread violations of the human rights to water and sanitation.

Systemic obstacles to the realisation of the human rights to water and sanitation must be identified and addressed. For example, if people wishing to connect to water and sanitation services must, by law, provide official tenancy documents, this presents a barrier to the realisation of the rights of all people living in many informal settlements. In such cases, courts can and should play a corrective role, by ordering the legislative and executive branches to change their legislation and policies so they comply with human rights. (see Frameworks; Services)

Where governments fail to take reasonable measures to address the circumstances in disadvantaged regions, for example, those with a predominantly indigenous population, courts should identify these policies of neglect as violations of the rights to water and sanitation, and require governments to design and implement programs to remedy these violations.

In some cases, collective rights may be at stake, for example, those involving land or resource rights, or damage to the environment. Such cases may affect the rights of indigenous peoples.

In *Xákmok Kásek Indigenous Community v. Paraguay*, the Inter-American Commission submitted an application to the jurisdiction of the Court, after having in 2001 received a complaint from community leaders of the Xákmok Kásek indigenous community concerning their living conditions. The Xákmok Kásek community had no access to water sources, because the State had sold their traditional land to private owners. The court decided that the measures adopted by the State had not “been sufficient to provide the members of the Community with water in sufficient quantity and of adequate quality, and this has exposed them to risks and disease”.<sup>52</sup>

SYSTEMIC OBSTACLES  
TO THE REALISATION  
OF THE HUMAN  
RIGHTS TO WATER  
AND SANITATION  
MUST BE IDENTIFIED  
AND ADDRESSED



.....

PUBLIC INTEREST  
LITIGATION ENABLES  
PEOPLE TO TAKE  
LEGAL ACTION ON  
BEHALF OF THE  
GENERAL PUBLIC

### Issues of standing

‘Standing’ determines who may bring a complaint to courts and quasi-judicial bodies. One challenge in addressing systemic human rights violations is that standing has traditionally been limited to individuals or groups of individuals. However, these rules are evolving to embrace more categories of complainants. The South African provision on legal standing in Section 38 of the Bill of Rights, confers standing to anyone acting on behalf of persons who cannot act in their own name, as well as on class actions, actions in the public interest, and associations acting in the interests of their members.<sup>53</sup>

Public interest litigation can respond to systemic violations by enabling people to take legal action on behalf of the general public or of particular groups in the public interest. In some instances, it is the courts themselves that press a particular issue. The focus of public interest litigation is on the community rather than the individual and this provides an important mechanism for addressing systemic human rights violations.<sup>54</sup>

In India, there are many examples of court orders based on public interest litigation, filed by civil society organisations to ensure the human rights to water and sanitation.

On 18 October 2011, the Supreme Court of India ordered all states and union territories to build toilets, especially girls’ toilets, in all public schools by the end of November 2011, on the basis of public interest litigation.<sup>55</sup>

In Colombia, the writ of protection (*acción de tutela*), enshrined in article 86 of the Constitution, is a proceeding on an individual case involving people who need immediate protection against the action or omission by any public authority or provider of a public service. It also addresses whether policies are ‘reasonable’ and can therefore challenge systemic violations. Article 86 has proved to be an important instrument to help guarantee respect for the human rights to water and sanitation. The Constitutional Court of Colombia ruled to prohibit disconnections in homes where people need special protection, for example children or older persons.<sup>56</sup>

Another way of introducing broader arguments into a particular case are *amicus curiae* briefs. These are submissions by ‘friends of the court’ who are not parties to a given case, but can offer additional information and arguments. *Amicus curiae* briefs are increasingly common and are a way to introduce matters of broader concern into a particular case, so that it is relevant for people other than the two parties. Often, *amicus* briefs are based on bringing international human rights law to the attention of the court.

The NGO Centre on Housing Rights and Evictions (COHRE) submitted an *amicus curiae* brief to the South African Constitutional Court case of *Mazibuko v. City of Johannesburg*, highlighting relevant international human rights law on the right to water.<sup>57</sup>

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## Standards of review

The standard of review in this context is the degree of deference accorded to the legislative and executive branches of government. An appropriate standard of review has the purpose of guaranteeing that judges fulfil their duty to issue judgements that comply with human rights. The relevance a judgment has beyond the particular case in question, and whether it can be used as a precedent to address systemic violations, may depend on the standard of review adopted by the court. It is the judiciary's task to ascertain whether any measures, including legislation and policies created by the legislative and executive branches, comply with the norms set out in the higher legal hierarchy, including human rights norms. Courts may, in such cases, limit themselves to declaring that a certain policy violates human rights and ordering the legislative or executive branches to revise the measures in question and adopt a solution that complies with human rights law.

At the international level, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) has taken up the standard of 'reasonableness'.

### States must:

- ensure that courts can adopt effective standards of review;
  - abide by and implement courts' findings; and
  - make any necessary changes to legislation, policies and practices.
-

## Standard of reasonableness

There are many ways for governments to implement human rights. The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights uses the 'standard of reasonableness' to determine whether the policy choices made are in line with human rights. Explaining how it will interpret this standard, the Committee on Economic, Social and Cultural Rights has explained:

"In assessing whether [the measures taken by a State party] are 'adequate' or 'reasonable', the Committee may take into account the following considerations:

- (a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;
- (b) Whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;
- (c) Whether the State party's decision (not) to allocate available resources was in accordance with international human rights standards;
- (d) Where several policy options are available, whether the State party adopted the option that least restricts Covenant rights;
- (e) The time frame in which the steps were taken;
- (f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalised individuals or groups and, whether they were non-discriminatory, and whether they prioritised grave situations or situations of risk."<sup>58</sup>

The standard of reasonableness was originally developed by the South African Constitutional Court in the context of the right to housing. In the seminal *Grootboom* case, the Court held that a reasonable programme must: be comprehensive, coherent and coordinated; be capable of facilitating the realisation of the right; prioritise the needs of those in the most desperate situations; make appropriate financial and human resources available; be balanced and flexible and make appropriate provision for short, medium and long-term needs; be reasonably devised and implemented.<sup>59</sup>

Through this 'reasonableness review', the Court has made it clear that while it is the role of the government to determine precise policies and programmes, it is the proper role of courts to assess whether the government's policies and programmes comply with human rights.<sup>60</sup> In this case, the Court found that the State's programmes failed to give priority to the people in the most desperate situations and required the government to take measures to correct this.<sup>61</sup>

With regard to budgets, the same Court demonstrated the role that courts can play in determining whether budgets comply with human rights obligations. In the *Blue Moonlight* case, it held that "it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations".<sup>62</sup> Maximum available resources are not being committed to water and sanitation budgets if such budgets have been developed on the basis of decisions or fiscal policies that fail to prioritise the human rights to water and sanitation.

## Other bodies

National human rights institutions (NHRIs), non-governmental organisations, regional quasi-judicial commissions and international monitoring mechanisms, such as the regular reviews of State's performances by the Committee on Economic, Social and Cultural Rights, can also recommend changes when systemic human rights violations are found.<sup>63</sup> (see [Monitoring, p.26](#))

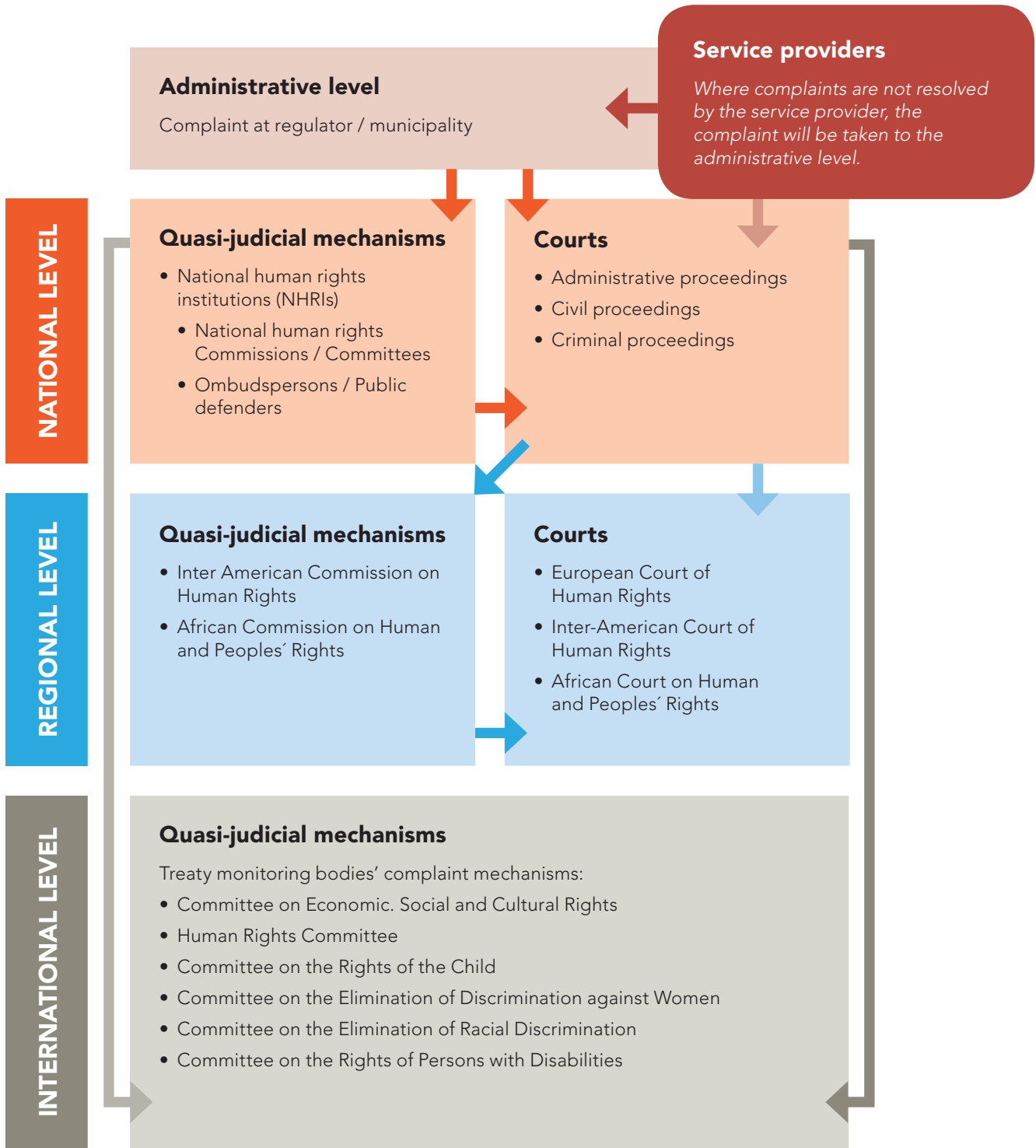
The Peruvian national human rights institution, the Defensoría del Pueblo, conducted extensive consultations and research and published a report analysing the legal protection and implementation of the human rights to water and sanitation in Peru. The Defensoría identified significant systemic violations of the human rights to water and sanitation, and made recommendations for remedial action.<sup>64</sup>

### States must ensure that:

- systemic violations of the human rights to water and sanitation are within the mandate and authority of courts to address and remedy;
- that courts have the competence to assess whether laws and regulations are compatible with the human rights to water and sanitation, by ensuring that judges and other members of the legal profession are provided with training in the justiciability of rights to water and sanitation, and that all of the necessary evidence, including expert opinions and *amicus curiae* submissions, is available to courts.

### States should:

- ensure that public interest litigation and class action claims are allowed for in the national legal framework;
- adjust procedures and rules of standing to ensure that communities have standing as parties, and that they have access to resources, information and legal representation in order to make the case in their collective interest fully;
- allow for mechanisms that group claims together, and, in relevant areas, permit socially relevant litigation to have effects beyond the particular case, to ensure that people who do not have access to courts can still benefit from judicial decisions;
- mandate and encourage national human rights institutions to initiate investigations into the systemic causes of the denial of economic, social and cultural rights, and to scrutinise national laws and policies for their consistency with human rights.



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# 02.

## Mechanisms for access to justice

States must provide a national legal and policy framework that addresses all aspects of the human rights to water and sanitation. This legal framework must clearly assign responsibilities for implementing the human rights to water and sanitation, thus providing the basis for accountability. In order to ensure that effective remedies can be claimed by rights holders, the framework must ensure that administrative complaint mechanisms, courts, and quasi-judicial mechanisms at the regional and international levels can decide on cases related to the human rights to water and sanitation.

(see Frameworks)

### 2.1.

#### Mechanisms at the national level

This section clarifies the range of options for individuals and groups to have their complaints addressed and remedied (see diagram opposite).

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ADMINISTRATIVE BODIES SHOULD BE ABLE TO RESOLVE COMPLAINTS QUICKLY AND IMPLEMENT DECISIONS PROMPTLY

### 2.1.1. Service providers

When someone faces a problem with their water or sanitation services, they should be able to turn to their service provider with their complaint. The service provider is often able to resolve problems directly. As the service provider is not independent and impartial this does not constitute 'access to justice', but it often provides a rapid and effective solution for problems with access to water and sanitation, relating, for example, to faulty bills.

The service provider may provide complaint hotlines, advisory services or mediators to resolve complaints.

Where services are provided directly by the State, individuals and groups of individuals may submit a complaint to the public service provider, which – if the complaint is not resolved– can progress directly from the service provider to the regulator or a similar administrative oversight body.

In situations where water and sanitation are provided by a non-State service provider, people can refer to customer complaint mechanisms via the service provider in the first instance, but will then have to complain to the relevant authorities if they feel that the initial response is unsatisfactory.

**Legislation regulating water and sanitation service providers must stipulate that they have a responsibility to create effective and timely complaint procedures.**

### 2.1.2. Administrative and regulatory procedures

If the service provider's complaints mechanisms do not resolve a particular problem, individuals should be able to turn to administrative or regulatory bodies with their complaints. Generally, this will be preferable to going to court. As administrative bodies are often organised at the local level, their procedures tend to be more accessible than those of courts, and it should be possible for them to resolve complaints quickly and implement decisions promptly.

As the Committee on Economic, Social and Cultural Rights explains, "those living within the jurisdiction of a State party have a legitimate expectation [...] that all administrative authorities will take account of the requirements of the Covenant in their decision-making".<sup>65</sup> This means in practice that all legislation, regulations, and policies must be consistent with the human rights to water and sanitation. Regulatory bodies are also often mandated to receive complaints.

The responsibilities of the Portuguese Regulator for Water and Wastewater, ERSAR, include setting standards, regulating services, monitoring the quality of services, analysing consumer complaints and supporting conflict resolution between consumers and service providers. ERSAR receives an increasing number of complaints each year, as new legislation has made it obligatory for all service providers to document all complaints and forward them to ERSAR.<sup>66</sup>

The Water Services Regulatory Board (WASREB), in Kenya, has a mandate to oversee the implementation of policies relating to the provision of water and sewerage services. It sets rules and enforces standards that guide the water and sanitation sector towards ensuring that consumers are protected and have access to adequate services. It also establishes and monitors procedures for handling complaints by consumers against service providers and created Water Action Groups to improve responsiveness to consumer concerns.<sup>67</sup> As a regulator, WASREB has powers to compel service providers, including the option to recommend the removal of boards of directors and top management and – ultimately – the power to withdraw licenses.<sup>68</sup>

Independent review mechanisms play an important role in overseeing and reviewing administrative decisions, ensuring that they are consistent with the human rights to water and sanitation. For example, administrative decisions about affordability and the consequences of not paying for water and sanitation services must be monitored and reviewed for consistency with the human rights to water and sanitation.

People can turn to courts when administrative bodies fail to consider and apply the human rights to water and sanitation properly.<sup>69</sup>

The State should put in place impartial and independent administrative complaint procedures, including regulatory bodies, to guarantee that government officials implement laws, regulations and policies correctly and consistently.

Administrative decision-makers at all levels must interpret legislation and exercise the discretion conferred by law in a way that is compliant with the human rights to water and sanitation.

States should ensure that there is effective oversight of administrative bodies, that they are accountable, and that officials are properly informed about the human rights to water and sanitation.

States must ensure that quasi-judicial and judicial appeal is available to review administrative decisions.

States must also ensure that independent administrative or judicial bodies can review whether existing statutory entitlements are adequate.

Individuals and groups must be able to access a court that is able to review whether existing entitlements or provisions are consistent with the human rights to water and sanitation.

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NATIONAL HUMAN RIGHTS INSTITUTION PROCEDURES TEND TO BE MORE ACCESSIBLE THAN COURTS

### 2.1.3. National human rights institutions

National human rights institutions (NHRIs), such as human rights commissions and ombudspersons (also known in some countries as public defenders or public protectors) are State bodies that have been established in many countries. The role, status and functioning of NHRIs for the protection and promotion of human rights is set out in the Paris Principles, endorsed by the UN General Assembly. They are quasi-judicial bodies with a broad mandate to promote and protect human rights. Autonomy and independence from the government are fundamental to such institutions and an essential precondition for their effective functioning and credibility.<sup>70</sup>

NHRIs have a mandate, among other things, to publicly promote and monitor the implementation of human rights, and promote the harmonisation of national law and practice with international human rights. While the Paris Principles do not require that NHRIs be authorised to receive and address complaints of violations of rights, in practice most do have this capacity.

Regardless of whether NHRIs have monitoring functions only or can receive individual complaints, States must always ensure that the NHRI's mandate covers the entire human rights framework, including economic, social and cultural rights. For example, the South African Human Rights Commission is explicitly mandated to monitor economic, social and cultural rights, including the human right to water.<sup>71</sup>

NHRIs cannot usually take binding decisions as courts can; instead, they issue recommendations. The advantage of such quasi-judicial mechanisms is that NHRI procedures tend to be less time-consuming, less expensive, less formal, less confrontational, more flexible, and thus more accessible, than courts. Where necessary, the majority of NHRIs can refer complaints to courts, which then consider the NHRI's recommendations and may enforce them through a legal judgement.

When NHRIs receive numerous similar complaints, this often leads to an expanded review of the particular human rights situation in question. The complaints should be resolved in a manner that has both an educational and a preventive function.

Colombia's Defensoría del Pueblo published the country's first nationwide study on compliance with the human right to water. The study includes detailed information gathered from each of the country's 32 departments, making it possible to assess progress toward achieving the legal content of the rights in nearly every municipality. The Defensoría disseminated this information to communities, civil society organisations and local governments.<sup>72</sup> The Defensoría also collaborates with the Environmental Ministry's Vice-Minister of drinking water and basic sanitation, to raise public awareness of the objectives of the country's drinking water and sanitation strategy.<sup>73</sup>

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In the case of *Makhaza*,<sup>74</sup> the South African Human Rights Commission found violations of the right to dignity and the right to privacy by the City of Cape Town, which provided unenclosed toilets for an informal settlement, as the lack of enclosures was deemed not reasonable. When the Commission's recommendations were not implemented, the community appealed to the High Court, which confirmed the Commission's view that requiring an impoverished community to enclose the toilets was unreasonable and ordered interim relief, including meaningful consultation with the community and the construction of temporary enclosures. Ultimately, the High Court also ordered the City to enclose all of the toilets fully, because failing to do so violated the inhabitants' constitutional rights to dignity, as well as the right to adequate housing and the right to adequate services.

The South African Human Rights Commission's findings prompted it to carry out a more comprehensive investigation into whether South Africa was fulfilling its obligations relating to the human rights to water and sanitation. The Commission held provincial hearings on the right to access water and sanitation in 2012.<sup>75</sup> The findings indicated that many people, particularly in poorer areas, suffered from a complete lack of access, or only had access to non-functional infrastructure, which has a disproportionate impact on disadvantaged individuals and groups, such as women, children and persons with disabilities.<sup>76</sup>

The Commission developed comprehensive recommendations, which included improving institutional arrangements to reflect the obligations of the human rights to water and sanitation better, and improving access to services in schools, particularly for girls. In an effort to hold the government to account, the Commission engaged extensively with government departments on the subject of these recommendations.<sup>77</sup>  
(see p.19)

**States must ensure that the mandate of the national human rights institution covers the entire human rights framework, including economic, social and cultural rights.**

**States should establish or strengthen national institutions for the promotion and protection of economic, social and cultural rights.**

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### 2.1.4. Courts

Many complaints are satisfactorily resolved by the service provider, the regulator or an administrative body. Where this is not the case, the right to an effective remedy requires that people be able to turn to a court. Judicial enforcement is (or should be) considered only as a last resort, when administrative or national quasi-judicial mechanisms are not successful.<sup>78</sup>

However, access to judicial remedies is a crucial component of access to justice. Moreover, the mere fact of being able to turn to a court has an important preventive function. The CESCR has pointed out that “An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. [...] whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary”.<sup>79</sup>

Judges serve as impartial arbiters in disputes about rights and obligations, impose enforceable remedies, and sometimes fulfil a monitoring and corrective role. Depending on the type of claim and alleged violation of the human rights to water and sanitation, different courts will be involved, including civil, criminal, administrative and constitutional courts at various levels.

JUDGES SERVE AS  
IMPARTIAL ARBITERS  
IN DISPUTES ABOUT  
RIGHTS AND  
OBLIGATIONS

**States must ensure that courts are competent to deal with economic, social and cultural rights, and magistrates, including judges, must receive, in their initial and on-going training, information on economic, social and cultural rights, in particular the human rights to water and sanitation.**

## 2.2.

### Mechanisms at the regional level

Regional human rights mechanisms in Africa, the Americas and Europe provide a further avenue for accountability, and for remedying violations of the human rights to water and sanitation. When people have exhausted all mechanisms available at the national level<sup>80</sup>, they can still seek remedies at the regional level. Regional bodies apply human rights standards that stem from human rights treaties. Some of these bodies (regional courts) issue binding decisions, others (commissions or committees) issue non-binding recommendations. In the Inter-American system, individuals must usually file their complaint with the Commission first, before the Commission can decide to refer it to the Court.<sup>81</sup>

**States should ratify or accede to regional human rights mechanisms that guarantee economic, social and cultural rights, including the human rights to water and sanitation, as well as to regional mechanisms that establish complaints procedures for alleged violations of these rights.**



An outline of the main regional human rights mechanisms in Africa, the Americas and Europe follows, including examples of relevant decisions that demonstrate how remedies for violations of the human rights to water and sanitation can be sought using regional mechanisms.

### 2.2.1. Africa

#### **The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights**

Individuals may bring a complaint to the attention of the African Commission on Human and Peoples' Rights, alleging that a State party to the African Charter on Human and Peoples' Rights violated any of their rights. If no friendly settlement is reached, the Commission takes a decision. If the concerned State seems unwilling to comply with the decision, the Commission can refer individual cases to the African Court on Human and Peoples' Rights. Individuals and non-governmental organisations with observer status before the African Commission can also access the Court directly if the State involved in the case has made a Declaration accepting the jurisdiction of the Court. Decisions of the African Court are final and binding on States parties to the Unique Court Protocol.<sup>82</sup>

The Commission found a justiciable human right to water implicit in article 16 (right to health) of the African Charter.<sup>83</sup> In the case of *Centre on Housing Rights and Evictions v. Sudan*, the Commission held that "the destruction of homes, livestock and farms, as well as the poisoning of water sources, such as wells" amounted to a violation of the Charter's article 16.<sup>84</sup>

**African States are encouraged to ratify/accede to the African Charter and Protocol and make a declaration accepting the competence of the Court to receive complaints. States that have entered any reservations should withdraw these and fully implement the recommendations and decisions from these regional bodies.**

A JUSTICIABLE  
HUMAN RIGHT TO  
WATER IS IMPLICIT IN  
ARTICLE 16 (RIGHT  
TO HEALTH) OF THE  
AFRICAN CHARTER



## 2.2.2. Americas

### **Inter-American Commission on Human Rights and the Inter-American Court of Human Rights**

Individuals, groups and non-governmental organisations may lodge “petitions”, alleging violations of the human rights guaranteed under the inter-American human rights treaties. If no friendly settlement is reached and the Commission determines that a State has violated the human rights of a person or group, it will issue a report that includes non-binding recommendations. In case of non-compliance with these recommendations, the Commission may refer the case to the Inter-American Court. A State party must submit to the Court’s jurisdiction for the Court to be competent to hear a case involving that State.<sup>85</sup>

In the case of the *Sawhoyamaya Indigenous Community v. Paraguay*<sup>86</sup>, the Court found that the human rights to water and sanitation are implicit in article 4 (right to life) of the American Convention on Human Rights. The Court held that Paraguay must adopt measures to protect and preserve the right to life, which, for the Court, included the provision of sufficient water for consumption and personal hygiene to the members of the community, as well as the provision of latrines or other sanitation facilities in the settlements of the community.

THE HUMAN RIGHTS  
TO WATER AND  
SANITATION ARE  
IMPLICIT IN ARTICLE 4,  
AMERICAN  
CONVENTION ON  
HUMAN RIGHTS  
(RIGHT TO LIFE)

American States are encouraged to ratify or accede to the American Convention on Human Rights, as well as to the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights. They should accept the Inter-American Court’s jurisdiction to hear cases of alleged violations of human rights, and fully implement the recommendations and decisions from these regional bodies.

## 2.2.3. Europe

### European Court of Human Rights

The European Court of Human Rights was established by the European Convention on Human Rights and Fundamental Freedoms. The Court hears applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the States Parties of the rights set forth in the Convention or the Protocols thereto. The mandate of the European Court is judicial; its judgments are binding and typically involve compensation for the victims of violations, to be paid by the State party found to be violating the Convention.

The European Court of Human Rights has dealt with issues related to the human right to water, basing its findings on implicit guarantees in the provisions of the European Convention on Human Rights.

In the case of *Dubetska and Others v Ukraine*<sup>87</sup>, the European Court found a violation of article 8 (the right to respect for private and family life and the home) of the European Convention. The Court found that Ukraine had failed to prevent pollution by mining and industry, which negatively affected the quality of drinking water and led to health problems.

**European States should ratify the European Human Rights Convention and all its Protocols; they should withdraw any reservations entered to the Convention or its Protocols. States Parties to the Convention should fully implement the judgments and decisions of the European Court of Human Rights.**

### European Committee of Social Rights

The European Committee of Social Rights is a body set up under the European Social Charter, tasked with monitoring the compliance of States parties with the Charter. Non-governmental organisations with consultative status to the Council of Europe can submit collective complaints. The Committee adopts decisions. If a State does not implement a decision, the Committee of Ministers addresses a recommendation to the State concerned.<sup>88</sup>

In the case of *European Roma Rights Centre v. Portugal*, the Committee found that Roma people suffered disproportionately from inadequate housing. Consequently, the Committee ordered remedial action, recommending that such a violation should “trigger a positive obligation of authorities to take such [disproportion] into account and respond accordingly”, and that the right to adequate housing “includes a right to fresh water resources”.<sup>89</sup>

**European States should ratify the European Social Charter and its Additional Protocol providing for a system of collective complaints, as well as making a declaration, in accordance with article 2 of the Additional Protocol to the European Social Charter. States that have submitted reservations should withdraw these.**

**States should fully implement decisions of the European Committee of Social Rights.**

## Other international mechanisms

### The World Bank Inspection Panel

The World Bank Inspection Panel is a complaint mechanism for people and communities that consider that they have been, or are likely to be, adversely affected by a project funded by the World Bank. The Panel aims to promote accountability and provide redress where needed. After receiving complaints, the Panel assesses their compliance with internal safeguard policies and has a mandate to review projects funded by the World Bank. The World Bank management is involved in the critical stages of the investigation process, which could detract from the independence of the investigation proceedings and decisions of the Inspection Panel. Cases may relate to the displacement and resettlement of people; environmental risks; and adverse effects on natural habitats, including protected areas such as water bodies.<sup>96</sup>

Mechanisms similar to the World Bank Inspection Panel exist at other major development banks and development actors, including for example the European Bank for Reconstruction and Development and the UK's Department for International Development.<sup>97</sup>

The Organisation for Economic Cooperation and Development's Guidelines for Multinational Enterprises are recommendations developed by States to guide multinational enterprises operating in or from countries that are signatories to the Declaration on International Investment and Multinational Enterprises. The Guidelines have a dispute resolution mechanism for resolving conflicts involving alleged corporate misconduct.<sup>98</sup>

States represented on the Board of Directors of the World Bank and other development banks should make sure, should make sure that its internal safeguards are informed by international human rights standards, including the human rights to water and sanitation, so that the Inspection Panel can provide effective remedies for projects that may contribute to violations of those rights.

**States represented on the World Bank's and other development banks' Board of Directors should make sure that its internal safeguards are informed by international human rights standards, including the human rights to water and sanitation, so that the Inspection Panel can provide effective remedies for projects that may contribute to violations of those rights.**

## 2.3.

### Mechanisms at the international level

United Nations human rights treaty bodies, such as the Committee on Economic, Social and Cultural Rights (ICESCR), are committees of independent experts that monitor the implementation of the most important international human rights treaties. Almost all of these committees are able to receive complaints from individuals who consider that their rights have been violated. The individual complainant must have exhausted domestic remedies, and normally the complaint must not have been submitted to another international or regional body. The State concerned must have recognised the competence of the Committee to receive such complaints.

Individual complaint mechanisms relevant to the human rights to water and sanitation are found under six conventions: the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; the First Optional Protocol to the International Covenant on Civil and Political Rights; the third Optional Protocol to the Convention on the Rights of the Child; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; article 14 of the Convention on the Elimination of All Forms of Racial Discrimination; and the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

Cases related to the right to water have been brought before the UN Human Rights Committee under the First Optional Protocol to the International Covenant for Civil and Political Rights (OP1-ICCPR). The Human Rights Committee has found that the denial of access to water amounts to a violation of the ICCPR, and in particular of articles 6 (right to life)<sup>90</sup>, 26 (equal protection of the law)<sup>91</sup> and 27 (minority group rights).<sup>92</sup>

Even though a complaint mechanism directly linked to ICESCR is now in force, the Human Rights Committee will remain an important mechanism for cases involving States that have not yet ratified the Optional Protocol to ICESCR, or that are not party to the ICESCR itself.

Individual complaints presented to these international bodies serve as an extra layer of protection for human rights. In the adjudication of individual cases, international norms that may otherwise seem abstract are put into practice. Treaty bodies can guide States, non-governmental organisations and individuals in interpreting the meaning of human rights in particular contexts.<sup>93</sup> When they consider individual cases, the UN treaty bodies issue views and recommendations that may affect similar cases in the country in question, thereby highlighting and helping to address systemic violations of rights. [\(see p.19\)](#)

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The Committee's decisions represent an authoritative interpretation, and although recommendations are not legally binding, the State has an obligation to consider and act upon views and recommendations in good faith.<sup>94</sup> All of the committees have developed follow-up procedures to monitor whether States have implemented their recommendations. If the State party fails to take appropriate action, the case is kept under consideration by the Committee. A dialogue is pursued with the State party and the case remains open until satisfactory measures are taken.<sup>95</sup> The role of the treaty bodies can be complemented by civil society and national human rights institutions, which can advocate for the effective implementation of decisions. These quasi-judicial decisions are a way of creating legal precedents at the international level and these precedents can be used for advocacy at the national level.

**States should ratify or accede to international human rights treaties and accept the complaints procedures that they establish.**

**States that have entered reservations to any of these treaties relating to economic, social and cultural rights should withdraw them.**

**States should fully implement the Views of UN treaty bodies regarding any communications, inquiry procedures and inter-State procedures.**

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# 03.

## Making access to justice effective

All accountability mechanisms must adjudicate promptly, expeditiously, effectively, impartially and independently on complaints<sup>99</sup>; remedies must be accessible, affordable, timely or prompt, and effective.<sup>100</sup>

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Middle- and high-income households benefit the most from access to justice. States must therefore adopt all necessary measures to ensure access to justice for all people equally, and overcome the barriers that disadvantaged individuals and groups face. Only in this way will it be possible to strengthen access to justice and address the structural and systemic challenges that slow the realisation of the human rights to water and sanitation. The people whose human rights to water and sanitation are most likely to be violated are rarely in the position to access complaints mechanisms.<sup>101</sup> This section starts by setting out some of the barriers to justice, and how to overcome them. It then explains the fundamental principles that must be taken into account to ensure that such mechanisms can effectively address violations of the rights to water and sanitation.

**States have an obligation to set up accountability mechanisms (administrative complaint mechanisms, courts and other mechanisms) and to make them accessible, so that rights-holders can bring alleged violations to the attention of the responsible authorities and courts**

States must:

.....  
STATES MUST ADOPT  
ALL NECESSARY  
MEASURES TO  
ENSURE ACCESS  
TO JUSTICE FOR ALL  
PEOPLE EQUALLY

- establish courts or tribunals that are independent of the executive and legislative branches of government;
- provide them with sufficient resources;
- ensure that they are competent to deal with cases relating to economic, social and cultural rights, including the human rights to water and sanitation;
- ensure access to free legal counsel where necessary for cases of alleged violations of the human rights to water and sanitation.

## 3.1.

### Overcoming common barriers to access to justice

People often face significant barriers in accessing remedies. Obstacles to seeking redress may take various forms, but it is often the poorest, most vulnerable and marginalised individuals and groups in society that face these obstacles.

Everyone is entitled to equal access to judicial and quasi-judicial mechanisms without discrimination, “as failure to provide effective remedial mechanisms can itself amount to a breach of human rights obligations”.<sup>102</sup>

**States must take positive measures to eliminate barriers to access to justice and conditions that cause or perpetuate discrimination, while paying particular attention to the poorest, most vulnerable and marginalised individuals and groups.**

.....

**AWARENESS OF  
THE EXISTENCE  
OF LEGAL RIGHTS IS  
FUNDAMENTAL TO  
THE ENJOYMENT OF  
ALL HUMAN RIGHTS**

#### 3.1.1. Access to information

Awareness of the existence of legal rights and the possibility of enforcing them is fundamental to the enjoyment of all human rights and to seek remedies. Many people do not have sufficient knowledge or skills to engage with administrative and court procedures, or to secure the assistance they need.

States must anticipate the barriers people may face in accessing relevant information, such as linguistic barriers because of legal terminology and jargon, or because important information is not available in minority languages.<sup>103</sup> Written information will not reach people who have limited or no reading skills; dissemination in only one language can exclude minorities or indigenous groups<sup>104</sup>; information that is only published online or in commercial newspapers will remain largely useless where access to the internet and newspapers is limited.

**States must proactively inform the public about human rights, including the human rights to water and sanitation. States must inform people about how they can gain access to remedial mechanisms, while using:**

- non-technical and accessible language, including relevant local languages;
  - relevant and accessible formats;
  - a variety of media, particularly radio and traditional forms of communication.
- .....

### 3.1.2. Physical accessibility

People must be able to physically reach the places where they can seek remedies for violations of their human rights to water and sanitation. The lack of courts and other mechanisms at the local level constitutes a serious obstacle to their access to justice. Frequently it is the family members responsible for managing household water and sanitation, often women, who cannot submit a complaint or claim, or attend a hearing, because of their responsibilities at home.<sup>105</sup>

**States should adopt concrete measures to address and overcome the difficulties people may face in accessing courts and administrative offices.**

**States should identify and implement solutions to overcome barriers to physical access, for example, by establishing decentralised institutions, enacting regulations that (financially) support travel by claimants, or appointing intermediaries who can represent claimants at some stages of the proceedings,**

**States should ensure that persons with disabilities are provided the necessary resources to participate fully in all aspects of the justice system and that they are consulted regarding the removal of barriers they may face.**

### 3.1.3. Affordability

Economic barriers often prevent access to justice.<sup>106</sup> The costs of seeking remedies for violations of human rights, including administrative and legal costs, must be affordable for all.<sup>107</sup> Costs include legal assistance and the fees that have to be paid at every stage of the administrative or judicial process, including fees for registration, obtaining legal documents, the commissioning of independent expertise, and making photocopies and phone calls. There is also the expense of transportation and accommodation when complainants travel to reach lawyers, courts and other bodies. Further, the loss of income while away from employment may constitute an insurmountable burden. Women may be disproportionately disadvantaged, as they are often less financially independent, or have limited access to financial resources.<sup>108</sup> Finally, illegal fees, or bribes, are often exacted before complainants are granted access to administrative officials, procedures and courts.<sup>109</sup>

**States should establish provisions in legislation or regulations for the waiving or reduction of legal fees for people who would otherwise not be able to make a claim.**

**States should support or put into place programmes, which may incorporate paralegal assistance or support from NGOs, to ensure that access to remedies is affordable for all people.**

**States must take immediate and sustainable measures to prevent and combat corruption, and prosecute State and local officials for any acts of corruption. They should also train the police and other law enforcement officers, prosecutors and judges to address corruption, and require public authorities to operate in a transparent manner.**

### 3.1.4. Legal services

People will often require assistance with the procedures and deadlines that apply to legal processes, and this should be provided for by States, using the maximum available resources.<sup>110</sup>

The Irish Human Rights Commission has an explicit mandate to provide legal assistance for legal proceedings that involve human rights. The Commission can in such cases provide (1) legal advice, (2) legal representation, and/or (3) such other assistance as is appropriate.<sup>111</sup>

If a case proceeds to court, financial aid to pay for legal counsel is often needed to ensure that claimants who cannot afford a lawyer can adequately present their cases. The right to financial assistance to claim and enforce human rights has been found to be implicit in a number of international and regional human rights instruments.<sup>112</sup>

In the case of *Airey v. Ireland*, the European Court of Human Rights determined that the right to a “fair hearing”<sup>113</sup> includes a right to legal representation in situations in which an unrepresented litigant would be unable to present his or her case “properly and satisfactorily”.<sup>114</sup>

The right to legal aid has been recognised in domestic law in many countries, where it may be provided on the basis of low-income level<sup>115</sup>, disadvantage or marginalisation; through constitutional provisions and statutory guarantees<sup>116</sup>; or by way of court decisions.

People may also find it difficult to access remedial mechanisms because of the complexity of a system they are not familiar with. The labyrinth of laws, traditions and interactions, the use of legal jargon, and the restrictive time limits and procedural rules can deter people from seeking justice.<sup>117</sup>

States often allocate inadequate human and financial resources to the justice sector, undermining the quality

of legal services.<sup>118</sup> The fees legal aid lawyers are paid often fail to reflect the amount of time and effort required to litigate effectively in a criminal or civil case, with the result that lawyers working on legal aid cases are often inexperienced, in short supply and overstretched.

#### States must:

- create a system of legal aid to ensure compliance with the human right to a remedy;
- ensure that the lawyers provided through legal aid are independent, adequately trained and paid, and meet the quality standards of the legal profession;
- ensure that legal aid is available for all types of proceedings related to alleged violations of the human rights to water and sanitation, including claims by rights holders before administrative bodies and other mechanisms;
- inform the public widely about their right to seek legal aid when needed and ensure the process to receive such aid is not difficult or restrictive;
- introduce legal literacy programmes;
- ensure that independent national human rights institutions and/or non-governmental organisations have a mandate to assist individuals and can guide victims of alleged violations of the human rights to water and sanitation, both through a first assessment of a case, their options, and whether litigation seems promising, and through the first steps in legal proceedings.

### 3.1.5. Other barriers

There may be additional obstacles facing people who seek remedies. These include:

- Social barriers faced by women who want to submit a case because of cultural norms against women speaking on their own behalf.<sup>119</sup> Justice systems must be sensitive to these circumstances, while at the same time working towards empowering women.
- People may be unfamiliar with, and are often intimidated by, regulations and traditions in court on where to sit, when to speak and how to address the judge or person in charge.<sup>120</sup>
- People may avoid seeking justice because they fear deportation. Measures to guarantee non-deportation or non-exposure of undocumented status must be put in place.
- People may face barriers in accessing justice because they are economically dependent on the people or groups that violate their rights.<sup>121</sup>
- People may avoid seeking justice because they fear reprisals, discrimination or stigmatisation from within their communities or from beyond. In some cases, courts may be required to protect the privacy and anonymity of claimants, or allow groups to speak on behalf of affected individuals. Courts may also encourage the participation of human rights institutions to bring to light problems that may be difficult or dangerous for individuals to address alone.

Since violations of the human rights to water and sanitation are often systemic in nature, affecting entire communities, the provision of remedies should not be confined to individual complaints. Infringements of the human rights to water and sanitation often affect more than one person or household. Procedures and rules of standing should allow group claims, with, for example, the support of a non-governmental organisation. This way, one person does not have to bear the burden of the entire proceedings alone. For example, article 2 of the Optional Protocol to the ICESCR states that communications may be submitted by or on behalf of individuals or groups.

PEOPLE MAY AVOID  
SEEKING JUSTICE  
BECAUSE THEY  
FEAR REPRISALS,  
DISCRIMINATION  
OR STIGMATISATION



## The role of civil society organisations in overcoming barriers to access to justice

Civil society organisations play a significant role in supporting the most disadvantaged individuals and groups to gain access to justice, motivating and empowering people to seek justice. States should support human rights advocacy groups to raise awareness about potential violations among those affected and the broader public, and to outline options for change. Civil society organisations, in cooperation with the people concerned, can often identify the root causes of human rights violations, through fact-finding and research, as well as careful analysis of the findings. Public interest litigation can enable organisations to take legal action on behalf of the general public or particular groups.

Provision of financial and legal support for the involvement of civil society organisations in developing group-based claims is critical.

In Kenya, the Akiba Mashinani Trust and the Muungano Support Trust have documented poor drainage, inadequate sanitation services, and lack of access to clean, potable water in Nairobi. Questionnaires have been distributed to women to gain an understanding of the gendered dimension of these problems. This research has provided the basis for litigation invoking the right to sanitation under the Kenyan Constitution, demanding the sustainable management of human waste, using both State and community resources.<sup>122</sup>

States should:

- provide support for human rights advocacy groups, so that they can organise group claims, identify systemic barriers, collect evidence and hold meetings with claimant groups to ensure that claimants can make informed decisions for the litigation process;
- disseminate general legal information and ensure that civil society and community-based organisations are able to take up informal legal education;
- promote and fund independent research and collaborative work between communities and universities about the human rights to water and sanitation;
- support test case litigation and other activities that help enforce the human rights to water and sanitation, by providing resources to community legal clinics and independent centres specialising in litigation on the human rights to water and sanitation.<sup>123</sup>

### 3.2.

#### What is required to ensure access to justice?

This section outlines the principles that States must follow to ensure effective decision-making in cases related to violations of the rights to water and sanitation.



### 3.2.1. Expertise and training

Ensuring access to justice for violations of economic, social and cultural rights requires competent administrative and judicial bodies.<sup>124</sup>

Claims relating to water and sanitation may raise challenges for courts and human rights bodies, as they may require specific technical expertise.

In many countries, judges, judicial officials, prosecutors and law professionals receive initial and on-going professional training in human rights, international and regional human rights treaties and related subjects.<sup>125</sup>

Specific expertise may also be required in relation to budgetary decisions. In cases that concern the obligation to progressively realise the human rights to water and sanitation, courts and human rights bodies must assess whether the State has used the maximum available resources. In these cases, government bodies must provide the necessary information about budgetary allocations to enable courts to make an assessment. Independent experts and organisations engaging in human rights budget analysis can assist courts.

COURTS AND HUMAN RIGHTS BODIES MUST ASSESS WHETHER THE STATE HAS USED THE MAXIMUM AVAILABLE RESOURCES

The Canadian Centre for Policy Alternatives provides detailed research and recommendations on reasonable budgetary allocations in particular circumstances to realise the human rights to water and sanitation.<sup>126</sup>

The US Center for Economic and Social Rights has developed resources to monitor the obligation to fulfil social rights.<sup>127</sup>

On the basis of the evidence provided, courts and human rights bodies must review whether budgetary decisions by the legislature are in violation of human rights law, while respecting the prerogative of the legislature to set budgets.

Legal systems should ensure that the “burden of proof” to show that the budget is insufficient is not placed on rights claimants, because they do not have full access to the relevant government information.

**States must ensure relevant training for members of the legal profession on the human rights to water and sanitation.**

**States should make sure that courts and other accountability mechanisms are able to call on independent technical advice, to enable them to make a competent assessment of the facts.**



### 3.2.2. Independence, impartiality, transparency and accountability

Accountability mechanisms must be independent and impartial.<sup>128</sup> Once each administrative or quasi-judicial procedure has run its course, there must be the possibility of accessing an independent court.

In many countries – often because of overstretched and underfunded administrative and judicial systems – corruption is entrenched in the entire system. Illicit payments and special favours enable people with financial and social capital to access the justice system and even help secure a particular outcome. The cases of the poorest and most disadvantaged individuals and groups, who cannot afford to pay bribes and don't know anyone within the system, may not be taken up, and their claims may be delayed or even not accepted.<sup>129</sup>

To ensure that remedial mechanisms are independent, accountable and equally accessible for everyone, States must take a proactive role in eliminating corruption, investigating and sanctioning the people involved.<sup>130</sup> State budgets must ensure that proper financing and adequate human resources are allocated to accountability mechanisms, and that the right incentives exist to address some of the causes of corruption.

**States must ensure that courts and other mechanisms, and the personnel involved, are independent, transparent and accountable.**

### 3.2.3. Prompt and timely decision making

When access to justice is delayed, people are denied access to justice. Proceedings should not result in 'unwarranted delays'.<sup>131</sup> All quasi-judicial mechanisms at the regional and international levels provide for the possibility of submitting complaints, not only when domestic remedies are exhausted, but also when proceedings at the national level take unreasonably long.<sup>132</sup>

Sometimes remedies require prompt decisions in order to be effective.<sup>133</sup> Access to justice may also require interim measures to ensure access to water and sanitation during the course of litigation.

In the case of *Assenova Naidenova et al v. Bulgaria*<sup>134</sup>, the Human Rights Committee used interim measures to order the reconnection of water supply to a community. (see p.8)

#### States must:

- **Ensure that remedial mechanisms for violations are able to resolve cases in a prompt and timely manner;**
- **Allocate sufficient financial and human resources to ensure the efficient and effective functioning of all organs of the judicial system, including police stations, the prosecution corps and courts.**

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### 3.2.4. Understandable processes and decisions

Judicial and administrative processes are often characterised by the complexity of procedural rules, traditions, copious paperwork, legal jargon, and strict timeframes.<sup>135</sup>

The use of legal jargon makes it difficult for lay people to understand the process and the outcome of the court experience, and the impact a judgment may have on their lives.

**States must take measures to make legal procedures more accessible and ensure that all proceedings and decisions are understandable for everyone involved.**

### 3.2.5. Interpreting domestic law in line with international law

Judges interpret and apply the legal framework to come to a decision. When faced with a choice between an interpretation of domestic law that contradicts international human rights law and an interpretation that would enable the State to comply with it, judges are required by international law to choose the latter interpretation.<sup>136</sup>

One way to invoke the human rights to water and sanitation in national courts is to rely on the rights that are guaranteed in international human rights law. Courts can also rely on national provisions and constitutional norms. Whether or not courts apply international law directly, the judiciary has to interpret and apply domestic law consistently with the human rights to water and sanitation.

In a 2004 case related to the leakage of untreated municipal wastewater into a community's drinking water supply, the Civil and Commercial Court of Córdoba, Argentina invoked General Comment 15 of the CESCR to rule that the municipality had not acted to prevent the threat to public health posed by the contaminated water.<sup>137</sup>

**States should ensure that courts and administrative decision-makers are exposed to the legal decisions of international human rights mechanisms, and to the successful enforcement of the human rights to water and sanitation in other countries.**

Where there are two possible interpretations of national law, judges must follow the interpretation that complies with human rights.

States should widely disseminate and, when necessary, translate case law on the human rights to water and sanitation as decided by international human rights bodies among law schools and members of the legal profession.

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### 3.3.

## Appropriate and effective remedies

The right to a remedy requires that remedies be effective, just and enforceable. An effective remedy will be reached when the appropriate type of remedy is found, when the remedy is properly enforced, and when all aspects of violations of the rights to water and sanitation are fully corrected.

### 3.3.1. Crafting appropriate remedies, including systemic remedies

The most appropriate remedies will depend on the circumstances of each case, including the goals of the litigation and the needs and capacities of stakeholders. Because cases involving violations of the human rights to water and sanitation often have serious effects on people's day-to-day lives, a decision by the court may require immediate action. Ordering interim measures can be important for granting immediate relief.

In the case of *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council* on disconnection of the water supply because of non-payment, the applicant requested interim relief while the case was being heard by the High Court of South Africa, and this was granted by the judge.<sup>138</sup>

In some cases, the appropriate decision will be to require private actors to provide compensation for violations of the rights to water and sanitation.

In the case of *Enviro-Legal Action v Union of India*<sup>139</sup>, brought forward as public interest litigation, the Supreme Court of India considered the appropriate remedy in a case in which "the damage caused by the untreated highly toxic wastes [...] inflicted untold miseries upon the villagers and long lasting damage to the soil, to the underground water and to the environment of the area in general". The Supreme Court required the government to recover the costs for the remedy from the industry responsible.

When one person brings a case to court and there are many other people living in similar situations, who suffer from the same violations and require similar remedies, these can be understood as systemic violations. For example, regulations and policies may pose a barrier, preventing people from accessing water and sanitation.<sup>140</sup>

(see p.19)

In such cases, courts often have to scrutinise measures adopted by the legislative or executive branches of government, including laws, policies and budgets. The decision



taken by the court must be effective, but may be limited to declaring that a certain policy violates human rights, and ordering the government to revise the measures in question and adopt a solution that complies with human rights law. In some cases, remedies will involve the court requiring government to put policies in place, with appropriate monitoring of compliance with goals, timelines and other indicators of compliance.

In the *Grootboom* case, the Court did not re-write the government policies or budgets. Rather, it explained the nature of the human right to housing and the corresponding obligations and found that the government programmes to meet these obligations were unreasonable, thus requiring the government to adopt a reasonable policy.<sup>141</sup>

The primary concern may not always be compensation for past harms or the prevention of imminent harm, but rather ensuring that water and sanitation services are provided in the present and into the future. In these cases, a court may order both immediate and long-term remedies, or require the executive to adopt appropriate policies and plans for long-term solutions. Again, in the *Grootboom* case, the Court stated that “programmes must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs”.<sup>142</sup>

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## A COURT MAY ORDER BOTH IMMEDIATE AND LONG-TERM REMEDIES

**States must guarantee the right to adequate, effective and prompt compensation, reparation, restitution, and rehabilitation, as well as making guarantees of non-repetition and public apologies.**

**States should ensure that these measures are effectively implemented.<sup>143</sup>**

**States must comply with court decisions on the revision of legislation, regulations and policies, so as to ensure compliance with the human rights to water and sanitation.**

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### 3.3.2. Ensuring enforcement of judgements

Studies have shown that while the number of judicial decisions about economic, social and cultural rights such as the human rights to water and sanitation is on the rise, not every such judgement is immediately enforced.<sup>144</sup> While the complexity of implementing certain decisions, particularly those dealing with positive obligations or structural and systemic reform, has been cited as an obstacle to implementation, evidence demonstrates that these obstacles can be overcome.

Factors that favour the effective enforcement of remedies are:

- continued oversight or supervision by courts;
- active engagement by stakeholders;
- monitoring and promotion of enforcement by third parties such as human rights institutions or NGOs.

One way to ensure the enforcement of decisions is for the decision-making body to retain supervisory jurisdiction over the enforcement of its rulings. Courts and other bodies can set up monitoring processes, including direct monitoring by the court, periodic reporting by governments on steps taken to implement decisions, and reliance on non-governmental organisations and other groups for information about the implementation of decisions.

Restorative remedies for violations, whereby the *status quo ante* (the state of affairs that existed previously) is restored, may fall short of addressing the underlying violations at the structural or systemic level. Consequently, transformative remedies, which aim to correct not only direct violations but also the underlying structural conditions, are required in order to provide comprehensive remedies for structural and systemic violations. For example, court orders may aim to change the structural causes of human rights violations through a participatory process. “Participatory structural injunctions” require the State to adopt a plan to correct a structural violation, with the meaningful participation of the people who will benefit from the changes. The State then reports back to the court on progress made. This allows courts to supervise progress and make ancillary orders to ensure that both the process and its outcomes are consistent with the rights to water and sanitation. As such, transformative remedies can move claimants further towards the full enjoyment of human rights.<sup>145</sup>

In India, the Supreme Court can appoint Commissioners who monitor the implementation of court orders. In interim orders of May 2002 and 2003, the Supreme Court appointed two Commissioners to monitor the implementation of all orders relating to the right to food.<sup>146</sup> The Commissioners are empowered to enquire about any failure to implement

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TRANSFORMATIVE  
REMEDIES WHICH  
AIM TO CORRECT  
THE UNDERLYING  
STRUCTURAL  
CONDITIONS  
ARE REQUIRED IN  
ORDER TO PROVIDE  
COMPREHENSIVE  
REMEDIES FOR  
STRUCTURAL  
AND SYSTEMIC  
VIOLATIONS

the orders and to demand redress, with the full authority of the Court; they are also expected to report regularly to the Court.<sup>147</sup>

In Argentina, the Supreme Court in *the National Ombudsmen v. the State* and others granted an injunction and ordered the Government to provide drinking water and food to indigenous communities, also ordering that the defendants must inform the Court within thirty days about the implementation of a number of measures and programmes related to water supply and health care, as well as information on budget allocations.<sup>148</sup>

In Bangladesh, a public interest petition sought a court order to oblige the Government to take measures against severe arsenic contamination of groundwater. The Court ordered measures to be undertaken by the State, and ordered the Government to provide a yearly report to the Court regarding the steps taken to implement arsenic policies and plans.<sup>149</sup>

The implementation of court decisions may also be furthered by social mobilisation and political pressure, with the aim of ensuring that the authorities meaningfully implement court decisions and orders, including those coming from international bodies.

Monitoring of the implementation of remedies by human rights institutions, ombudspersons, independent commissions, research institutions or non-governmental organisations can also play a critical role in ensuring effective implementation of remedies.<sup>150</sup> They can use court judgements where they entail an authoritative decision that orders States to undertake or refrain from certain actions as an advocacy tool. Legal cases can be used to educate the broader public about the human rights to water and sanitation, and to galvanise public support for the realisation of human rights. Such public support and mobilisation can in turn contribute to furthering the political will to abide by judicial and quasi-judicial rulings. Through press releases and published reports, monitoring

bodies can put pressure on governments to comply with remedies, and ensure that governments receive positive recognition when they do comply.

In *Beatriz Mendoza and others v. Federal Government*, the Supreme Court of Argentina ruled on the negative impact of the pollution of a river, ordering the authorities to develop an integrated environmental plan and improve the quality of life of the inhabitants. The plan and its implementation should include measurable short, medium and long term objectives. The Court decided to entrust the ombudsperson with the formation of a Commission, which was to include the non-governmental organisations that participated as third parties in the litigation.<sup>151</sup>

**States should ensure that their constitutional and legislative frameworks give their judicial systems clear responsibility for providing systemic remedies and accepting complaints in the public interest.**

**States must ensure the effective enforcement of judgements, and compliance with judicial rulings.**

**States should encourage civil society organisations, NGOs and other monitoring bodies to play a consultative role to help identify the right approach to the implementation of court decisions on human rights by proposing amendments to policies, law or practice.**

**States must respect judicial decisions and take remedial orders seriously, making use of international assistance where necessary.**





# 04. Checklists

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State actors	
	Yes In progress No
Are judicial remedies available for violations of economic, social and cultural rights?	<input type="radio"/> <input type="radio"/> <input type="radio"/>
Is information about the existence of legal rights, and the options for enforcing them, available? Does the government proactively inform the public about the enforceability of the human rights to water and sanitation?	<input type="radio"/> <input type="radio"/> <input type="radio"/>
Does the government ensure that remedies are financially accessible? Is financial assistance for legal counsel available? Do governments allocate adequate human and financial resources to legal services, so as to guarantee their quality?	<input type="radio"/> <input type="radio"/> <input type="radio"/>
Does the government ensure that no illegal fees or bribes are demanded or paid before access to remedies is possible?	<input type="radio"/> <input type="radio"/> <input type="radio"/>
Does the government provide legal assistance that guides people through the procedures and deadlines?	<input type="radio"/> <input type="radio"/> <input type="radio"/>
Does the government take special measures to ensure that migrants who are unfamiliar with the host country's legal system, and who may be fearful of deportation, have meaningful access to courts and other procedures to enforce their rights?	<input type="radio"/> <input type="radio"/> <input type="radio"/>
Do State actors provide training on international legal standards regarding economic, social and cultural rights; is international human rights law on the curriculum at law schools?	<input type="radio"/> <input type="radio"/> <input type="radio"/>
Do State actors, including governments, ensure that courts and administrators are aware of the legal decisions of international mechanisms? Do they promote the application of international human rights law in domestic court proceedings? Do they encourage review by regional or international human rights bodies?	<input type="radio"/> <input type="radio"/> <input type="radio"/>
Has the State ratified the relevant international conventions establishing regional or international complaint mechanisms?	<input type="radio"/> <input type="radio"/> <input type="radio"/>
Are remedies available for extraterritorial claims?	<input type="radio"/> <input type="radio"/> <input type="radio"/>
Do State actors make people aware of complaints procedures and other ways of accessing justice with respect to access to water and sanitation? Are measures taken by the State to strengthen its capacity to hold providers of water and sanitation services accountable?	<input type="radio"/> <input type="radio"/> <input type="radio"/>
Legislators	
Do laws and regulations fully integrate human rights principles and the legal content of the human rights to water and sanitation?	<input type="radio"/> <input type="radio"/> <input type="radio"/>
Are there mechanisms to hold service providers accountable? Do these mechanisms involve the use of external resources or are they wholly financed by the service provider?	<input type="radio"/> <input type="radio"/> <input type="radio"/>
Are the mechanisms for ensuring that service providers are accountable planned and administered with the participation of the people who use the services and may need access to remedies?	<input type="radio"/> <input type="radio"/> <input type="radio"/>



## Administrative bodies

	Yes	In progress	No
Are administrative bodies impartial and independent?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Is the oversight and accountability of all administrative actors properly informed by the human rights to water and sanitation?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

## Courts

Do the courts proceed on cases regarding the obligations to respect, protect and fulfil the human rights to water and sanitation?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do the courts critically and proactively evaluate budget allocation policies, in order to fulfil the human rights to water and sanitation for underserved and un-served individuals and communities?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do the courts address systemic violations of the human rights to water and sanitation?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Can people take their complaint to a court when administrative bodies fail properly to consider and apply the human rights to water and sanitation?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do judges serve as impartial arbiters in disputes about rights and obligations? Do they impose enforceable remedies, and do they sometimes fulfil a monitoring and corrective role?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do courts settle complaints promptly, expeditiously, effectively, impartially and independently? Are courts transparent and accountable? Are judicial remedies timely and / or prompt?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Are proceedings understandable? Is information also available in local languages, including minority and indigenous languages?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do courts provide a full explanation of their decisions on the merits of the claim? Do they indicate the consequences and applicable reparations?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Are remedies effective, just and enforceable? Are remedies then properly enforced?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Is domestic law interpreted in line with international law?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Are courts and tribunals aware of the nature and implications of the International Covenant on Economic, Social and Cultural Rights? Does judicial training take full account of the justiciability of the Covenant?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do courts base their decisions on the recommendations of national human rights institutions?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Are mechanisms that provide people with a remedy for violations of their rights equally accessible to all, without distinction on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (including socio-economic status) ensured? Are all parties in any proceedings treated without discrimination?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Continued...

## Courts continued...

	Yes	In progress	No
Are the courts physically accessible to all?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Are remedial bodies sensitive to social and cultural barriers?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do remedial systems empower women?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do courts protect the privacy and anonymity of claimants who face barriers in accessing courts because they fear reprisals, discrimination or stigmatisation within or outside their communities or society?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do courts allow groups to speak on behalf of affected individuals in order to ensure that rights claimants are not subjected to further stigmatisation or reprisals?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do courts set up monitoring processes to ensure the full enforcement of their decisions?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

## National human rights institutions

Is there an independent national human rights institution?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Is the national human rights institution authorised to receive and adjudicate complaints of violations of economic, social and cultural rights?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Does the mandate of the national human rights institution cover the entire human rights framework, including economic, social and cultural rights?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do national human rights institutions address systemic violations?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do national human rights institutions monitor the implementation of legal remedies?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

## Non-governmental organisations

Do States support NGOs' contributions to monitoring the effective implementation of legal remedies?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do States support NGOs' contributions to overcoming the barriers that prevent people from accessing remedies?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>









# 05.

## Image credits and references

### Image Credits:

**Page 14** 'Unenclosed' toilet in Cape Town. Social Justice Coalition.

**Page 31** A disabled man uses the accessible latrine designed specifically to accommodate his needs, Beltola slum, Dhaka, Bangladesh, 2011. WaterAid/Guilhem Alandry.

**Page 40** Waterpoint, Kathmandu, 2014. Virginia Roaf.

**Page 46** Catarina de Albuquerque meeting with civil society, South Tarawa, Kiribati, 2012. Madoka Saji.

**Page 54** A boy pours water to flush the latrine at the UNICEF-supported Sahara Community School in the village of Manfalout in the Assiut Governorate in Upper Egypt. UNICEF/NYHQ2005-1604/Pirozzi.

**Page 59** Berthine and Fara on their way to fetch dirty water from a local source. Pre-intervention situation in Ampizaratany village, Tsiranoamandidy commune in Tsiranomandidy district, Bongolava region, Madagascar. WaterAid/ Ernest Randriarimalala.

**Page 60** Village chief and his wife washing their hands – Village Assaini programme, Democratic Republic of the Congo. UNICEF/DRC/2014

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- 2 International Commission of Jurists, *Courts and the legal enforcement of economic, social and cultural rights – Comparative experiences of justiciability* (2008), p. 6.
- 3 See articles 6 and 13, European Convention of Human Rights (ECHR); article 7, African Charter on Human and Peoples' Rights (ACHPR); article 8, American Convention on Human Rights (ACHR); article 13, Convention on the Rights of Persons with Disabilities (CRPD); article 5, Convention on the Elimination of All Forms of Racial Discrimination (CERD).
- 4 Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The right to water, (E/C.12/2002/11), para. 55.
- 5 See CESCR, Statement on the right to sanitation (E/C.12/2010/1).

6 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), 2008 (A/RES/63/117).

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