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### Strengthening the human right to sanitation as an instrument for inclusive development

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## **Chapter 5. Human Right to Sanitation Principles**

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### **5.1 INTRODUCTION**

As shown in Chapter 4, international human rights (HR) law mostly prioritises social and relational inclusion which has implications for human development and issues of access to resources like water, sanitation and hygiene facilities, characteristically falling within the domestic jurisdiction. The subsidiary research questions for this chapter are therefore: (a) How did the international human right to sanitation emerge and what does it mean across multiple levels of governance? (b) What are the principles of the human right to sanitation and how can progress towards realising the right be monitored? (c) How do the principles of the human right to sanitation address the drivers of poor sanitation services to promote inclusive development? The chapter adopts a multi-level governance approach because the human right to sanitation (HRS) initially evolved internationally through a bottom-up approach, as a result of local advocacy efforts and HRS norms now transcend multiple levels of governance. It analyses the emergence, legal bases and status of the international HRS (see 5.2); the analyses is enriched through content analysis of HRS legislations in 67 States across Africa, Asia, Europe, North America, Oceania and South America (see Annex I), and decisions of national, regional and international courts. The remaining sections address the principles of the HRS (see 5.3), and the instruments through which the HRS principles are operationalised (see 5.4). Section 5.5 discusses the structural, process and outcome indicators for monitoring the HRS, while Section 5.6 discusses the HRS principles in relation to drivers and ID. Further, Section 5.7 articulates the key inferences derived from this chapter.

### **5.2 EMERGENCE, LEGAL BASIS, AND MEANING OF THE HUMAN RIGHT TO SANITATION**

This section analyses the emergence of the HRS in international law (see 5.2.1) before exploring the legal bases (see 5.2.2) and status (see 5.2.3), and the meaning of the right (see 5.2.4). In exploring the emergence, I make relevant references to the closely linked human right to water (HRW) because of the similarities in the evolution of both rights despite their differences illustrated in Table 1.1 in Chapter 1. In exploring the legal status and meaning, I also examine regional and national instruments which support better understanding of the normative elements of the international HRS.

### 5.2.1 Emergence

I begin this section with an overview of developments in the emergence of the international HRW that are relevant for the emergence of the HRS. The HRW itself was initially not expressly recognized in the International Bill of Rights (see Chapter 4). Prior to the evolution of the HRW in its current understanding as an individual right, the need for equitable access to clean water was central to the international environmental policy and sustainable development discourse since the 1970s. The incorporation of human rights principles like availability, safety and affordability in the 2015 Sustainable Development Goals (SDGs) water and sanitation target is evidence of the synergies between international environmental policy, sustainable development and human rights discourse. Table 5.1 illustrates key international environmental, water and (sustainable) development law and policy instruments and political declarations with provisions relevant to the rights to water and sanitation, without distinguishing the legal status of the instruments.

Table 5.1 International environmental, water and (sustainable) development instruments and political declarations relevant to the human rights to water and sanitation principles

Year	Instruments	HRWS Principles				
		Acceptable	Accessible	Affordable	Safe	Sufficient
1972	Stockholm Declaration					
1977	Mar del Plata Convention					
1992	Rio Declaration*					
1992	Agenda 21*					
1997	UN Watercourses Convention					
1999	UNECE Protocol on Water and Health*					
2000	UN Millennium Development Goals*					
2001	Bonn International Conference on Freshwater*					
2002	Johannesburg Plan of Implementation*					
2004	ILA Report					
1992	Dublin Statement*					
1994	International Conference on Population and Development*					
2001	Recommendation (2001) of the Committee of Ministers to Member States on the European Charter on Water Resources					
2006	Abuja Declaration*					
2007	Message from Beppu, First Asia-Pacific Water Summit*					
2008	Delhi Declaration*					
2015	Sustainable Development Goals*					
*The instrument also explicitly addresses human sanitation needs.						

Remarkably the instruments mainly focus on accessibility (including physical accessibility), affordability, safety and sufficiency, but rarely on acceptability. Acceptability is crucial to the HRS, and this is a salient difference between water and sanitation because the latter also needs to be culturally acceptable to ensure use (see 3.4.1). Other recent political declarations explicitly recognising the HRS include the 4th and the 5<sup>th</sup> South Asian Conference on Sanitation (SACOSAN), held in 2011 and 2013, respectively; and the Ngor Declaration on Sanitation and Hygiene adopted at the Fourth African Conference on Sanitation and Hygiene, held in 2015.

Within the human rights framework, some scholars and water rights advocates argued that a HRW can be implied from specific rights in the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) (see for instance, Gleick, 1998; McCaffrey, 1992; Kiefer & Brölmann, 2005). Similarly, the HRS is equally essential for the attainment of relevant ICESCR rights (Ellis & Feris, 2014; Meier et al., 2014; Obani & Gupta, 2015). The HRW was initially recognized as subordinate to economic, social and cultural rights like the rights to an adequate standard of living,<sup>62</sup> food,<sup>63</sup> housing,<sup>64</sup> health<sup>65</sup> and development<sup>66</sup> *inter alia*. Sanitation is also necessary for the realisation of various economic, social and cultural rights, illustrated in Table 5.2, and it is this realisation that has culminated in the recognition of the HRS. Nonetheless, in 2002, the Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment No. 15 (GC 15) which remarkably recognises the HRW as self-standing and essential for realising an adequate standard of living and other related ICESCR rights (Obani & Gupta, 2015). The HRW has also been recognised in treaties *ratione personae* like the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW), and the Convention on the Rights of the Child 1979 (CRC). Further, the HRWS have been upheld in various resolutions of the UNGA and the UN HRC,

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<sup>62</sup> International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966; in force 3 January 1976) ('ICESCR') Article 11;

<sup>63</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 15, The Right to Water (Articles 11 and 12 of the Covenant) (UN Doc. E/C.12/2002/11, 20 January 2003) ('General Comment No. 15'), at paragraph 6.

<sup>64</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 4, The Right to Adequate Housing (Article 11 (1) of the Covenant) (UN Doc. E/1992/23, 13 December 1991) ('General Comment No. 4'), at paragraph 8(b).

<sup>65</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant) (UN Doc. E/C.12/2000/4, 11 August 2000) ('General Comment No. 14'), at paragraphs 11, 12 (a), (b) and (d), 15, 34, 36, 40, 43 and 51.

<sup>66</sup> Declaration on the Right to Development, 4 December 1986, (UNGA Resolution A/RES/41/128, 4 December 1986), Article 8.

including the UNGA Resolution 70/169 of 2015 which clearly recognized sanitation as a self-standing right, without vote.

Prior to the 2015 UNGA Resolution, the HRS evolved through UN human rights mechanisms like the Sub-Commission on Human Rights, while also being considered in relation to other rights as illustrated in Table 5.2 (Kamga, 2013; Obani & Gupta, 2015; Winkler, 2016). The GC 15 only considered sanitation marginally, highlighting the importance of the HRS for water quality and human dignity and privacy. Nonetheless, in 2010, the CESCR issued a “Statement on the Right to Sanitation”<sup>67</sup> reaffirming the interrelatedness of the HRS with the HRW (Obani & Gupta, 2015). The normative content of the HRS has been enriched at the international level through the work of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation. The HRC first established the mandate of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation in 2008 and appointed Catarina de Albuquerque to the position that same year. The position was however renamed Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation in 2011 and the tenure of Ms. de Albuquerque was extended for another three years until 2014, when Mr. Léo Heller was appointed as the new Special Rapporteur.

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<sup>67</sup> UN Committee on Economic, Social and Cultural Rights, Statement on the Right to Sanitation (UN Doc. E/C.12/2010/1, 19 November 2010) (‘Sanitation Statement’).

Table 5.2 Evolution of a distinct international human right to sanitation through interrelated rights

<b>Human rights</b>	<b>Source Documents</b>	<b>Key References</b>
<b>Life; Healthy environment</b>	1982 CCPR/C/21/Rev.1 2009 A/HRC/12/24	Kamga, 2013; Winkler, 2016
<b>Adequate housing</b>	1992 E/1992/23 Annex III 2002 E/CN.4/2002/59 2009 A/HRC/12/24 2009 E/C.12/2008/2	Kamga, 2013; Winkler, 2016
<b>Adequate standard of living</b>	1998 E/CN.4/1998/53/Add.2 2008 E/CN.4/Sub.2/2005/25 2009 A/HRC/12/24	Kamga, 2013; Winkler, 2016
<b>Health</b>	2000 E/C.12/2000/4 2005 CRC/C/GC/7/Rev 2008 E/CN.4/Sub.2/2005/25 2009 A/HRC/12/24 2009 CRC/C/GC/11	Kamga, 2013; Winkler, 2016
<b>Work</b>	2000 E/C.12/2000/4 2009 A/HRC/12/24	Kamga, 2013; Winkler, 2016
<b>Water</b>	2002 E/C.12/2002/11 2009 A/HRC/12/24	Kamga, 2013; Obani & Gupta, 2015; Winkler, 2016
<b>Education</b>	2003 CRC/GC/2003/4 2009 A/HRC/12/24	Kamga, 2013
<b>Water and Sanitation</b>	2006 E/C.12/GC/19 2009 A/HRC/12/24 2010 A/HRC/RES/12/8 2011 A/HRC/RES/18/1 2012 A/HRC/RES/21/2 2013 A/HRC/RES/24/18 2014 A/HRC/RES/27/7	Obani & Gupta, 2015; Winkler, 2016
<b>Sanitation (as a distinct right)</b>	2007 A/HRC/6/3 2015 A/RES/70/169	Obani & Gupta, 2015; Winkler, 2016
<b>Physical security</b>	2009 A/HRC/12/24	Winkler, 2016
<b>Prohibition of inhuman treatment</b>	2009 A/HRC/12/24	Winkler, 2016
<b>Equality of men &amp; women</b>	2009 A/HRC/12/24	Winkler, 2016
<b>Prohibition of discrimination</b>	2009 A/HRC/12/24	Winkler, 2016

### 5.2.2 Legal Basis

The literature on the HRS recognises it as a distinct right and analyses its legal foundations (Winkler, 2016), but the question of the legal status of the right remains unanswered. It is the legal status, based on the legal foundations, that determines the nature of obligations established by the right, the relationship between the duty bearers and rightsholders, and the available remedies in case of violation of the right. This is all the more significant because the HRS is mostly implied in treaties (see 5.2.2) and only recently emerged as a self-standing right (see 5.2.1). In this section, I therefore analyse the legal bases for the HRS together with the legal status of the right.

### *Customary international law*

The evolution of HRS into customary international law (CIL) requires evidence of: (a) concordant practise by a number of States in relation to a particular situation; (b) continuity of that practise over a considerable time period; (c) a sense of legal obligation to follow the practise, *opinion juris*; and (d) general acquiescence of the practice by other States (see 4.4.2). I now analyse political declarations of States and the recognition of the HRS in national constitutions and laws, as evidence of State practise (Bates (2010) analyses the customary international law status of the HRW and argues that it is a principle of customary international law based on usage and *opinio juris*, but that this further requires formal recognition by an international court.

States have increasingly made declarations and committed to promoting the HRWS, and the recent SDGs commitment which incorporates HRWS principles supports the emergence of custom (Obani & Gupta, 2016). However, taking HRS as a distinct right, States have not shown consistency in implementing the commitments reached on sanitation. A Government Spending Watch report on the financing of the MDGs sectors in 67 low and lower-middle income countries, shows that only three out of thirty-one countries with data on MDGs financing actually allocated the recommended 1.5% of GDP to water, sanitation and hygiene services (WASH) in 2014 (Martin & Walker, 2015). And on an average, since 2011, WASH has accounted for only 0.9% of GDP and 2.3% of government annual budget (Martin & Walker, 2015). The figures highlight both the underfunding of WASH and the difficulty of tracking sanitation financing as a result of the fragmented implementation and linked funding with water. Other declarations like the eThekweni commitments on sanitation in Africa, under which State Parties committed to a national budgetary allocation of a minimum of 0.5% of GDP for sanitation and hygiene programs *inter alia* are also poorly implemented.

States have also increasingly recognised the HRS in their national constitutions and laws, which indicates State practice to some extent. However, the numbers of HRS legislations are still few and fairly recent. The UN-Water global analysis and assessment of sanitation and drinking-water (GLAAS) 2014 report indicates that 63 countries out of the 94 respondents recognise the HRS in their legislations. In addition, countries like Angola, Algeria and Nicaragua, also have HRS legislations while Burkina Faso recognised the right in 2015. Hence, in total, there are about 67 States with HRS legislations globally. The States are specified in Annex I, according to their continents. However, the Tables in Annex I only

show States that were recorded in the 2010 UNGA Resolution A/64/292 on the human right to water and sanitation, and therefore exclude Cook Island, South Sudan, Tonga, West Bank and Gaza Strip even though they have legislation on the HRS. Nonetheless, the uniformity and consistency in the HRS legislations that is required for CIL status is lacking. For instance, the United Kingdom while it recognised the HRS in the Statement on the Human Right to Sanitation of 2012 also declared that the right does not require “the collection and treatment of human waste” (see 5.2.3).<sup>68</sup> This is a very limited conception of the HRS which falls short of basic sanitation both under the HRS (see 5.2.3) and the SDGs (see 3.2 and 3.5.5).

Hence, the HRS is yet to fully evolve into CIL due to variations in actual State practices (and so I do not analyse the need for formal recognition of the CIL status by an international court as suggested by Bates (2010) in the case of the HRW). Nonetheless, the HRS is nonetheless binding where it is either expressly or implicitly contained in legally binding instruments like treaties, constitutions and laws.

### *Treaties*

As already mentioned, the HRS is implied from the ICESCR, particularly articles 11 and 12, which respectively guarantee “an adequate standard of living” and “the enjoyment of the highest attainable standard of physical and mental health”, although the ICESCR and the General Comments on these articles did not expressly address sanitation.<sup>69</sup> The ICESCR provisions are subject to progressive realisation and require States to cooperate and apply the maximum of their available resources for this purpose (see 5.2.3) (Kiefer & Brölmann, 2005).<sup>70</sup> The HRS is also implied from other human rights treaties of limited scope either *ratione loci* or *ratione personae* like the CEDAW,<sup>71</sup> CRC,<sup>72</sup> and the 2006 Convention on the Rights of Persons with Disabilities (CRPD). The CEDAW imposes an obligation on States to ensure the right of women in rural areas to an adequate standard of living, including sanitation and water;<sup>73</sup> this falls short of universal recognition of the HRS for all women in other vulnerable settings. The CRC obliges States to conduct hygiene and environmental

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<sup>68</sup> United Kingdom, Statement on the human right to sanitation, Paragraph 2. Retrieved from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/36541/human-right-sanitation270612.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/36541/human-right-sanitation270612.pdf).

<sup>69</sup> Human Rights Council, Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and association, A/HRC/12/24, 1 July 2009.

<sup>70</sup> ICESCR, article 2(1).

<sup>71</sup> Article 14(2)(h).

<sup>72</sup> Article 24(2)(e).

<sup>73</sup> CEDAW, article 14(2)(h).



sanitation education to promote children's right to health; this is presumably broader than equating sanitation to excreta management (see 3.2) but does not oblige States to provide sanitation services but only sanitation education. The CEDAW and CRC significantly delink the rights to water and sanitation.

The HRS can be implied from regional human rights treaties. For instance, in Africa, the HRS can be implied from the right to health in the African Charter of Human and People's Rights 1981 and the African Charter on the Rights and Welfare of the Child 1990, the Senegal River Water Charter 2002; the rights of women to a healthy and sustainable environment and States' duty to provide women with access to clean drinking water as part of measures to promote their right to nutritious and adequate food in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003. The Senegal River Water Charter 2002 recognises the HRW and authorises free access for domestic uses. The African Convention on the Conservation of Nature and Natural Resources 2003 further obliges States to guarantee "a sufficient and continuous supply of suitable water" for their populations; and the Niger Basin Water Charter 2008 guarantees the HRW as well as the right to access information, and participate in water governance. While these provisions do not expressly guarantee the HRS, they can be considered to imply the HRS and are especially salient on the development of the normative content of the right like affordability, access to information and participation.

The implied recognition of HRS imposes limitations on the normative development of the right that are easily illustrated by the limitations on a subordinate HRW: (a) the HRW became solely dependent on the legal remedies for the primary right, (b) each State has a different set of obligations for each primary right,<sup>74</sup> and (c) the amount of water needed to fulfil the primary right and the HRW varies (Obani and Gupta, 2015). In the South African case of *Johnson Matotoba Nokotyana and Others v Ekurhulen Metropolitan Municipality and Others*,<sup>75</sup> the court held that the right of access to adequate housing which is guaranteed under national law cannot be interpreted to include basic sanitation in the absence of minimum standards for housing. Nonetheless, in the absence of a treaty on the HRS, the right

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<sup>74</sup> Despite increasing constitutional convergence, national constitutions still grant varying legal status to human rights. For instance, while economic, social and cultural objectives are classified as non-justiciable fundamental objectives and directive principles of State policy in the Constitution of the Federal Republic of Nigeria 1999, similar rights are guaranteed and justiciable under the Constitution of the Republic of South Africa (Act No. 108 of 1996).

<sup>75</sup> [2009] Constitutional Court CCT31/09, reported in WaterLex 2014.

can be implied from existing binding legal rights in courts at various levels of governance and benefit vulnerable groups like women (through the CEDAW) and children (through the CRC), especially where lack of sanitation results in violation of other HR guarantees. This also allows HRS to benefit from the existing enforcement mechanisms for the respective HR from which HRS may be implied (see 4.2.1).

### ***Judicial decisions***

Courts at different levels of governance have been instrumental to developing the normative content of the HRS and promoting implementation (Obani, 2015). Even in the absence of formal recognition of HRS in national legislations, national, regional and international courts have relied on other national and international human rights guarantees, including the rights to life, health, adequate housing, and education, and the guarantees of dignity and freedom from inhuman and degrading treatment, as a basis for recognising the rights to water and sanitation. Some examples of such cases are summarised in Table 5.3.

### ***Soft law***

Although the resolutions of the UNGA and HRC on the HRS indicate increasing State commitment and support for the HRS as a distinct right (see 5.2.1), the resolutions are not legally binding *per se*. It is however important to note that the reservations which States expressed about the HRWS while voting the UNGA Resolution A/64/292 did not consider HRS separately otherwise, there may have been less concerns over the implications of the HRWS for State sovereignty, for instance (as expressed by States like Ethiopia). In total, 33 African, 35 Asia, 22 European, 18 North American, 4 Oceanian and 10 South American States voted in favour of the resolution. The details of the States that abstained or were absent are also presented in Annex I, according to their continents. The HRC resolutions are significant because they are based on the UN Charter and therefore apply generally to all UN Member States, while GCs are only relevant to ICESCR State Parties. Remarkably, the United States of America was among the States that adopted the HRC Resolution even though it viewed the rights as being a derived right from the ICESCR and the United States is not a party to the ICESCR. It is equally remarkable that many national HRS legislations followed in the wake of the UNGA and HRC resolutions (like Kenya, Morocco, Zimbabwe and Tunisia; see Annex I), and more can be expected with the distinct recognition of HRS by the UNGA in 2015.

Table 5.3 Judicial decisions on the human right to sanitation

Case	Summary
Municipal Council, Ratlam v. Shri Vardhichand & Others (1980) <sup>d</sup> India	A court can through affirmative action compel a statutory body to provide sanitation services.
Carlos Alfonso Rojas Rodríguez c/ ACUAVENORTE y Otros (1992) <sup>d, e</sup> Colombia	Connection to the sewage network is a fundamental right.
Government of the Republic of South Africa and Others v Grootboom and Others (2000) <sup>d, e, g</sup> South Africa	The State is obliged to fulfil the basic needs of extremely poor people, including access to sanitation for the homeless.
Case of the Sawhoyamaxa Indigenous Community v. Paraguay (Merits, Reparations and Costs) (2006) <sup>d, e</sup> Paraguay	Lack of sanitation services is a threat to the right to life of the indigenous community. <sup>76</sup>
Carolina Murcia Otálora c/ Empresas Públicas de Neiva ESP (2009) <sup>f</sup> Colombia	Service disconnections for non-payment, particularly affecting vulnerable groups, due to involuntary reasons violates human rights.
Hernán Galeano Díaz c/ Empresas Públicas de Medellín ESP, y Marco Gómez Otero y Otros c/ Hidropacífico SA ESP y Otros (2010) <sup>c, d, e</sup> Colombia	Failure to connect a property to the sanitation network is a human rights violation.
Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security eKLR (2011) Kenya <sup>b, g</sup>	Forcible eviction of an informal settlement and cutting off their access to sanitation, <i>inter alia</i> , violated their human rights.
Beja and Others v Premier of the Western Cape and Others (2011) <sup>a, g, h</sup> South Africa	Providing unenclosed toilets to a poor community violates the rights to dignity and adequate housing; failure to ensure meaningful participation is also a human rights violation.
Habeas Corpus Colectivo presentado por Víctor Atencio c/ el Ministerio de Gobierno y Justicia, Director General del Sistema Penitenciario (2011) <sup>e</sup> Panama	Failing to provide detainees with adequate access to sanitation constitutes amounts to inhuman or degrading treatment and violates dignity. <sup>77</sup>
Dagoberto Bohórquez Forero c/ EAAB Empresa de Acueducto y Alcantarillado de Bogotá y Otros (2012) <sup>b, e</sup> Colombia	Public authorities and service providers are obliged to provide efficient and timely sanitation services to legalised settlements.
Environment & Consumer Protection Foundation v Delhi Administration and Others (2012) <sup>a, e</sup> India	The State has an immediate obligation to provide toilets for boys and girls in schools, in order to guarantee the right to education.
Human right to sanitation principles expressed in the court's decisions: a – Acceptability; b – Access (physical); c – Access to information; d - Accountability; e - Availability; f - Affordability; g – Equality and non-discrimination; h – Participation	

Source: Compiled by the author, from case summaries reported in WaterLex 2014

<sup>76</sup> The Inter-American Commission on Human Rights/Paraguay reached a similar decision in the case of *Yakye Axa Indigenous Community v Paraguay* Inter-American Court of Human Rights Series C no 125 (17 June 2005), reported in WaterLex 2014.

<sup>77</sup> Similar decisions on access to sanitation for detainees has been reached in national courts (in Angola, France, Fiji and Ireland, for instance), as well as regional courts (like the European Court of Human Rights and the Inter-American Commission on Human Rights), reported in WaterLex 2014.

### 5.2.3 Meaning

The HRS generally imposes tripartite obligations on States, to respect, protect and fulfil the right, and soft law instruments like the United Nations “Protect, Respect, Remedy” Framework and Guiding Principles on Business and Human Rights (Ruggie, 2011) further expand the possibility of holding businesses liable for HRS violations (Obani & Gupta, 2016). The framework and guiding principles are set on three pillars: (a) State’s duty to protect against human rights abuses by third parties, including business; (b) corporate responsibility to respect human rights; and (c) improved access by victims to an effective remedy, in case of violation. The enforcement of HRS obligations against either the State or businesses however requires a clarification of the meaning of the HRS.

The HRS is defined differently by actors at various levels of governance. The former Special Rapporteur, de Albuquerque, defined sanitation in human rights terms: “as a system for the collection, transport, treatment and disposal or reuse of human excreta and associated hygiene,” including “domestic wastewater, which flows from toilets, sinks and showers, ... insofar as water regularly contains human excreta and the by-products of the associated hygiene,” and “in some places, existing solutions for human excreta management make it inseparable from solid waste management” (de Albuquerque 2009, paragraph 63). This definition extends to “all spheres of life” (de Albuquerque 2009, paragraph 63), and protects other human rights, like health, which could otherwise be violated due to unsafe sanitation or hygiene practices (Winkler, 2016; Zimmer, Winkler & de Albuquerque, 2014). It thereby places a corresponding duty on the rightsholders to use and hygienically maintain the available sanitation facilities, and may require those who can afford to, to cross-subsidise access for the poor, in order to advance universal access (Obani & Gupta, 2014a). Nonetheless the definition does not integrate environmental sustainability (Feris, 2015). This is evident from the narrow list of sanitation services excluding non-excreta related waste streams, like solid waste management, which nonetheless poses a threat to human wellbeing and the environment if poorly managed. Similarly, the UNECE Protocol on Water and Health defines sanitation as: “the collection, transport, treatment and disposal or reuse of human excreta or domestic waste water, whether through collective systems or by installations ... serving a single household or undertaking”,<sup>78</sup> and a collective (sanitation) system as: “[A] system for the provision of sanitation which serves a number of households or undertakings and, where appropriate, also provides for the collection, transport, treatment and disposal or

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<sup>78</sup> Article 8.

reuse of industrial waste water, whether provided by a body in the public sector, an undertaking in the private sector or by a partnership between the two sectors”.<sup>79</sup> Further, the Message from Beppu 2007, emphasises the need to “[P]romote thinking of sanitation as the full cycle of proper arrangements, safe conveyance and sanitary disposal/re-use of liquid and solid wastes (including solutions that do not adversely impact the quality of land and water resources), and associated hygiene behaviour”.

More recently, the UNGA Resolution 70/169 of 2015 recognised *inter alia* that the HRS “entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living”.<sup>80</sup>

At the national level, there have been three main approaches to defining the HRS. One emphasises the relational focus of the HRS and the interests of vulnerable groups. For instance, in South Africa, the Water Services Act, Act 108 of 1997, provides *inter alia* that everyone has a right to access basic sanitation services,<sup>81</sup> defined as “...the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal households”.<sup>82</sup> Hence, basic sanitation which is the minimum standard is defined by the Act to include the management of human excreta as well as wastewater and sewage and also applies to those in informal settlements. Another approach integrates environmental protection. For instance, in Guinea Bissau the aim of sanitation is broadly stated as being “to ensure the immediate removal of domestic and industrial wastewater likely to cause harm, and of rivers likely to flood inhabited places, subject to public health requirements and environmental protection”.<sup>83</sup> The third approach is more restrictive than the definition by the former Special Rapporteur. For instance, the United Kingdom defines HRS to include: “... achieving the outcome of providing a system for the treatment and disposal or re-use of human sewage and associated hygiene. It entitles right holders to reasonable access to the elements of the right, but allows for recovery of the cost of providing such access, including any environmental and resource costs. The right does not

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<sup>79</sup> Article 9(b).

<sup>80</sup> Paragraph 2.

<sup>81</sup> Section 3.

<sup>82</sup> Chapter 1.

<sup>83</sup> Guinea Bissau, *Water Code, Law No. 5-A/92* (unofficial translation), article 29.

prescribe any particular model of delivery for public and private sectors. It also does not require the collection and transport of human waste...<sup>84</sup> This further threatens environmental sustainability due to the risk of contamination of the environment from uncollected or poorly managed human waste (Zimmer et al., 2014).

The meaning of the HRS can be further expanded on the basis of the ICESCR, from which the right is mainly derived in international law, to require that States use their maximum available resources to progressively achieve full realisation. The ICESCR, article 2(1), provides that each State Party “undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” States are also obliged by the ICESCR, article 2, to guarantee human rights without discrimination,<sup>85</sup> while “[D]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”<sup>86</sup> Progressive realisation reflects the reality that States may be unable to immediately attain full realisation of the ICESCR provisions, depending on their available resources, for instance.<sup>87</sup> Nonetheless, the HRS imposes a minimum set of obligations, the core content of the right (see 5.3), from which States are not allowed to deviate, not even due to lack of economic resources, otherwise, the right essentially becomes meaningless (Martin, 2011).

The HRS therefore means that additionally, States can apply the “maximum of its available resources” to fulfil the core content of the right (see 5.3) and establish safeguards against retrogression from any progress achieved in the implementation process (Obani & Gupta, 2016). The available resources include both financial and non-financial resources (including human capital, natural resources like land and water, information, and technology) on which the realisation of the HRS depends. Such a broad definition of resources prevents States from relying on the scarcity of finances as an excuse for non-implementation of the HRS (Skogly, 2012). It also means that even a developing country with abundant non-financial resources, like natural resources, bears a duty towards assisting other countries with less resources to

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<sup>84</sup> United Kingdom Statement (n. 68).

<sup>85</sup> ICESCR, article 2(2).

<sup>86</sup> ICESCR, article 2(3)

<sup>87</sup> The CESCR describes this as a “necessary flexibility device” in the ICESCR. See Committee on Economic, Social and Cultural Rights, 1990, paragraph 9.

realise the HRS based on the principle of extraterritorial obligations (see 5.3.2). Applying the tripartite obligations to respect, protect and fulfil further means that States are to take steps to: (a) protect rightsholders against arbitrary disconnection, exclusion from services, unaffordable tariffs and discriminatory practices which interferes with their access to sanitation services; (b) respect the HRS both within their jurisdictions and abroad, and establish safeguards against violations; and (c) take appropriate legislative and other measures necessary to fulfil the HRS.

### 5.3 PRINCIPLES OF THE HUMAN RIGHT TO SANITATION

This section presents eleven principles of the HRS that I derive through content analysis and literature review, based on the definition of principles in my conceptual framework (see 2.5.1). I derive the principles from the core content of the HRS (availability, physical accessibility, safety, acceptability, affordability, and equality and non-discrimination),<sup>88</sup> and cross-cutting HR (accountability, extra-territorial obligation, participation, sustainability, and transparency and access to information) (see 4.3) (de Albuquerque, 2009; 2014). A clear definition of the HRS principles is essential for limiting the administrative discretion and ensuring predictability in HRS enforcement by the courts (McIntyre, 2012). One of the consequences of the historical linking of the HRWS (see 1.2.2 and 5.2.1) is that HRS principles have largely been subsumed under the development of the HRW principles; hence my discussion of the HRS principles in this section draws heavily from the HRW where relevant.

#### *Accessibility*

Access is mentioned in the various UNGA and HRC resolutions concerning the HRS, and environmental, water and (sustainable) development instruments and political declarations (see 5.2 and Table 5.1). The recent UNGA Resolution 70/169 further reiterates that the HRS “entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life...”<sup>89</sup> Hence, accessibility has both a physical and an economic element (which I discuss under affordability below). Physical accessibility requires that

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<sup>88</sup> General Comment No. 3 indicates that the rights provided for in the ICESCR have a core content which guarantees that the minimum essential level of each right is achieved. States are expected to fulfil the core content except this becomes impossible due to resource constraints, for instance; see Riedel, Giacca and Golay (2014). Nonetheless, non-discrimination is an immediate obligation which does not require additional resources *per se* but requires available resources to be used to address the needs of the marginalised and vulnerable groups. I have relied on the normative content of the HRW, specified by the CESCR in paragraphs 10-12 of the General Comment No. 15, to determine the core content of the HRS.

<sup>89</sup> Paragraph 2.

sanitation facilities and services are constructed, operated and maintained hygienically and without putting users at any risk during the day and night); negative socio-cultural practices (see 3.4.2) that prevent vulnerable groups like women and girls from accessing sanitation facilities are addressed; and sanitation facilities sited outside the house and in public places, to be within a reasonable distance from the vicinity of users (COHRE et al., 2008; de Albuquerque, 2009; Winkler, 2016).

### *Acceptability*

Acceptability features in the various UNGA and HRC resolutions concerning the HRS (see 5.2) and the UNGA Resolution 70/169 also provides for universal access, that is: “socially and culturally acceptable and that provides privacy and ensures dignity.”<sup>90</sup> Dignity is a shared basis for all human rights (McCrudden, 2008), though it lacks a definite meaning under HR (see 4.4.3), and while the notions of privacy and dignity also vary among different societies, the HRS is violated by: (a) “[d]egrading living conditions and deprivations of basic needs” (Schachter, 1983, p.852); (b) lack of access to sanitation facilities (de Albuquerque 2009); and (c) lack of privacy when using sanitation facilities (Lee & George, 2008).<sup>91</sup> Women and girls are more at risk of physical danger in addition to a violation of their dignity when they are forced to defecate in the open or use facilities that violate their privacy (Amnesty International, 2010). Acceptability therefore requires taking into account the local perspectives, especially from vulnerable groups like women and girls, when designing and distributing facilities, in order to counter the socio-cultural drivers that cause non-acceptance or violate dignity and privacy (Obani & Gupta, 2016). Nonetheless, some cultural practices are ill-informed (for instance, banishing women from dwellings during their menstrual cycle or prohibiting the siting of facilities within the living area) and require sanitation and hygiene awareness to promote good practices (Akpabio, 2012).

### *Affordability*

Affordability features in the various UNGA and HRC resolutions (see 5.2) concerning the HRS and is an aspect of accessibility because the direct and indirect costs of accessing sanitation services can prevent access for the poor. Affordability therefore requires that the cost of sanitation does not affect access to sanitation, reduce the users’ quality of life or in other ways compromise the realisation of their rights (COHRE et al., 2008; Fonseca, 2014).

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<sup>90</sup> Paragraph 2.

<sup>91</sup> *Beja and Others v Premier of the Western Cape and Others* [2011] High Court (Western Cape) 21332/10, [2011] ZAWCHC 97 (South Africa); *Municipal Council, Ratlam v. Shri Vardhichand and Others*, (1981) 1 S.C.R. 97 (India).



This is best determined at local level, taking into account the local circumstances as what may constitute an affordable tariff to one set of individuals may be unaffordable to others. It requires a broad system of funding through a combination of tariffs, taxes, transfers and cross-subsidies for the poor (de Albuquerque, 2014; Heller, 2017; Obani & Gupta, 2016). The threshold figures for affordability specified in the literature often include both water and sanitation services and range from 5% (Fonseca, 2014; Deutsche Gesellschaft für Technische Zusammenarbeit [GTZ], 2009; UN-Water Decade Programme on Advocacy and Communication & Water Supply and Sanitation Collaborative Council, 2010), to 3 – 6% (Smets, 2008) of household income; whereas in the United Kingdom, for instance, 3% already indicates hardship on the users (United Nations Development Programme [UNDP], 2006). However, expressing affordability as a percentage of household income does not account for non-monetised economies (COHRE et al., 2008), labour exchange or other forms of non-monetary contributions (Obani & Gupta, 2015), nor households without regular incomes (hence, the recommendation to measure affordability using household expenditure instead of income) (COHRE et al., 2007). Further, practices like indexing tariffs to the USD or servicing contract loans in a foreign currency may also hamper affordability for poor countries (Barlow, 2009).

### *Availability*

Availability is contained in the various UNGA and HRC resolutions concerning the HRS, and environmental, water and (sustainable) development instruments and political declarations (see 5.2 and Table 5.1). Availability means a sufficient quantity of sanitation facilities for domestic and personal uses in all spheres of life (de Albuquerque, 2009; Obani & Gupta, 2016; Winkler, 2016).<sup>92</sup> This requires establishing clear targets and timelines for progressively achieving universal access to the highest attainable sanitation standards (see 3.5.5) (de Albuquerque, 2014).<sup>93</sup> Unlike drinking water requirements that are clearly defined in quantitative terms (Howard & Bartram, 2003), the number of facilities necessary to fulfil the HRS is best determined on a case by case basis with due consideration of the special needs of vulnerable users like women and people living with disability and the ratio of users to sanitation facilities set (taking into account the special needs of users) in order to avoid

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<sup>92</sup> Bangladesh, National Policy for Safe Water Supply and Sanitation 1998; South Africa - *Beja and Others v Premier of the Western Cape and Others* [2011] High Court (Western Cape) 21332/10, [2011] ZAWCHC 97, case summary in Waterlex, 2014.

<sup>93</sup> Some countries include sanitation targets and service standards in laws and policies as a benchmark service provision. See, Kenya, *The National Water Services Strategy (NWSS)*, 2007-2015, paragraph 3.3; South Africa, *Regulations relating to compulsory national standards and measures to conserve water* 2001.

long waiting times (see 3.5.5 and 3.6.1). Further, the question of whether or not shared facilities meet human rights standards is best addressed at scale and it depends on whether or not the facility ensures the dignity and wellbeing of users, as shared facilities may be necessary where space constraints prevent the building of personal facilities, for instance (see 3.5.5).

### ***Safety***

Safety is contained in the various UNGA and HRC resolutions concerning the HRS, and environmental, water and (sustainable) development instruments and political declarations (see 5.2 and Table 5.1). It requires the integration of environmental considerations in the design and implementation of sanitation services, in order to protect both humans and the environment from contamination by human excreta or wastewater (Feris, 2014; Zimmer et al., 2014); broad definition of the HRS to include waste collection, treatment and safe disposal or reuse services (see 5.2.3); universal access to public (sanitation) goods like sewer networks (see 3.3); development of alternatives to manual emptying of on-site sanitation facilities and regulation and monitoring to ensure safe handling and treatment of the waste collected from sanitation facilities (see 3.5); hygiene promotion and access to facilities for the hygienic disposal of menstrual products and water and soap for related hygiene needs (see 3.5.5); and the segregation of shared toilets by gender, to minimise assault on vulnerable users.

### ***Accountability***

Accountability features in the various UNGA and HRC resolutions concerning the HRS. It requires effective remedies to redress violations of the HRS; adequate reparation to the victims of such violations with measures to prevent the repeat of such violations, and mechanisms for monitoring the operations of duty bearers service providers (Baer, 2015; de Albuquerque, 2014; Obani & Gupta 2016, 2017). Accountability may either be achieved through substantive HR like access to information, or global administrative law principles like legality and due process (Harlow, 2006) that have been further legitimised with the adoption of the universal SDGs (Obani & Gupta, 2016). Accountability applies to States as the primary duty bearers (Martin, 2011), international organisations and NGOs (UNGA, 2010), private corporations that are directly involved in delivering sanitation services or interfering with the realisation of the right (Cavallo, 2013), and users who are required to cross-subsidise the poor through paying affordable tariffs (Obani & Gupta, 2014a) and hygienically maintain their facilities to minimise negative externalities (de Albuquerque,

2012). Accountability is further strengthened through the rule of law and pressure from the civil society (Abey Suriya et al., 2007; de Albuquerque, 2014; Giles, 2012; Kühl, 2009). The rule of law requires States to: (a) adopt a strong effective regulatory framework for the full realisation of the HRS; and (b) ensure that its agencies and non-State actors comply with the HRS (de Albuquerque, 2009; 2012; 2014). In addition, where local or national remedies are either lacking or inadequate, aggrieved individuals or groups may seek redress for violations through the international HR enforcement mechanisms like international courts or the Committee for Economic, Social and Cultural Rights (see 4.2.1), provided their country of origin is a State Party to the Convention and has accepted the competence of the Committee or the jurisdiction of the relevant court to consider individual complaints.

### *Equality and non-discrimination*

Discrimination features in the various UNGA and HRC resolutions concerning the HRS, and one of the main objectives of the right is to address inequalities in access for the benefit of vulnerable and marginalised groups (see 5.2). Non-discrimination is also a central principle in the ICESCR (see 5.2.3) and discrimination can assume both formal and covert forms, where embedded in apparently neutral laws and practices that exacerbate inequities in access (de Albuquerque 2014).<sup>94</sup> Non-discrimination and equality require immediate steps to end discriminatory practices where they exist, targeted affirmative action to reduce inequalities in access with special attention to vulnerable and marginalised individuals or groups with special needs that are likely to suffer exclusion or discrimination in accessing sanitation, and an understanding of the disparities in access among various individuals and groups rather than relying on averages which might obscure inequalities in access (de Albuquerque, 2009; Obani & Gupta, 2016; WaterLex, 2014).

### *Participation*

Participation is recognised in the various UNGA and HRC resolutions concerning the HRS and declarations like Rio, the Dublin Statement and Bonn (see 5.2) as an important principle for the protection of vulnerable and marginalised groups. The HR framework particularly emphasizes the need for participation to be meaningful and effective (de Albuquerque, 2014). It is through meaningful and effective participatory mechanisms that the special needs and

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<sup>94</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, available at: <http://www.refworld.org/docid/4a60961f2.html> [accessed 28 September 2017].

interests of vulnerable and marginalised groups can be reflected in sanitation governance. Participation requires States to provide the affected individuals and communities with full and equal access to information concerning sanitation and hygiene services and the implications for their health and immediate environment through accessible media, and the opportunity to effectively partake in all the processes for the planning, construction, operation, maintenance, and monitoring of services (de Albuquerque, 2014).

### ***Transparency and access to information***

The need for transparency in the governance process and access to information is recognised in the various UNGA and HRC resolutions concerning the HRS (see 5.2).<sup>95</sup> Transparency and access to information entail (including the right to seek, receive and share) information about sanitation laws, policies and programmes, service design, tariffs, the financial information of service providers, and the quality of services (de Albuquerque 2014; Obani and Gupta 2016). The information would need to be disseminated through accessible media and language and be freely available to the public without illegal restrictions like prohibitive access fees (de Albuquerque 2009; 2014).<sup>96</sup> Transparency and access to information foster democratic engagement, effective participation, accountability and informed decision making by rightsholders (de Albuquerque 2014). Further, access to information mitigates the power imbalance that exists between the poor and marginalised individuals and groups, like residents of informal settlements, and the State or service providers (de Albuquerque 2014).

### ***Sustainability***

The imperative of sustainable access is recognised in the various UNGA and HRC resolutions concerning the HRS (see 5.2). Although the meaning of sustainability is not clearly articulated in the resolutions, the literature shows that sustainability requires the progressive realisation of the HRS for everyone, without any retrogression. This entails a holistic consideration and balancing of the social, economic, and environmental aspects of sanitation services delivery (Feris, 2015; Obani & Gupta, 2016).<sup>97</sup> Sustainability further requires the operation, maintenance and repairs of sanitation facilities (Darrow, 2012), prioritisation of personal and domestic sanitation and hygiene needs over competing demands

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<sup>95</sup> The right to information is enshrined in the Universal Declaration of Human Rights 1948, article 19 and the International Covenant on Cultural and Political Rights 1966, article 19(2).

<sup>96</sup> See *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others* [2012] High Court (North Gauteng, Pretoria) 35672/12, [2012] ZAGPPHC 128 (South Africa); *Hernan Galeano Diaz c/ Empresas Publicas de Medellin ESP, y Marco Gomez Otero y Otros c/Hidropacifico SA ESP y Otros* [2010] Corte Constitucional T-616/10 (Colombia), case summary in Water Lex, 2014.

<sup>97</sup> General Comment No. 15 (n. 63), paragraphs 11 and 28.

for available resources (see 5.4.1), and inter-generational equity (de Albuquerque, 2014). Sustainability is also reflected in SDGs 6 (see 3.2) which incorporates safe access, and sustainable management of water resources.

### ***Extra-territorial obligation***

The CESCR obliges States to “take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction” (CESCR, 2011, paragraph 5) and “prevent their own citizens and companies from violating the right to water of individuals and communities in other countries” (CESCR, 2002, paragraph 33). Extra-territorial obligation thereby generally restrains States from using their resources either directly or indirectly to cause harm abroad (de Albuquerque, 2014).<sup>98</sup> The need for international cooperation is recognised in the various UNGA and HRC resolutions concerning the HRS, and the ICESCR itself (see 5.2). In relation to sanitation, the richer States therefore ought to respect, protect, and assist with the realisation of the HRS in poorer States, for instance through refraining from imposing embargoes that affect the supply of sanitation services or using sanitation as an instrument of political or economic pressure, and preventing their citizens from violating the HRS in other countries (de Albuquerque, 2014; Obani & Gupta, 2016).<sup>99</sup> Further, the Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights 1997, developed by international human rights law experts, obliges States to *inter alia* ensure the availability of effective accountability mechanisms in dispensing their extraterritorial obligations, as well as “prompt, accessible and effective remedy before an independent authority, including, where necessary, recourse to a judicial authority, for violations of ESC rights” (De Schutter et al., 2012).<sup>100</sup>

## **5.4 HUMAN RIGHT TO SANITATION INSTRUMENTS AND INDICATORS**

This section analyses the key regulatory (see 5.4.1), economic (see 5.4.2), and suasive (see 5.4.3) instruments through which the HRS principles (see 5.3) are operationalized.

### **5.4.1 Regulatory**

<sup>98</sup> See General Comment No. 15 (n. 63), paragraphs 23, 24, 33, 34, 35 36, 44 (c) (vii), 49, 50, 60; Sub-Commission Guidelines, paragraph 10; *Trail Smelter (United States v. Canada) Arbitration*, [1938/1941] 13 RIAA 1905; ICJ 25 September 1997, *Gabc'ikovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] ICJ Rep 7; ICJ 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] ICJ Rep. 14. See also UN Convention on the Law of the Non-Navigational Uses of International Watercourses, article 32.

<sup>99</sup> General Comment No. 15 (n. 63), paragraph 32.

<sup>100</sup> See Principles 36 and 37.

This section discusses seven regulatory instruments.

### ***Guaranteed free access to basic services***

Guaranteed free access to basic sanitation services protects human dignity and assures access for vulnerable individuals and groups, like the residents of informal settlements which are often excluded from national development plans and in particular the formal sanitation networks (UN-Habitat, 2016). An example of statutory protection of guaranteed free access to basic services is in the Flemish region of Belgium which guarantees a minimum of 15 m<sup>3</sup> of water supply annually for domestic uses, including sanitation, progressive pricing for surplus consumption (see 5.5.2) and exempts the poorest citizens living under the Minimum Subsistence Level from the regional tax regime for sanitation services *inter alia*.<sup>101</sup> In the Brussels region of Belgium, there is also a Social Fund for Water that is financed by a tax of 0.01 euro/m<sup>3</sup> of water consumed, and the poorest people in the Brussels region receive a sanitation tax refund but the amount varies among the different municipalities. Nonetheless, the statutory protection of free basic water supply was challenged in the case of *Commune de Wemmel*,<sup>102</sup> as a violation of the competence of the municipal water companies to determine the water supply tariff. In that case, the Court of Arbitration upheld the municipality's right to legislate on the water tariff and stated that the provision advanced human dignity, and reduced water wastage using the progressive pricing mechanism. While the argument may be advanced that progressive pricing may increase the tariff for larger consumption users and thereby encourage water conservation and moderate consumption, the counter-argument can also be made that the increased prices at higher levels of consumption could negatively affect effective access for the vulnerable, poor, or marginalised people who need more than the free minimum quantity to meet their needs, especially in the absence of social safety nets (Obani & Gupta, 2014a).

### ***Prohibiting arbitrary disconnections***

Laws prohibiting arbitrary disconnections for non-payment of tariffs protect human dignity and prevent discrimination against poor users for instance by offering the option to pay in arrears, or subsidised or free basic services for users who cannot afford to pay for their domestic sanitation and hygiene services (de Albuquerque, 2014).<sup>103</sup> Such prohibitions are

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<sup>101</sup> Décret de la Communauté Flamande concernant diverses mesures d'accompagnement du budget 1997, 20 December 1996, *Moniteur belge*, 31 December 1996, 3rd edition (unofficial translation), articles 3.1 and 3.4.

<sup>102</sup> 8 Commune de Wemmel, Cour d'arbitrage, Arrêt N°36/1998, 1 Avril 1998, *Moniteur belge*, 24 April 1998.

<sup>103</sup> In Brazil, defaulting customers are also protected from ridicule or embarrassment in the process of debt recovery through provisions like the *Consumers Defence Code*, Law 8078 of 11 September 1990, as last amended by Law 12.039 of 2009 (unofficial translation), article 42.

incidental to the enjoyment of the HRWS.<sup>104</sup> It is further important for service disconnections to be guided by procedures that are clearly stated in the legal framework. For instance, in South Africa, the Water Services Act requires that the procedures for limiting or discontinuing services must: “(a) be fair and equitable; (b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless – (i) other consumers would be prejudiced: (ii) there is an emergency situation; or (iii) the consumer has interfered with a limited or discontinued service.”<sup>105</sup> The prohibition of arbitrary disconnections has however been challenged in courts. In Belgium, the 1994 Belgian regional ordinance which prevents water distribution companies from disconnecting tenants who do not pay their water bill was challenged before the Court of Arbitration of Belgium.<sup>106</sup> Dismissing the petition, the Court held that access to a minimum quantity of drinking water and sanitation is a fundamental right and that a tenant’s access must be guaranteed despite the inability to pay. Also, where the tenant is insolvent, the service providers are entitled to account the bill to the landlord on the basis of the property’s connection to the distribution network. Similarly, in France, in the case of *Compagnie de services dévirement v. Association des consommateurs de la Fontaulière*,<sup>107</sup> the Tribunal de Grande Instance of Privas upheld a similar prohibition stating that water is essential to life and the partial non-payment of water bills could not justify disconnection of services.

#### ***Direct provision of access by the State***

The responsibility for sanitation provision is often assigned to a tier of government, a government organization, a line department or an agency. In India, the 12th Schedule to the 74th Constitutional Amendment Act, 1992 vests the urban local bodies with the responsibility for public health, sanitation, conservancy, and solid waste management; water supply for domestic, industrial, and commercial purposes; slum improvement and upgrading; protection of the environment and promotion of ecological aspects, among others. Similarly, the Constitution of South Africa, 1996, lists sanitation services as a local government responsibility, while in Kenya it is the responsibility of the county government. This

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<sup>104</sup> City of Cape Town v Strümpher [2012] Supreme Court of Appeal 104/2011, [2012] ZASCA 54 (South Africa).

<sup>105</sup> Section 4 (3).

<sup>106</sup> Belgian Court of Arbitration, *A.s.b.l. Syndicat national des propriétaires et autre*, Case No.9/1996, 8 February 1996, in: *Moniteur belge*, 1996(02)00035, section I, paragraph III, 2.

<sup>107</sup> Case No. 9800223, 5 March 1998. See also Tribunal de Grande Instance (District Court) of Meaux, xxx.v.xxx., 28 February 2001, in: *Droit Monde*, No. 37-28, 2004, p. 77, quoted in COHRE (2008), p. 295.

responsibility could either be exercised directly or indirectly through various forms of public-private partnerships involving private service providers (see 7.3.2).

### ***Universal access & mandatory connections***

National laws that require universal access and mandatory connection of users to sanitation service networks prevent discriminatory practices against the poor, marginalised and vulnerable individuals and groups like residents of informal settlements (de Albuquerque 2014). Some countries require mandatory provision of sanitation facilities in homes,<sup>108</sup> places controlled by organisations and people other than the users, like schools,<sup>109</sup> work places,<sup>110</sup> detention centres,<sup>111</sup> rented residences,<sup>112</sup> care homes and assisted living spaces,<sup>113</sup> and urban areas.<sup>114</sup> Some countries like Mali also mandate connection to the sewerage network where this exists.<sup>115</sup> For instance, in Uruguay,<sup>116</sup> it is mandatory for house owners and potential house buyers to connect their properties to the sewerage system within one-year or be liable to pay fines until they comply.<sup>117</sup>

### ***Prioritisation of human needs***

The depletion of resources and destruction of infrastructure that occur in humanitarian situations (see Chapter 6) may necessitate the prioritisation of human needs in the allocation of access to the remaining scarce resources. As a result, some national laws prohibit all other water intensive activities apart from human consumption during emergencies and humanitarian situations, depending on the nature of the emergency. In Niger for instance, during droughts the local authority may prohibit the watering of gardens or other water intensive activities except for direct human consumption.<sup>118</sup> Similarly, in Burkina Faso, the use of water for drinking and basic needs and human dignity (presumably including

<sup>108</sup> Republic of Benin, *Public Hygiene Code, Law No. 87-015* of 21 September 1987 (unofficial translation), article 20.

<sup>109</sup> England and Wales, the Education (School Premises) Regulations (1999 No. 2); Kenya, National School Health Policy 2009.

<sup>110</sup> England and Wales, Workplace (Health, Safety and Welfare) Regulations (1992 No. 3004); Benin, *Public Hygiene Code, Law No. 87-015* of 21 September 1987 (unofficial translation), article 93.

<sup>111</sup> Panama, Executive Decree 393 of 2005, article 12.

<sup>112</sup> Republic of Benin, Law No. 87-015, Public Hygiene Code, article 20.

<sup>113</sup> United States of America, State of Georgia, Rules and Regulations for Assisted Living Communities

<sup>114</sup> Mauritania, *Water Code, Law No. 2005-030* (unofficial translation), article 37.

<sup>148</sup> Mali, *Decree No. 01-395/P-RM* of 06 September 2001 determining the modalities for the management of wastewater and silt (Unofficial translation), article 8; Guinea Bissau, *Water Code, Law No. 5-A/92* (Unofficial translation), article 29(1)(2)(5); Australia, *Australian Utilities Act 2000 No. 65*, 2002, last amended by A2010-54 of 16 December 2010, sections 83, 84, 85 & 86; Guatemala, *New Health Code, Decreto 90-97* (unofficial translation), article 89.

<sup>116</sup> Law No. 18.840 of 2011, articles 6 and 7.

<sup>117</sup> Special Rapporteur on the human rights to water and sanitation, Mission to Uruguay, 2012 (A/HRC/21/42/Add.2), paragraph 18.

<sup>118</sup> Niger, *Water Law, Law No. 93-014* of 2 March 1993 (unofficial translation), article 9.



sanitation) is prioritised during emergencies and the hierarchy of other water uses is to be determined according to the local context and the principles of equity, subsidiarity, and where possible, participation.<sup>119</sup>

### ***Litigation***

Courts monitor and enforce compliance with the HRS principles (see 5.4) expressly contained in laws and policies, and in the absence of express recognition of the HRS they progressively interpret existing human rights provisions to imply the HRS at multiple levels of governance, which underscores the indivisibility and interdependence of human rights (Obani, 2015). For this purpose, the three standards generally applied by courts for the determination of the violation of economic, social, and cultural rights are also relevant for the HRS: reasonableness, minimum core, and proportionality.

Reasonableness is a measure for progressive realisation and prevents discrimination against segments of the society (WaterLex, 2014). In the case of *Lindiwe Mazibuko and Others v. City of Johannesburg and Others*,<sup>120</sup> the Constitutional Court stated that the socio-economic rights contained in the Constitution only entail an obligation to take reasonable legislative and other measures to ensure the progressive realization; it was inappropriate for a court to quantify what amounts to sufficient water; and the introduction of pre-paid meters in the poorer sections of the municipality was legal and non-discriminatory against the affected residents. This tersely illustrates the need to clearly define the HRS in national laws (see 5.2.3) and the limits of judicial activism in interpreting ambiguous provisions.

Defining the minimum core of HR ensures predictability of court decisions by specifying how a right is to be successfully implemented,<sup>121</sup> but this could be seen as undermining democratic values by being too prescriptive (Bernal, 2015). However, as HRS provisions do not generally state the minimum core in quantifiable terms, this is subject to contestation.<sup>122</sup> Establishing the minimum core of the HRS is especially difficult because of the contextual nature of access to sanitation and the slow development of its normative content, compared to water which has a minimum of 50 litres per person per day water (for drinking and domestic

<sup>119</sup> Burkina Faso, *Decree No. 2005-191/PRES/PM/MAHRH* 4 April 2005 regarding priority uses and authority of government to control and allocate water in case of water shortage (unofficial translation), articles 2 and 3.

<sup>120</sup> Case No. CCT 39/09, Judgement of 8 October 2009 (Constitutional Court of South Africa).

<sup>121</sup> See *Hernan Galeano Diaz c/ Empresas Publicas de Medellin ESP, y Marco Gomez Otero y Otros c/Hidropacifico SA ESP y Otros* [2010] Corte Constitucional T-616/10 <<http://www.corteconstitucional.gov.co/relatoria/2010/T-616-10.htm>>.

<sup>122</sup> Mazibuko (n. 120).

sanitation and hygiene uses) based on the World Health Organization standards (Howard & Bartram, 2003).

Proportionality is based on three sub-principles, namely, suitability, necessity, and balancing (Bernal, 2015). Suitability requires that any limitation of HR implementation contributes to a legitimate objective; necessity requires that such a limitation is the least restrictive means of achieving the desired objective; balancing requires that the limitation achieves the desired objective to an extent justifying the extent of limitation of the right in question.<sup>123</sup> Proportionality could be seen as interfering with legislative and executive functions but from a social and relational perspective, it is useful for prioritising HR over competing interests (Bernal, 2015).

#### ***Monitoring and accountability mechanisms***

Monitoring and accountability mechanisms enhance the participation of users in sanitation governance and transparency (see 4.2.1 and 5.4.1). Some of the relevant monitoring and accountability mechanisms include supervising and reviewing the operations of service providers against the minimum service standards;<sup>124</sup> taking corrective action against providers who contravene the service standards;<sup>125</sup> establishing procedures for handling consumer complaints against the service providers;<sup>126</sup> and ensuring public access to information on consumer rights and the quality of services rendered by the providers (de Albuquerque 2014; WaterLex 2014).<sup>127</sup>

### **5.4.2 Economic**

This section discusses three economic instruments.

#### ***Participatory budgeting for sanitation services***

Participatory budgeting enables citizens to determine the priorities for public expenditure and budgetary allocations through negotiations with the government (Gonçalves, 2014). Public expenditure is essential for the provision of merit goods like sanitation (see 3.3.2) and participatory budgeting at the local level of governance has been linked to increased spending

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<sup>123</sup> Venezuela - *Condominio del Conjunto Residencial Parque Choroní II c/ Compañía Anónima Hidrológica del Centro (Hidrocentro)* Corte Primera de lo Contencioso Administrativo (2005); Slovenia - *Ruling no Up-156/98 Ustavno Sodišče, Ruling No Up-156/98* [1999] *Constitutional Court Official Gazette RS*, no 17/99; OdlUS VIII, 118, case summary reported in Waterlex, 2014.

<sup>124</sup> South Africa, *Water Services Act, Act 108 of 1997*, amended 2004, sections 62 and 63.

<sup>125</sup> Namibia, *Water Resources Management Act, Act No. 24 of 2004*, 26.

<sup>126</sup> Kenya, *The Water Act 2002, No 8 of 2002*, article 47(c); Ghana, *Public Utilities (Complaints Procedure) Regulation 1999*.

<sup>127</sup> See Brazil, *Law on basic sanitation*, 2007, Articles 26, 27 & 53; Colombia, *Law 142 establishing the regime for public household services* of 11 July 1994 (unofficial translation), article 9.

on basic sanitation and health services in some cases (Gonçalves, 2014; Wampler, 2017). However, some cases suggest a lack of systematic association between participatory budgeting and improvements in water and sanitation coverage as a result of inherent weaknesses in the process itself and weaknesses among different actors (Jaramillo & Alcázar, 2013). Some of the weaknesses include that the poor may bear high costs of participation as a result of participatory budgeting, the process requires political commitment to be effective, and the service providers and municipalities may lack the finances and technical resources necessary for service expansion to the poor (Boulding & Wampler, 2010; Gonçalves, 2014). The literature suggests ways of addressing the weaknesses of participatory budgeting: greater participation of women, improved access to information about the budgetary process, increased resources and independence from political influences for technical teams involved in the service delivery process, specific measures to enhance technical capacities and access to finances for the process, and the education and empowerment of social organisations to enhance auditing (Jaramillo & Alcázar, 2013).

#### *Progressive pricing & cross-subsidies*

Progressive pricing consists of charging more for higher blocks of consumption than for lower blocks; it may be funded through cross-subsidies from large users which also encourages conservative use (Government of Belgium, 2007). Whereas a flat rate subscription tariff structure imposes higher usage costs for individuals, which could hamper access for the poor (Biran et al., 2011), progressive pricing of water and wastewater services ensures affordability (see 5.4.1) for small users. In the Brussels region of Belgium, the water tariff is composed of a fixed connection cost, progressive pricing for water services, and sanitation tariff (Government of Belgium, 2007). Similarly, the Walloon region of Belgium<sup>128</sup> water supply system allows a minimum block of 30 m<sup>3</sup> of water per household per year at a lower price than the other three higher blocks of consumption, with cross-subsidies funded by the larger users (Government of Belgium, 2007). In France, water services also attract a reduced value added tax rate and there is financial aid to ensure affordable access for the poor (Thielbörger, 2014).

Targeted subsidies address poverty and related drivers of poor sanitation services that are linked to collective action problems (see 3.4.1) and enhance non-subsidy approaches like Community-Led Total Sanitation (see 7.3.3) (Guiteras, Levinsohn & Mobarak, 2015).

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<sup>128</sup> Décret relatif au Livre II du Code de l'Environnement constituant le Code de l'Eau, Moniteur belge, 23 July 2004, Article 1.1 (Walloon region of Belgium) (unofficial translation).

Critiques argue that subsidies hamper local innovation and lead to retrogression once the subsidy is exhausted (Harvey, 2011; Kar, 2003; Kar & Milward, 2011; Kar & Pasteur, 2005), while proponents advocate that subsidies are likely to increase ownership of sanitation facilities both among recipients of the subsidies and their neighbours, through a social multiplier effect, and the increased sanitation coverage/ownership is also likely to improve the use of facilities (Barnard et al., 2013; Guiteras et al., 2015).

### *Development finance*

Development finance consists of official development finance (ODF), which includes official development assistance (ODA) and other official flows (OFF), and flows from non-official sources like NGOs and philanthropists (Cotton, 2013; Winpenny, Trémolet, Cardone, Kolker & Mountsford, 2016). Following the trend in official reports and the literature, this section mainly focuses on ODA.

From 1995 to 2009, annual ODA investments in basic and large-scale water and sanitation systems averaged 17% and 39%, respectively, with higher investments in water supply than sanitation (Winpenny et al., 2016). The GLAAS 2013/2014 external support agency survey also shows that an average of 60% of the ODA takes the form of loans rather than grants; only about 21% of the ODA for WASH is committed to basic systems and basic sanitation receives a meagre 27% of the disaggregated flows to WASH (UN-Water, 2014). This shows a recurrent pattern of underfunding sanitation services even at the international level, compared to water, and could be a reason for the poor state of sanitation services despite a general increase in ODA commitments to WASH as noted in the literature (Botting et al. 2010; Salami, Stampini & Kamara, 2012).

Unsurprisingly, nine out of the top ten recipients of ODA for WASH achieved their MDGs target for water, compared to only three who achieved their MDGs sanitation target; the tenth country (Kenya) was recorded as having made good progress (World Health Organization [WHO] & UNICEF, 2015). Further, although development assistance is increasingly targeting poor countries, with low sanitation and water access status, there are exceptions where some of the countries with the lowest sanitation and water access status are excluded from the list of priority countries for ODA suggesting a need to review the targeting of concessional flows (UN-Water, 2014); WaterAid, 2015).

In principle, donor countries committed to spending 0.7% of their gross national income (GNI) on ODA, and though this commitment has not been fully met by all the donors, there

has been a total increase in ODA in general. Nonetheless, 10.8% of ODA in 2016 was spent on internal refugee costs within donor countries, an increase from 9.2% in 2015 and less than 5% in 2014; thus reducing the ODA available to poor countries by about 3.9% overall compared to 2015 (Organisation for Economic Cooperation & Development [OECD], 2017). Hence, it is imperative for States to explore new funding options that do not impose an unequal burden on the poor, while committing the available ODA towards basic sanitation services and progressive improvements for the poor.

### **5.4.3 Suasive**

This section discusses two suasive instruments.

#### ***Human rights manuals and handbooks***

Human rights manuals and handbooks expound legal provisions and practical ways of realising the HRS. A key example is the Handbook for realising the human rights to water and sanitation, authored by the former Special Rapporteur, with clear, practical guidelines and concrete examples to help States implement the right (de Albuquerque, 2014). It highlights issues like financing, monitoring, and translating the normative content of the rights into law, policy, budgets, and interventions. Another example is the Manual on the Right to Water and Sanitation written in non-legal language to provide practical implementation guidelines for policymakers and practitioners working on implementing the human right to water and sanitation (COHRE et al., 2007). This highlights the key components of the rights and States' obligations, the role of non-State actors, and practical policy recommendations for implementation.

#### ***Human rights reports***

Human rights reports on sanitation services are important for tracking progressive realisation. An example is the biennial UN-Water, Global Analysis and Assessment of Sanitation and Drinking-Water (GLAAS), a multi-stakeholder process that assesses the inputs required to extend sustainable WASH systems and services in countries. GLAAS provides reliable, comprehensive, easily accessible and global analysis of the investments and enabling environment for WASH, for informed decisions in the WASH sector (Baquero, Jiménez & Foguet, 2015). In the post-MDGs framework, GLAAS monitors progress with the SDGs targets on international cooperation and capacity building support for developing countries in WASH related activities and programmes (Target 6a) and support and strengthen the

participation of local communities in improving sanitation and water management (Target 6b), while the World Health Organization and UNICEF Joint Monitoring Programme (JMP) is monitoring the drinking water and sanitation targets (United Nations [UN], 2017).

### 5.5 HUMAN RIGHT TO SANITATION INDICATORS

This section analyses the existing indicators in the literature, because monitoring progress on the HRS has been historically hampered by a paucity of indicators and poor reporting practices by States (Riedel 2006). Indicators ensure comparison of States' compliance with HRS commitments, like the eThekweni Commitments on Sanitation, and are therefore critical for promoting accountability in sanitation governance (Obani & Gupta, 2016). I categorise the indicators for monitoring the realisation of the HRS into three: structural, process and outcome indicators (see 4.5) because realising the obligations imposed by the HRS depends as much on the policies established by the State (structures), and the actions which duty bearers take to advance progressive realisation (process), as on the result for the rightsholders (outcome), and link them to the HRS principles (see Tables 5.4, 5.5 and 5.6).

#### *Structural*

The literature presents two main indicators which I classify as structural indicators because they directly monitor the law and policy framework for the HRS, namely: (a) the inclusion of the HRS in law (Baquero et al., 2015), and (b) the prioritisation of universal access for vulnerable groups (UN Water & World Health Organisation [WHO], 2014) (see Table 5.4).

Table 5.4 Structural indicators for monitoring the human right to sanitation

<b>Structural Indicators</b>	<b>Human Right to Sanitation Principles (see 5.3)</b>	<b>Key References</b>
<b>HRS included in the legal framework<sup>a</sup></b>	Rule of Law	Baquero et al., 2015
<b>HRS and access for vulnerable groups included in the legal framework<sup>a</sup></b>	Equality and Non-discrimination	UN Water & WHO, 2014

**a - Can be measured under the GLAAS framework**

Nonetheless, beyond recognition of the principle in relevant laws, equality and non-discrimination would additionally require: a) an understanding of the factors that engender inequality and discrimination and identifying the resulting vulnerable groups; (b) disaggregating data on access to sanitation services based on the vulnerable groups identified; c) measuring the rate of progress required for both the worse-off and the better-off

groups, in order to meet the universal access target; and d) calculating the disparity in the use of services between the worse-off and the better-off within each group (Satterthwaite, 2014; Winkler et al., 2014). In order to be considered on-track to realising the HRS and particularly promoting equality and non-discrimination, the progress of both the better-off and the worst-off groups would either follow or exceed the pre-determined rate of progress, in addition to a reduction in the disparity between the progress of the two groups (Satterthwaite, 2014; Winkler, Satterthwaite & de Albuquerque, 2014). Hence, in addition to structural indicators, it is also necessary to develop process indicators that monitor policy implementation, and outcome indicators that monitor the impact on rightsholders.

### *Process*

The literature offers sixteen indicators which I classify as process indicators because they directly reflect on the milestones towards achieving the HRS (see 4.5), and I link these to eight HRS principles: (a) affordability (UN, 2012; UN Water & WHO, 2014), (b) rule of law (Baquero et al., 2015), (c) participation (Baquero et al., 2015), (d) equality and non-discrimination (Baquero et al., 2015; UN, 2012), (e) transparency and access to information (Baquero et al., 2015), (f) accountability (Baquero et al., 2015; UN Water & WHO, 2014), (g) sustainability (UN, 2012), and (h) extra-territorial obligations (Baquero et al., 2015) (see Table 5.5).

However, beyond establishing processes for the realisation of the HRS, the processes also need to be quantifiable, through milestones linked to the law and policy framework, to enhance measurement across temporal and spatial scales (Meier et al. 2017), and accessible to the most vulnerable rightsholders in order to improve the HRS outcomes (de Albuquerque, 2014). Further, the human rights literature does not specify process indicators for availability, accessibility, safety, acceptability and dignity.

### *Outcome*

The literature offers nineteen indicators which I classify as outcome indicators because they directly measure the impact of HRS policies and processes on the quantity and quality of sanitation services used by rightsholders (see 4.5), and I link these to eight HRS principles (see 5.4): (a) availability (Baquero et al., 2015; Meier et al., 2017; UN, 2012), (b) accessibility (Baquero et al., 2015; UN, 2012), (c) safety (Baquero et al., 2015), (d) acceptability (Baquero et al., 2015; UN, 2012), (e) affordability (UN, 2012), (f) dignity

(Baquero et al., 2015), (h) equality and non-discrimination (Meier et al., 2017), and (i) sustainability (UN, 2012) (see Table 5.6).

Nonetheless, the outcome indicators which do not specify measurable targets for determining whether progress towards the HRS is on or off track paint a limited picture of HRS progress at best. For instance, household expenditures on sanitation need to be tied to a benchmark for assessing affordability expressed as a percentage of individual or household income or expenditure on the lifecycle cost of sanitation facilities (including operations, maintenance, and repairs) and other costs associated with accessing sanitation services or the number of maintenance hours per person per year for non-monetary contributions to HRS costs (see 5.3.1). Further, the human rights literature does not specify outcome indicators for the remaining five HRS principles (rule of law, participation, transparency and access to information, accountability and extra-territorial obligations).



Table 5.5 Process indicators for monitoring the human right to sanitation

Process Indicators	Human Right to Sanitation Principles (see 5.3)							
	Affordability	Rule of Law	Participation	Equality and Non-discrimination	Transparency/Access to Information	Accountability	Sustainability	Extra-territorial obligation
HRWS justiciability*								
International assistance by industrialised States* <sup>a</sup>								
Private sector participation*								
Monitoring mechanisms <sup>a</sup>								
Civil society inclusion in monitoring process								
Complaints mechanisms in place <sup>a</sup>								
Financial flows to the vulnerable <sup>a</sup>								
Inequities reduction <sup>b</sup>								
Budgetary strategies for the vulnerable <sup>a</sup>								
Monitoring access among the vulnerable <sup>a</sup>								
Time-frame national strategy and plan of action for WASH provision* <sup>a</sup>								
Service users and communities participation in WASH supply decision making <sup>a</sup>								
Level of sector financing and human resources development <sup>a</sup>								
Direct or indirect discrimination by public and private actors <sup>c</sup>								
Share of public expenditure on provision and maintenance of sanitation in homes <sup>d</sup>								
Proportion of targeted population that was extended sustainable access <sup>d</sup>								
* - Presented as cross cutting and general indicators; a - GLAAS Report indicators; b - Can be measured under the JMP-post 2015 framework through the SDGs; c - Illustrative indicator on the sanitation aspect of the right to non-discrimination & equality; d - Illustrative indicator on the sanitation aspect of the right to adequate housing								

Source: Compiled by the author, based on Baquero et al., 2015, UN, 2012, and UN Water & WHO, 2014

Table 5.6 Outcome indicators for monitoring the human right to sanitation

Outcome Indicators	Human Right to Sanitation Principles (see 5.3)							
	Availability	Accessibility	Safety	Acceptability	Affordability	Dignity	Equality & Non-discrimination	Sustainability
% access to improved/basic sanitation <sup>a,b</sup>								
All members at any time <sup>b</sup>								
Security at facilities and paths								
Education/Health facilities <sup>a,b</sup>								
Open defecation <sup>b</sup>								
Safe management of excreta <sup>b</sup>								
Sanitary conditions (facilities)								
Wastewater treatment <sup>a</sup>								
Hygiene awareness <sup>a</sup>								
Hand washing device & soap <sup>a,b</sup>								
Menstrual Hygiene Management (MHM) <sup>b</sup>								
Household expenditure on sanitation								
Assistance to low income groups <sup>b</sup>								
Privacy, comfort, dignity <sup>a</sup>								
% change in access to improved facility								
% change between rural and urban access								
Proportion of population using improved sanitation facility <sup>a,c,e</sup> and waste disposal <sup>c</sup>								
Proportion of household budget spent on sanitation and waste disposal <sup>d</sup>								
Proportion of targeted populations that was extended sustainable access to services <sup>d</sup>								
a - GLAAS Report indicators; b - Can be measured under the JMP-post 2015 framework through the SDGs; c - Illustrative indicator on the sanitation aspect of the right to non-discrimination & equality; d - Illustrative indicator on the sanitation aspect of the right to adequate housing; e - Illustrative indicator on the sanitation aspect of the rights to life & health								

Source: Compiled by the author, based on Baquero et al., 2015; Meier et al., 2017 and UN, 2012

## **5.6 HUMAN RIGHT TO SANITATION, DRIVERS & INCLUSIVE DEVELOPMENT**

This section analyses the relevance of the human right to sanitation principles and instruments for addressing the drivers of poor sanitation services (see 5.6.1), and the wider implications for inclusive development (see 5.6.2); based on literature review and inductive analysis of the human right to sanitation institution.

### **5.6.1 Human Right to Sanitation and the Drivers of Poor Sanitation Services**

The HRS principles address ten direct and six indirect drivers of poor sanitation services, as illustrated in Table 5.7 and elaborated below.

#### *Principles for addressing the direct drivers*

Affordability addresses household poverty and unaffordable tariffs where progressive pricing and cross-subsidies (see 5.5.2) are targeted at the poor and these and other pro-poor instruments are expanded to cover both the monetary and non-monetary sanitation costs borne by rightsholders (COHRE et al., 2008; Obani & Gupta, 2015). Equality and non-discrimination also address household poverty, where the poor are prioritised in budgetary allocations and the distribution of resources for sanitation (see 5.6.1). Further, transparency, access to information about the tariff structure, and accountability to users can improve the efficiency of the tariff collection system and affordability addresses prohibitive sanitation costs (see 5.3.1). Accessibility addresses the distance to facility driver where a maximum reasonable distance for siting sanitation facilities away from the vicinity of users is specified in the legal framework (see 5.3.1). Participation, equality and non-discrimination address the exclusion of minorities and other similarly negative social practices (see 5.3.1). Mechanisms for acceptability and participation of users in sanitation governance, including the choice, operation and maintenance of facilities, address non-acceptance and participation particularly improves knowledge about the proper use of facilities (see 5.3.1). Further, safety imposes an obligation on service providers and users to respectively ensure the physical safety of users and the hygienic maintenance of facilities (see 5.3.1). Equality and non-discrimination address tenure insecurity where the HRS law prioritises service provision to residents of informal settlements, in spite of the legal status of their dwellings (see 4.3 and 5.4.1). Sustainability addresses pollution and environmental degradation from the location and use of sanitation facilities, provided the HRS obligations are broadly interpreted (see 3.2 and 5.3.2) to include an environmental sustainability imperative (Feris, 2015). I further elaborate

on addressing the remaining seven direct drivers which are not covered by the HRS principles (including discounting the future, preference distortion, risk aversion, space constraints, challenging or inaccessible topography, natural hazards and high temperatures/turbidity in source water) in Chapter 9.

Table 5.7 Human right to sanitation principles for addressing the drivers of poor domestic sanitation services\*

<b>Category of Drivers (see 3.4)</b>	<b>Details of Drivers (see 3.4)</b>	<b>Human Rights Principles for Addressing the Drivers (see 5.4)</b>
<b>Direct Drivers</b>		
<b>Economic</b>	Household poverty	Affordability Equality and Non-discrimination
	Inefficient tariff collection system	Transparency and Access to Information Accountability
	Unaffordable tariffs & connection fees	Affordability
<b>Social</b>	Distance to the facility	Accessibility
	Exclusion of minorities	Participation Equality and Non-discrimination
	Negative cultural practices	Participation Transparency and Access to Information
	Non-acceptance of sanitation facility	Acceptability Participation
	Poor maintenance culture/ improper use of facilities	Participation Safety
	Tenure insecurity	Equality and Non-discrimination
<b>Environmental</b>	Pollution/water scarcity	Sustainability
<b>Indirect Drivers</b>		
<b>Economic</b>	Huge foreign debts	Extra-territorial Obligations
	Insufficient/poorly targeted funds	Affordability Equality and Non-discrimination Transparency and Access to Information Accountability
	National poverty	Extra-territorial Obligations
	Sanctions	Extra-territorial Obligations
<b>Social</b>	Low awareness about sanitation	Participation Transparency and Access to Information
	Population density	Availability

\*Table 5.7 contains only direct and indirect drivers that are addressed by the HRS principles.

Source: Compiled by the author, based on COHRE et al., 2008; de Albuquerque, 2014; Feris, 2015; Obani & Gupta, 2016; Winkler, 2016

### *Principles for addressing the indirect drivers*

Extra-territorial obligations require States to desist from negatively interfering with the realisation of the HRS outside their jurisdictions, for instance through foreign debts or sanctions, and generally encourage international assistance to enable poor States meet their human rights obligations and development goals (see 5.3.2). Affordability, and equality and non-discrimination can improve public expenditure on service provision to the poor, marginalised and vulnerable while transparency and access to information and accountability offer mechanisms for tracking the equitable distribution of public funds (see 5.3.1 and 5.4.2). Nonetheless, the HRS cannot directly tackle insufficient funds. Finally, participation and access to information improve the level of awareness about good sanitation practices (see 5.3.1). Availability addresses poor access to sanitation services due to population density where the HRS law specifies a minimum ratio of users to facilities as part of the service levels, while taking cognisance of the local conditions (see 3.5.5 and 5.3.1). I further elaborate on addressing the remaining three indirect drivers which are not covered by the HRS principles (including insecurity, conflicts and poor social cohesion, mass migration/urbanisation and climate variability and change) in Chapter 9.

## **5.6.2 Human Right to Sanitation and Inclusive Development**

Recognising the HRS, and adopting HRS principles and instruments in sanitation governance does not guarantee ID, rather the way the HRS is operationalized will determine whether ID is achieved or not. As the HRS principles can be implemented differently in different contexts, which results in different outcomes for ID, it is further necessary to specifically analyse the impact of the HRS instruments discussed in Section 5.4, as they affect social and relational, and ecological inclusion. For example, if you have the principle of affordable access to basic sanitation services (see 5.3.1), this can be implemented through a variety of technologies and instruments. Figure 5.1 illustrates how instruments that are designed to operationalize the affordability principle can lead to different outcomes for ID. Further, although the same indicator of affordability is applied in the four quadrants, the outcome may also be different; the exclusion of the poor in Q1 may make sanitation services relatively less expensive for the rich living in formal settlements because there is no additional cost for wastewater treatment or cross-subsidies for poor users. However, the negative externalities in Q1 are also higher due to the exclusion of the poor from accessing sanitation, which is a public good (see 3.3). In Q4, the inclusion of wastewater treatment and poor users may

increase the cost of sanitation services for the rich but this also reduces the negative externalities which would have resulted from excluding poor users.

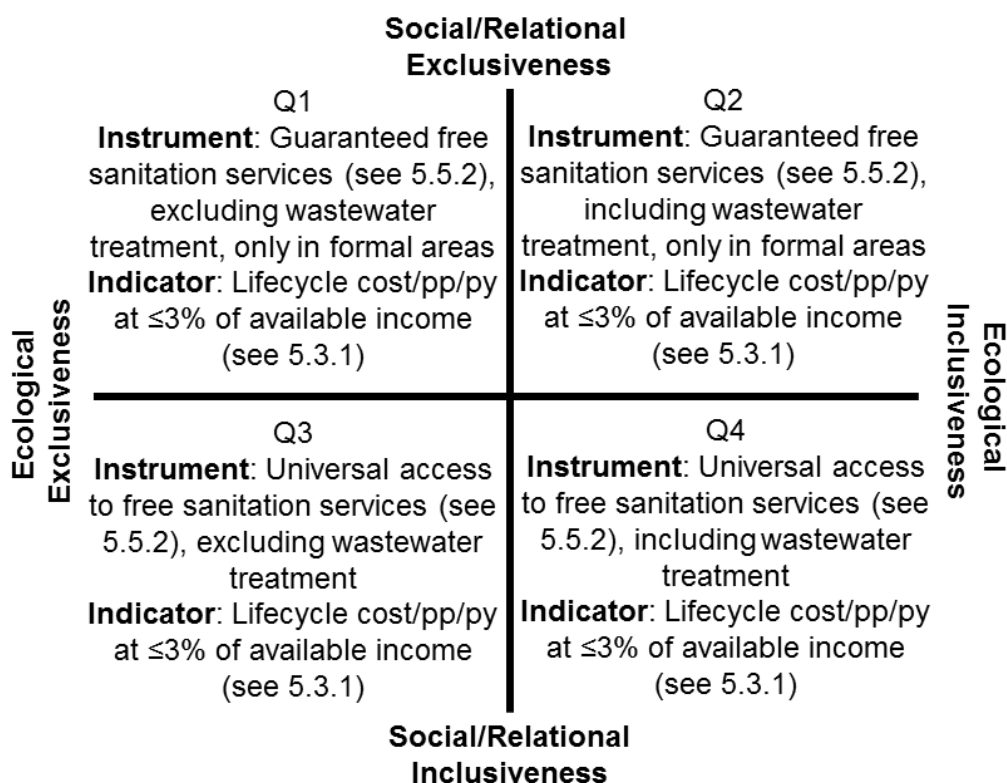


Figure 5.1 Assessing the affordability principle for inclusive development

#### ***Social and relational inclusion***

Regulatory instruments (see 5.4.1) like guaranteed free access to basic sanitation services (that are designed with input from all the stakeholders), compulsory connections and prohibiting arbitrary disconnections (for instance, due to the inability to pay tariffs for basic services), promote social and relational inclusion by ensuring affordability, preserving access rights and eliminating discrimination against the poor, vulnerable and marginalised users. The instruments could fall within either of the bottom half quadrants (Q3 or Q4 of Figure 5.1), depending on their level of integration of environmental sustainability. Direct provision of services to the vulnerable may also fall within either Q3 or Q4 of Figure 5.1), depending on the level of integration of environmental sustainability. However, the exclusion of informal settlements from the process of implementing free access or the safeguards against arbitrary disconnections results in social and relational exclusion in Q1 or Q2 of Figure 5.1. Litigation provides an opportunity for preventing HRS violations or seeking redress, but may fall within either Q4 or Q3 in Figure 5.1 if the processes are accessible for the most

vulnerable and/or do not integrate environmental sustainability, or the top quadrants (Q1 or Q2 in Figure 5.1) where the processes are inaccessible and/or do not integrate environmental sustainability. Monitoring and accountability mechanisms may similarly promote social and relational inclusion where they are freely accessible and facilitate participation by the vulnerable. Participatory budgeting (see 5.4.2) improves access to information and accountability in public expenditure and thereby advances social and relational inclusion (Q3 or Q4 of Figure 5.1), provided the process does not impose high costs of participation on the poor otherwise it leads to social and relational exclusion (Q1 or Q2 in Figure 5.1). Participation can engender a sense of ownership and responsibility for sanitation infrastructure, which is useful for addressing lack of social cohesion (McGranahan, 2013). Progressive pricing and cross-subsidies (see 5.4.2) also promote social and relational inclusion where the instruments are primarily designed to ensure access to basic sanitation services for the poor<sup>129</sup> or to allow in-kind contributions for services in densely populated areas where users would otherwise be unable to afford the monetary cost of accessing sanitation services inclusion (Q3 or Q4 of Figure 5.1).<sup>130</sup>

### ***Ecological inclusion***

Ecological inclusion requires a broad definition of basic sanitation services to include services like wastewater treatment that minimise the environmental impacts of sanitation services (see 3.2, 3.5.5, 5.2.3 and Q2 and Q4 in Figure 5.1). Ecological inclusion also requires instruments that encourage conservation such as progressive pricing of water and sanitation services beyond the basic consumption level (see 5.4.2).

## **5.6.3 Human Right to Sanitation and Legal Pluralism**

The realisation of the HRS partly depends on the relationship between the HRS norm and other norms and principles for the governance of natural resources like water and land, required for the progressive realisation of the right. This section specifically analyses the interactions between the HRS and other human rights. The resulting pluralism can either manifest as rules coherence, where the HRS and the other rights and rules are mutually supportive, or incoherence and even competition, where there is tension between the rights

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<sup>129</sup> Chile, *Law 18778 Establishing Services for the Payment of Drinking Water Consumption and Sanitation Services 1989/1994*, article 10; Nicaragua, *General Law on Drinking Water and Sanitation Services*, article 40.

<sup>130</sup> Rwanda, *Policy and Strategy for Water Supply and Sanitation Services 2010*, section 4.6.3.

and rules. Table 5.8 illustrates indifference, accommodation, competition and mutual support between the HRS and other rights and water governance rules.

Table 5.8 Typology of relationships between the human right to sanitation and other human rights

<b>Type of Relationship</b>	<b>Description of the Relationship</b>
<b>Competition</b>	Where the ICESCR requires States to apply maximum available resources for HR implementation but it does not clarify how much of the resources can be allocated to the HRS as a basic necessity
<b>Indifference</b>	Where the HRS is recognised in international law instruments, like the CEDAW and CRC, and captured without being implemented in the national legal system
<b>Accommodation</b>	Where the right to participation, included in the ICESCR, is used to try to encourage the rightsholders to participate in the policy process and contribute their unique perspectives on the prospects and challenges for realising their HRS
<b>Mutual Support</b>	Where the decisions of international courts expand on the meaning and principles of the HRS, in consonance with the ICESCR and other international law instruments recognising the right

Source: Compiled by the author, based on Bavinck & Gupta, 2014; Misiedjan & Gupta, 2014; Obani & Gupta, 2014b; 2016; WaterLex, 2014

### ***Competition***

The ICESCR which forms the main legal bases for the HRS, and the HRW, under HR treaty law does not expressly mention sanitation or water (see 5.2.1 and 5.2.2). However, the HRS, including the HRW, emerged in close connection with other rights that are expressly guaranteed in the ICESCR, like the rights to health, adequate housing, food and education, as illustrated in Table 5.2 (Obani & Gupta, 2015; 2016). The ICESCR requires States to use the maximum available resources to progressively realise the rights which it guarantees but does not clarify how the available resources are to be allocated to the various express and implied rights. This can create tensions between the HRS and other economic, social and cultural rights. The HRS as an individual right, may also be in competition with collective rights such as the indigenous' people's rights (Misiedjan & Gupta, 2014).



### *Indifference*

As mentioned under the discussion on the emergence of the HRS (see 5.2), the HRWS emerged from local advocacy to being recognised within the UN HR system, and as a distinct legal right in various international law instruments and political declarations (see 5.2). However, the realisation of the HRS requires action from both States and non-State actors, all the way from the international to the lowest levels of governance (Kamga, 2013; de Albuquerque, 2014; Obani & Gupta, 2016; Winkler, 2016). Indifference results where the HRS norm that exists in international law is captured but not implemented at the national and sub-national levels and therefore fails to improve access to sanitation for the rightsholders.

### *Accommodation*

The human rights framework offers procedural mechanisms for promoting HR, and obtaining redress for violations. These include the right to participation, guaranteed under the ICESCR (see 4.3 and 5.3.1). Accommodation results where mechanisms are established on the basis of procedural rights, like participation, in an attempt to encourage the rightsholders to engage with the policy process and express their unique perspectives on the HRS and the challenges which they face in accessing the right. Another instance is where efforts are made to enforce the HRS, using existing human rights mechanisms like the HR committees and Special Procedures (Obani & Gupta, 2016).

### *Mutual support*

Mutual support exists where the decisions of national courts expand on the meaning and principles of the HRS, in consonance with the ICESCR and other international law instruments (see 5.2.2 and 5.2.3). For instance, the European Court of Human Rights has severally decided that lack of adequate sanitation in detention centres amounts to degrading and inhuman treatment of the detainees that are held in such centres, guaranteed under regional and international HR laws (see Table 5.3). Such decisions advance the normative content of the HRS and improve enforcement at various levels (Obani & Gupta, 2016; WaterLex, 2014).

## **5.7 INFERENCES**

The chapter yields six main inferences. First, the HRS has evolved through implied recognition on the basis of the ICESCR provisions and has recently emerged as a distinct right in international law, but has not yet attained the status of CIL. In the absence of express

recognition of the HRS at the national and sub-national levels, HRS advocates can nonetheless rely on the fundamental importance of HRS for the realisation of other guaranteed rights, some of which have attained the status of custom, like the right to life and freedom from inhuman and degrading treatment (see 4.2.1 and 5.2).

Second, the HRS can either be defined narrowly with limited consideration of environmental impacts or broadly to ensure human wellbeing and environmental sustainability (see 3.2, 5.3.1). At the international level, the definition advanced by the former Special Rapporteur extends beyond the provision of facilities for the collection, transport, treatment and disposal or reuse of human excreta and wastewater and associated hygiene in households to other spheres of existence where people spend a considerable amount of their time. However, the definition does not sufficiently capture environmental sustainability concerns, and some countries like the United Kingdom further restrict the scope of the HRS in their national legal framework (see 5.2.3).

Third, the definition of the HRS and the scope of HRS principles indicate that in addition to States as the primary duty bearers for the HRS, non-State actors also bear some of the responsibility for realising the right. For instance, the affordability principle imposes a corresponding duty on individuals who are able to contribute to the sanitation systems either in cash or in kind and a duty on non-State actors like private service providers to ensure equitable pricing of their services and not to disconnect users from accessing basic services due to inability to pay.

Fourth, the HRS principles, similar to the HR principles (see 4.3), mostly address the social pillar of sustainable development. The principles address ten direct and sixteen indirect drivers of poor sanitation services. This suggests a need to integrate complementary non-HRS principles in the sanitation governance framework in order to address the remaining seven direct and three indirect drivers, which may further contribute to plurality (characterised by rules incoherence, contradictions or support between the HRS and prevailing sanitation governance principles (Obani & Gupta, 2014b). The resulting rules incoherence may lead to the violation of the HRS, while coherence (mutual support) between the HRS and other dominant principles in the sanitation governance framework is the most desirable outcome capable of advancing ID.

Fifth, there is a paucity of quantitative indicators specifically developed for the HRS which further compounds the issue of evaluating the performance of HRS instruments. Nonetheless

in this chapter, I derive two structural indicators, sixteen process indicators, and nineteen outcome indicators (n=37 indicators) from the literature which offer a good starting point for developing HRS indicators in national legal frameworks (see 5.5). However, the indicators are unevenly spread across the thirteen principles of the HRS and this could mean that some principles get overlooked in the monitoring process. Further, there are few structural indicators but considerably more process indicators and the majority are outcome indicators. This could mean that the law and policy framework for the HRS becomes underreported, and the milestones for measuring progressive realisation of the HRS are insufficiently linked with the final outcomes for rightsholders.

Sixth, an inclusive development assessment (see 2.4.3) shows that the true impact of the HRS principles are more closely linked in practice and dependent on the local context. For instance, although safety is focused on social and relational inclusion when equated with safe use of sanitation services it could also address ecological inclusion if it is broadly applied to the safe management of wastewater and conservation of sanitation resources (like water for wet sanitation systems) to ensure environmental sustainability. In addition, the effect of HRS instruments on ID largely depends on how the implementation at scale (see 5.6). Taking the example of affordability, determining an affordable tariff for sanitation services requires empirical support based on local circumstance because what constitutes an affordable tariff for sanitation in one context may prove unaffordable under different circumstances.