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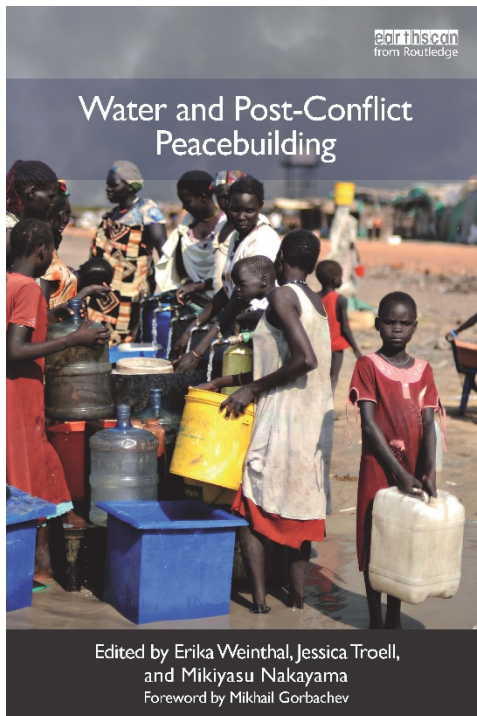
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### The right to water and sanitation in post-conflict legal mechanisms: An emerging regime?

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# The right to water and sanitation in post-conflict legal mechanisms: An emerging regime?

*Mara Tignino*

On July 26, 2010, the United Nations General Assembly (UNGA) formally recognized a human right to water and sanitation by adopting Resolution 64/292, which states that water and sanitation are “essential for the full enjoyment of life and all human rights” (UNGA 2010, 2). The resolution relied on the definition of a right to water and sanitation in General Comment 15, adopted by the UN Committee on Economic, Social and Cultural Rights (CESCR) in 2002: “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. . . . These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene” (ECOSOC 2002, paras. 2, 12(a)). The right has since been affirmed by the UN Human Rights Council in Resolution A/HRC/15/L.14, which declared that “the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity” (UNHRC 2010, 2). Thus the human right to water is contained within existing human rights treaties and is legally binding on the states that are party to those treaties.

The right to water and sanitation cannot be realized in isolation from other socioeconomic rights, such as the right to food and the right to health. After an armed conflict, lack of access to water and sanitation services undermines a state’s ability to achieve sustainable development.<sup>1</sup> Principles and norms drawn

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<sup>1</sup> The linkages between water and sustainable development are noted in Agenda 21, adopted at the UN Conference on Environment and Development (also known as the Earth Summit) held in 1992 in Rio de Janeiro, Brazil. Agenda 21 notes that “the extent to which water resources development contributes to economic productivity and social well-being is not usually appreciated, although all social and economic activities rely heavily on the supply and quality of freshwater” (UN 1992, sec. 18.6). Since the 1990s, the linkages between development and human rights have been affirmed by additional international meetings, including the 1993 World Conference on Human Rights, held in Vienna, Austria, and the 2000 UN Millennium Development Conference (Wolfensohn 2004).

from human rights law can serve as a reference point in such situations, supplying standards for the provision of water and sanitation during socioeconomic reconstruction. Some post-conflict states, such as South Africa, have included the right to water and sanitation in domestic laws as well as in peace agreements. Moreover, some transitional justice mechanisms have addressed the impacts of armed conflict on socioeconomic rights, including access to water.<sup>2</sup>

This chapter argues that socioeconomic rights, including the right to water and sanitation, should be understood as an integral part of the peacebuilding process, and it focuses on legal mechanisms for and international practices in the protection of these rights.<sup>3</sup> It views protection of the right to water through the lens of the concept of a “regime,” understood as a “system of rules or regulations” (Black 1990, 1283).

The right to water and sanitation is established by various mechanisms, ranging from norms enshrined in constitutions and peace agreements to obligations contained in human rights law instruments ratified by post-conflict states. There is also a wide spectrum of mechanisms capable of enforcing the right to water and sanitation, including international criminal tribunals, human rights bodies, and truth commissions.

This chapter considers the implications of taking a human rights-based approach to water and sanitation management in post-conflict settings. First, it focuses on the value of taking such an approach. Second, it examines some of the features of the right to water and sanitation that are relevant in post-conflict situations. Third, it discusses the modalities through which access to water might be addressed in the reconciliation efforts of a state emerging from armed conflict. Specifically, it explores the mechanisms available for implementing and enforcing the right to water and sanitation in a post-conflict setting. Finally, it highlights some obstacles to the establishment of the right to water and sanitation in post-conflict situations.

## THE VALUE OF A RIGHTS-BASED APPROACH

Awareness is growing regarding the importance of improving access to safe water supplies as part of development and poverty reduction efforts (Lenton, Wright, and Lewis 2005). It is becoming clear that water scarcity is a problem not only

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<sup>2</sup> According to the United Nations Security Council’s report the *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, transitional justice includes “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof” (UNSC 2004, para. 8).

<sup>3</sup> See Tignino (2011) for more on this topic.

of supply but also of uneven distribution of water resources and of competition among its multiple uses as population grows. Water scarcity has a direct impact on poverty and inequality, and solutions to it are undermined by weak governance (Falkenmark et al. 2007; UNDP 2006).

Meeting human needs for water and basic sanitation is one of the most pressing challenges in many post-conflict states. Combined with the ongoing and future impacts of climate change, the direct consequences of armed conflict on water infrastructure pose great risks to long-term access to water supplies. For example, in 2003, after two decades of armed conflict, the water network in Kabul, Afghanistan, was found to be losing up to 60 percent of its supply because of leaks and illegal use. Moreover, a drought had caused a catastrophic drop in the groundwater level in the Afghan capital between 2000 and 2003 (UNEP 2003a). Water facilities were also damaged or destroyed in Iraq during the 1990–1991 Gulf War, and by Israel’s military operations in Lebanon in 2006 and in Gaza between December 2008 and January 2009 (UNEP 2003b; UNGA 2006; UNHRC 2009).

Damage to water infrastructure, sanitation services, and relevant governance structures is an obstacle to short-term recovery and long-term sustainable development when that damage is coupled with inequitable access to services. It is no surprise then that over the years the linkages between sustainable development and human rights have been recognized (Boisson de Chazournes 2007).

Sustainable development rests on three interdependent pillars: environmental protection, economic development, and social development (UNDESA 2002). Access to water and sanitation is a critical aspect of all three pillars. From an environmental point of view, access to safe water supplies requires that water be free from dangerous and toxic substances (ECOSOC 2002). Access to safe water supplies and sanitation services is also an important dimension of a state’s socioeconomic development, supporting livelihoods and economic revitalization and contributing to poverty reduction (UN 2000).

Taking a rights-based approach to defining, implementing, and ultimately enforcing access to water and sanitation can help to produce more equitable short-term and more sustainable long-term development results (de Albuquerque 2010), thus alleviating some of the critical underlying causes of conflict at a local, national, and even international level. From a governance perspective, taking a rights-based approach provides a basis for integrating the right to water and sanitation into the policies and laws of post-conflict states, as well as for the development of the judicial mechanisms necessary to assess and ensure states’ compliance (Arbour 2006).

Peace agreements often constitute the basis on which a constitution and legal framework are drafted in post-conflict states, and they can thus provide the first opportunity for enshrining a rights-based approach in a post-conflict state’s policy and legal framework (Arbour 2006). Even without expressly ensuring a right to water and sanitation, peace agreements can emphasize the centrality of access to these services in post-conflict reconstruction and development.

Realization and protection of the right to water and sanitation requires legal systems based on the rule of law, nondiscrimination, accountability for violations, and specific attention to the interests of vulnerable groups. When a post-conflict situation is approached from a human rights perspective, the governance structure of the post-conflict state will be built in accordance with the principles of human rights law. Some post-conflict states have underscored their commitment to this perspective. For instance, the Comprehensive Peace Agreement of 2005 between the government of Sudan and the Sudan People's Liberation Movement/Army affirms that the government of Sudan "shall comply fully with its obligations under the international human rights treaties to which it is or becomes a party" and "should endeavor to ratify other human rights treaties which it has signed."<sup>4</sup> Under the agreement, Sudanese law is required to be in accord with the obligations in those treaties. One of the instruments ratified by Sudan is the International Covenant on Economic, Social and Cultural Rights (Covenant on ESCR), which includes the right to water and sanitation as part of the right to an adequate standard of living and the right to the highest attainable standard of health (ECOSOC 2002).<sup>5</sup>

The establishment of a legal right to water and sanitation does not automatically resolve the difficult policy issues that invariably arise regarding the financing and regulation of those services. However, it does provide international standards to which political and economic decision makers may refer when creating water policies and making decisions regarding allocation of resources with respect to the rebuilding or creation of access to these services. In addition, the recognition of access to water and sanitation as a legal entitlement, rather than just another government service, can help post-conflict institutions establish legitimacy and credibility. The evolving international standards for implementing the right to water and sanitation support the rule of law, accountability for the delivery of water and sanitation, and participation of communities in the decision-making process. These are all critical aspects of post-conflict governance reforms.

Recognition of a right to safe drinking water and sanitation can contribute to the realization of the whole bundle of human rights. Human rights law takes the indivisibility of human rights as a fundamental precept. Civil, political, economic, social, and cultural rights are all interconnected (UN 1993). The human rights perspective that access to water and sanitation are a prerequisite for the realization of other social and economic rights, and even civil and political rights, may act as a point of leverage to bolster efforts to prioritize human water needs.

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<sup>4</sup> Art. 1.6.1, chap. II, Power Sharing. For the complete text of the Comprehensive Peace Agreement, see <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>.

<sup>5</sup> The Covenant on ESCR was adopted by the UNGA on December 16, 1966. For its full text, see [www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf](http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf).

According to articles 2.1 and 23 of the Covenant on ESCR, post-conflict states themselves have the primary responsibility, to the degree made possible by the available resources, to realize the right to water and sanitation, but other states also have a responsibility: to extend international assistance, whether bilaterally or collectively. A rights-based approach might support the view that states that finance water projects to improve sanitation and access to water are complying with a legal obligation. Although states may be reluctant to consider financial assistance under human rights treaties to be mandatory, such commitments, especially within a treaty framework, may create shared expectations among stakeholders and thus may become legal obligations (Boisson de Chazournes 2007). Technical and financial assistance can be a significant incentive to promote compliance with the right to water and sanitation.

## MAIN FEATURES OF THE RIGHT TO WATER AND SANITATION

The right to water and sanitation is recognized either expressly or implicitly by a number of universal and regional human rights law instruments, including but not limited to the 1966 Covenant on ESCR, the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the 1989 Convention on the Rights of the Child (which is overseen by the Committee on the Rights of the Child (CRC)).<sup>6</sup> These universal instruments are among the most ratified treaties. Many post-conflict states, including Afghanistan, Guatemala, Iraq, Nepal, Sudan, and Timor-Leste, are parties to them.<sup>7</sup>

The right to water encompasses an amount of water sufficient for personal and domestic uses; the right to sanitation encompasses the collection, transport, treatment and disposal or reuse of human excreta and associated hygiene (de Albuquerque 2010). Proper sanitation services are necessary to prevent contamination of drinking-water supplies and the resulting negative impacts on health. Various publications provide guidance on the amount of water that is necessary per person per day to sustain life. For example, *Domestic Water Quantity, Service Level and Health*, a paper published by the World Health Organization surveying the literature, suggests that intermediate level of access to water requires approximately 50 liters per person per day, which includes water for consumption and basic hygiene; this amount is necessary to ensure that health concerns are

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<sup>6</sup> Although CEDAW (art. 14.2(h)) and the Convention on the Rights of the Child (art. 24.2(c)) expressly provide for a right to water, under the Covenant on ESCR (arts. 11.1 and 12.2), the right to water is part of the right to an adequate standard of living and the right to the highest attainable standard of health. CEDAW was adopted by the UNGA on December 18, 1979. For the complete text of CEDAW, see [www.un.org/womenwatch/daw/cedaw/text/econvention.htm](http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm). The Convention on the Rights of the Child was adopted by the UNGA on November 20, 1989. For the complete text of that convention, see [www.ovcsupport.net/libsys/Admin/d/DocumentHandler.ashx?id=123](http://www.ovcsupport.net/libsys/Admin/d/DocumentHandler.ashx?id=123).

<sup>7</sup> Information on the status of ratification is available from the UN treaty collection at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

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“low” (Howard and Bartram 2003, 22).<sup>8</sup> Water also has to be free of substances that constitute a threat to a person’s health. Provision of basic sanitation services is one of the main ways to protect the quality of drinking water (de Albuquerque 2010).

The right to water and sanitation contains some core obligations, such as “to ensure access to the minimum essential amount of water,” “to ensure the right of access to water and water facilities and services on a non-discriminatory basis,” and “to adopt relatively low-cost targeted water programs to protect vulnerable and marginalized groups” (ECOSOC 2002, para. 37). Some obligations are immediate, and others are progressive. For example, states have an immediate obligation to avoid engaging in any activity that denies or limits access to safe drinking water and sanitation. Obligations of a progressive nature include the requirement that states “take steps”—for instance, by adopting legislative and administrative policies and programs related to water and sanitation (UNOHCHR 2007).

Post-conflict states should move toward the goal of realizing the right to water and sanitation within the limits of available resources and within the framework of international cooperation and assistance.<sup>9</sup> A state must not attribute failure to meet its minimum core obligations to a lack of resources unless it can demonstrate that “every effort has . . . been made to use all available resources at its disposal in order to satisfy, as a matter of priority, those [minimum] obligations . . .” (ECOSOC 2002, para. 41).

The link between water and sanitation and the privatization of water services is a matter of concern when post-conflict states conclude concession contracts with private companies for the reconstruction of water infrastructure. Such privatization can increase water tariffs and raises the risk that water will be unaffordable for the poor (Salman and McInerney-Lankford 2004). The CESCR has pointed

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<sup>8</sup> Guy Howard and Jamie Bartram do note that minimum requirements for water following disasters and other emergencies may be lower; for example, the Sphere Project suggests “15 litres of water used per capita per day as being a key indicator in meeting minimum standards for disaster relief” (Howard and Bartram 2003, 1). The 2011 Sphere Handbook provides that a minimum of 7.5 to 15 liters per person per day is necessary for survival needs (drinking and food preparation), basic hygiene practices, and basic cooking needs (Sphere Project 2011). However, there are “medium” concerns over health with less than 20 liters per person per day, as not all needs are met and quality is uncertain (Howard and Bartram 2003, 22). Accordingly, 50 liters per person per day provides a more appropriate standard for a post-conflict state aiming at setting more stable and long-term frameworks.

<sup>9</sup> In this regard, the CESCR “require[s] that States parties recognize the essential role of international cooperation and assistance and take joint and separate action to achieve the full realization of the right to water” (ECOSOC 2002, para. 30). In addition, the CESCR points out that “[d]epending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required” (ECOSOC 2002, para. 34).

out some measures that governments must take if water services are privatized (McCaffrey 2005). States must ensure that third parties controlling or operating water services do not compromise equitable access to sufficient and safe water and sanitation services. This requires the adoption of an adequate legal framework that includes “independent monitoring, genuine public participation and imposition of penalties for non-compliance” (ECOSOC 2002, para. 24). Furthermore, when investments are made in water and sanitation, whether private or public, they should benefit as much of the population as possible; in particular, states should take steps to ensure access to water for vulnerable groups such as those living in rural areas, indigenous communities, internally displaced persons, and refugees (ECOSOC 2002).

A post-conflict state should pay special attention to ensuring that the population has access to water on an equitable basis. Post-conflict states often have to deal with practices that lead to inequitable and discriminatory access to water. Those practices may be among the ways a population was targeted during the armed conflict, and they may be a contributing cause of internal displacement of populations and the movement of refugees. The principle of nondiscrimination is recognized in all human rights instruments, and states must not deviate from this rule.<sup>10</sup>

In the past decade the conceptual links between water and human rights law have been strengthened, with numerous judgments being adopted by international and national courts since 2002. In two judgments—from June 17, 2005, and March 29, 2006, respectively—the Inter-American Court of Human Rights determined that the indigenous Paraguayan communities of Yakyé Axa and Sawhoyomaxa had lacked access to sufficient drinking water (an element of the right to life) and referred for that purpose to General Comment 15, which establishes the right to water in the Covenant on ESCR.<sup>11</sup> Additionally, in the *Sawhoyomaxa* case, the court decided that the government of Paraguay must make reparations by creating a community development fund to provide sanitation infrastructure and a supply of drinking water to the members of that community.

## **MECHANISMS FOR REALIZING THE RIGHT TO WATER AND SANITATION IN POST-CONFLICT SETTINGS**

Multiple mechanisms and institutions are available to aid in the realization of the right to water and sanitation in post-conflict settings. These include constitutions,

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<sup>10</sup> Judicial Conditions and Rights of Undocumented Migrants, Inter-American Court of Human Rights, Ser. A, No. 18, Advisory Opinion, September 17, 2003.

<sup>11</sup> Although in both cases the court affirmed positive duties concerning the right to life, it was only in *Sawhoyomaxa Indigenous Community v. Paraguay* that the court found enough evidence to hold the state liable for violation of the right to life. *Yakyé Axa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights, Ser. C, No. 125, Judgment, June 17, 2005; *Sawhoyomaxa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights, Ser. C, No. 146, Judgment, March 29, 2006.



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legislation, and peace agreements; UN treaty bodies; international criminal tribunals; regional human rights institutions; and truth commissions.

### Constitutions, legislation, and peace agreements

Inclusion of the right to water and sanitation in constitutions provides a way to anchor this right in the domestic legal system; therefore, constitutions are a fundamental mechanism for redressing social and economic inequalities related to access (Gowlland-Gualtieri 2007). The Constitution of the Republic of South Africa was one of the first national constitutions to guarantee a right to water (in section 27(1)(b)) and to adopt a legal framework for ensuring access to water services by communities that had historically faced discrimination (section 9 addresses the equality of rights and nondiscrimination).<sup>12</sup> South Africa's National Water Act, concluded in 1998, embraces human rights principles such as nondiscrimination, recognizing in the preamble that "the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users."<sup>13</sup>

The right to water was addressed in *City of Johannesburg v. Mazibuko* on March 25, 2009, in which the Constitutional Court of South Africa made reference to General Comment 15.<sup>14</sup> Relying on General Comment 15, the court determined (in paragraph 17) that "a right of access to sufficient water cannot be anything less than a right of access to that quantity of water that is required for dignified human existence." The case demonstrates how the UN definition of a right to water can serve as guidance to courts as they interpret provisions on the right to water that are enshrined in domestic legislation.

There are few examples of peace agreements that include socioeconomic rights. The Darfur Peace Agreement, concluded between the government of the Sudan, the Sudan Liberation Movement/Army, and the Justice and Equality Movement in 2006, is an example. The agreement recognizes that "competition for pasture and water by nomadic herders and settled agricultural producers is an important problem" and points to the need to develop "a framework for an

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<sup>12</sup> For the complete text of the Constitution of the Republic of South Africa, approved on December 4, 1996, see [www.info.gov.za/documents/constitution/](http://www.info.gov.za/documents/constitution/). Other post-conflict states whose constitutions have incorporated the right to safe drinking water include Colombia and Democratic Republic of the Congo, in articles 366 and 48, respectively. For the Political Constitution of the Republic of Colombia of 1991 with Reforms through 2005, adopted on July 27, 2005, see <http://pdba.georgetown.edu/Constitutions/Colombia/col91.html>. For the Constitution of the Democratic Republic of the Congo, adopted on February 18, 2006, see [www.wipo.int/wipolex/en/details.jsp?id=7449](http://www.wipo.int/wipolex/en/details.jsp?id=7449).

<sup>13</sup> For the complete text of the National Water Act of South Africa, see [www.info.gov.za/view/DownloadFileAction?id=70693](http://www.info.gov.za/view/DownloadFileAction?id=70693).

<sup>14</sup> *City of Johannesburg v. Mazibuko*, Constitutional Court of South Africa, Case No. 489/08, para. 17, March 25, 2009.

equitable access by different users” of water resources.<sup>15</sup> The agreement also extends special protection for access to potable water to internally displaced persons and refugees who are returning to their homes, restarting their livelihoods, and commencing reintegration.<sup>16</sup>

The Agreement on Social and Economic Aspects and Agrarian Situation, concluded in 1996, between the Presidential Peace Commission of the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca, spells out several targets for the achievement of socioeconomic rights, especially in relation to indigenous communities.<sup>17</sup> The Guatemalan agreement recognizes that socioeconomic rights and social justice are necessary to peace and security: “A firm and lasting peace must be consolidated on the basis of social and economic development directed towards the common good, meeting the needs of the whole population.”<sup>18</sup> Ensuring access to water for indigenous communities is listed as an explicit part of this objective.<sup>19</sup>

The inclusion of socioeconomic rights in constitutions and peace agreements goes hand in hand with the development of the legislative and judicial mechanisms necessary for their implementation. Realization of the right to water and sanitation often depends on well-functioning national institutions and well-designed legislation. UN treaty bodies such as the CESCR and the CRC can assist in the development of legislation and institutional frameworks at the domestic level in post-conflict states (Chinkin 2006).

### **United Nations treaty bodies**

States party to UN human rights treaties are required to regularly submit reports on the measures they have adopted and the progress they have made toward realizing the relevant rights, including the right to water and sanitation. The reporting obligations are the minimum duties under several of these human rights treaties. The UN treaty bodies also make general recommendations on ways to improve national frameworks for the protection of such rights. Although human rights treaty bodies do not often have any enforcement mechanisms at their disposal and thus have limited capacity to bring about change, those bodies can be a forum for dialogue between a post-conflict state and an international body of experts—particularly when the state has limited resources for realizing a broad range of socioeconomic rights. The reporting procedure itself is an opportunity to reaffirm a government’s commitment to respect the human rights of its citizens and to reassert that commitment in the domestic political forum (Alston 1997).

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<sup>15</sup> Art. 21, para. 149, chap. II, Wealth Sharing.

<sup>16</sup> Art. 21, paras. 179 and 187, chap. II, Wealth Sharing.

<sup>17</sup> For the complete text of the Agreement on Social and Economic Aspects and Agrarian Situation, see [www.incore.ulst.ac.uk/services/cds/agreements/pdf/guat6.pdf](http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/guat6.pdf).

<sup>18</sup> Preamble.

<sup>19</sup> Art. 34 (f).

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Through increasing cooperation between treaty bodies and national governments, the reporting process may also contribute to the identification of needs and priorities for the provision of humanitarian and technical assistance (ECOSOC 1990).

The effectiveness of the reporting procedure depends on the information submitted by the state party. When a state provides insufficient information on the realization of its obligations, human rights treaty bodies may request additional information (Sepúlveda 2003). This was the case with Israel when it submitted its first periodic report to the CESCR in 1998. The report did not contain information on the West Bank and Gaza. The committee asked Israel “to provide additional information on the realization of economic, social and cultural rights in the occupied territories, in order to complete the State party’s initial report and thereby ensure full compliance with its reporting obligations” (UNCESCR 1998, para. 32).

A lack of technical and human resources may affect a post-conflict state’s ability to submit national reports on a timely basis (O’Flaherty 2003). This was the case with Sudan, which did not submit its second and third periodic reports to the CESCR (Samar 2009). Moreover, damage to water infrastructure and sewage systems during an armed conflict, as well as restrictions on access to water during a regime of occupation, can hamper the capacity of a state to ensure access to water and sanitation.

In addition, human rights treaty bodies may underline existing gaps in national legislative and judicial mechanisms for ensuring equitable access to sufficient water and sanitation. They may also indicate areas where technical assistance and development cooperation is needed (ECOSOC 1990). In its concluding observations for Uganda, the CRC noted its concerns regarding the “increasingly large numbers of children who do not enjoy the right to an adequate standard of living, including access to food, clean drinking water, adequate housing and latrines” (UNCESCR 2005, para. 57). The CRC recommended that Uganda “reinforce its efforts to provide support and material assistance, with a particular focus on the most marginalized and disadvantaged families, and to guarantee the right of children to an adequate standard of living” (UNCESCR 2005, para. 58).

In a similar way, the 2006 CRC country report on Peru indicated that lack of access to water posed a barrier to the attainment of an adequate standard of living. Concern focused particularly on the disparity in access to water between rural and urban areas, as only 34 percent of rural families had access to water, compared to 74 percent of those living in urban areas. The CRC also expressed concern about “environmental health problems arising from a lack of access to safe drinking water, inadequate sanitation and contamination by extractive industries . . .,” and it recommended an increased state effort “to provide sanitation and safe drinking water to all the population . . .” (UNCESCR 2006, paras. 50, 51).

Reporting procedures can play a specific function in the realization of socioeconomic rights included in peace agreements. For example, the CESCR

noted that Guatemala had made “insufficient progress” toward the realization of the socioeconomic rights contained in that country’s 1996 peace agreement. It affirmed that the lack of implementation had led “to persistent serious problems, such as violence at the national level, intimidation, corruption, impunity and lack of constitutional, fiscal, educational and agrarian reforms. All these have impacted adversely on the full realization of economic, social and cultural rights enshrined in the Covenant, particularly with regard to indigenous peoples” (UNCESCR 2003, para. 10). Other human rights treaty bodies, such as the UN Committee on the Elimination of Discrimination against Women, have dealt with gaps in national legislation addressing discrimination against women—gaps that existed even though a peace agreement had provided for legal reforms (UNCESCR 2008).

Beyond reporting obligations, there are several special procedures of the UN Human Rights Council that have the specific purpose of addressing post-conflict situations (O’Flaherty 2003). Experts—designated as special rapporteurs, special representatives, or independent experts—are assigned to monitor, assess, and offer recommendations on the situation in specific countries and territories, currently including Cambodia, Haiti, Myanmar, Palestine, Somalia, and Sudan. The effectiveness of the recommendations made by these reports at the national level depends on the level of cooperation of the concerned states and on the receipt of international assistance.

The Commission of Inquiry on Lebanon and the UN Fact Finding Mission on the Gaza Conflict are examples of special investigating bodies addressing human rights violations committed during armed conflicts. Such bodies may recommend that assistance be given for the operation of national human rights mechanisms or that independent and appropriate investigation mechanisms be established at the national level (UNOHCHR 2006a, 2009). These recommendations may strengthen the capacity and legitimacy of national human rights institutions, which in turn could enhance local efforts to promote and respect human rights—including the right to water and sanitation.

### **Transitional justice mechanisms**

After a conflict, transitional justice mechanisms can also play an important role in setting the stage for long-term peacebuilding (Türk 2009).<sup>20</sup> Such mechanisms, which include international criminal tribunals, human rights courts, and truth commissions, are crucial for strengthening the rule of law in post-conflict settings (UNSC 2004). Peace and reconciliation demand comprehensive societal transformation that should embrace a broad notion of justice. The former UN High Commissioner for Human Rights, Louise Arbour, indicated that transitional justice mechanisms established after an armed conflict should seek to more comprehensively address the root causes of conflicts and to promote respect for all

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<sup>20</sup> For an analysis of consideration of environmental and natural resource issues in transitional justice mechanisms, see Harwell (2014) and Vialle et al. (2014).

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human rights (Arbour 2006). These mechanisms, especially human rights courts, are an emerging place for the right to water to be recognized in post-conflict situations.

### *International criminal tribunals*

To restore peace and create stability, it is critical to guarantee credibility and legitimacy to the political and judicial institutions of post-conflict societies. International criminal tribunals help to ensure more credible reconstruction and peacebuilding in part because they offer a vital opportunity to redress wartime activities related to access to water and sanitation.

Intentional starving of civilians as a method of warfare, including willfully impeding relief supplies, is recognized as a war crime in the Statute of the International Criminal Court (ICC).<sup>21</sup> Intentional attacks against civilian objects, such as drinking-water supplies and installations, and the use of poison are also crimes within ICC jurisdiction.<sup>22</sup> In other words, international criminal law links violations of the law of war directly to the protection of the right to water and sanitation.

The judgments of international criminal courts have historically been centered on deliberate and systematic killing, torture, and rape. Such judgments rarely address crimes involving violations of socioeconomic rights. There have, however, been some exceptions. For example, in the *Kupreskic* case, the International Criminal Tribunal for the Former Yugoslavia (ICTY), on January 14, 2000, addressed the issue of whether “economic rights can be considered so fundamental that their denial is capable of constituting persecution,” which is a crime against humanity.<sup>23</sup> Relying on the jurisprudence of the post–World War II Nuremberg Tribunal, which convicted several defendants of economic discrimination, the trial chamber of the ICTY recognized that the comprehensive destruction of homes and property constitutes a crime against humanity when committed with the requisite intent.

The *Kupreskic* judgment illustrates that violation of socioeconomic rights are an underlying element relevant to the crime of persecution. The measures offenders take against a national group may range from direct attacks on persons to discriminatory withdrawal of political, social, and economic rights. Discriminatory practices also take the form of attacks against essential resources for survival, such as water supplies. This point was underlined in the conclusions reached by the UN Fact Finding Mission on the Gaza Conflict:

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<sup>21</sup> Art. 8(2)(b)(xxv).

<sup>22</sup> Art. 8(2)(b)(ii) and (xvii).

<sup>23</sup> *Prosecutor of the International Tribunal for the Former Yugoslavia v. Kupreskic*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Jan. 2000, IT-95-16-T, para. 630, Judgment, January 14, 2000. See [www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf](http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf).

[T]he series of acts that deprive Palestinians in the Gaza Strip of their means of sustenance, employment, housing and water . . . could amount to persecution, a crime against humanity. From the facts available to it, the Mission is of the view that some of the actions of the Government of Israel might justify a competent court finding that crimes against humanity have been committed (UNOHCHR 2009, para. 75).

The implication of the mission's conclusions is that attacks against water supplies aimed at depriving an identifiable group of people of the essential means of survival can constitute a crime against humanity.

The indictment brought by the ICC prosecutor against President Omar al Bashir of Sudan also illustrates these linkages. The prosecutor invited the judges to recognize that destruction, pollution, and poisoning of water resources in Darfur constituted an act underlying the crime of genocide. In the court's decision of March 4, 2009, issuing the first arrest warrant against al Bashir, a majority of the pretrial chamber judges dismissed the charge of genocide.<sup>24</sup> In a dissenting opinion, which was attached to the arrest warrant, Judge Anita Ušacka highlighted the large amount of evidence regarding the destruction of essential resources for survival. She stated that she would recognize the charge of genocide on basis of article 6 (c) of the ICC statute. Ušacka's opinion accepts the argument put forward by the prosecutor, stipulating that destruction of water sources and the resulting deprivation of the population's means of survival was an act underlying the crime of genocide.<sup>25</sup>

One of the theoretical bases for international criminal law encompasses restorative justice and reconciliation (Keller 2008). Restorative justice requires that victims have access to compensation. The ICC statute confers on victims the right to participate in ICC proceedings and to have access to compensation through a trust fund.<sup>26</sup> Condemnation from an international criminal tribunal and compensatory liability for restricting water access would act as a deterrent during

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<sup>24</sup> *Prosecutor of the International Criminal Court v. Al Bashir*, International Criminal Court, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al Bashir, March 4, 2009.

<sup>25</sup> In a decision of February 3, 2010, the appeals chamber reversed the pretrial chamber's decision regarding the crime of genocide and remanded the matter to the chamber to reevaluate it on the basis of the correct standard of proof. On July 12, 2010, the pretrial chamber issued a second warrant of arrest including the charge of genocide. *Prosecutor of the International Criminal Court v. Omar Hassan Ahmad Al Bashir*, International Criminal Court, ICC-02/05-01/09, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," February 3, 2010 (see [www.icc-cpi.int/iccdocs/doc/doc817795.pdf](http://www.icc-cpi.int/iccdocs/doc/doc817795.pdf)); *Prosecutor of the International Criminal Court v. Omar Hassan Ahmad Al Bashir*, International Criminal Court, ICC-02/05-01/09, Pre-Trial Chamber Judgment, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, July 12, 2010 (see [www.icc-cpi.int/iccdocs/doc/doc907140.pdf](http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf)).

<sup>26</sup> Arts. 68, 75, and 79.

conflict and a mechanism for redress during reconstruction, and be recognition that individuals must be ensured access to water.

### **Regional human rights tribunals**

Regional human rights courts provide the most interesting examples of judicial enforcement of socioeconomic rights. The case *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*—brought before the African Commission on Human and Peoples' Rights by two nongovernmental organizations on behalf of the Ogoni people—illustrates how the African commission has dealt with violations of socioeconomic rights.<sup>27</sup> The case concerned attacks perpetrated against the Ogoni people by both private actors and the military government of Nigeria. In finding the Nigerian government in violation of the right to a healthy environment and the right to health, the commission implicitly considered issues related to the right to water, specifically the contamination of water supplies. The commission dealt particularly with the disposal of toxic waste in the Niger Delta area, the resulting environmental degradation, and the consequent health problems among the Ogoni people.

In its conclusions, the commission requested that the government of Nigeria take several measures to ensure protection of the environment and of the health of the Ogoni people. It appealed to Nigeria to undertake “a comprehensive cleanup of lands and rivers damaged by oil operations,” to ensure “that appropriate environmental and social impact assessments are prepared for any future oil development . . .” and to provide “information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.”<sup>28</sup> Despite these appeals, the adverse environmental effects of oil development activities in the Niger Delta region, particularly in Ogoniland, have remained an issue of concern to UN treaty bodies (UNCERD 2007).

The commission also rendered an important decision in May 2009 dealing with the right to water and the role that water plays during and after an armed conflict.<sup>29</sup> Indicating that the poisoning of wells and denying access to water sources during the Darfur conflict amounted to a violation of the African Charter on Human and Peoples' Rights, the commission recommended several measures related to water resources. In one of these, regarding the rehabilitation of economic and social infrastructure in the Darfur states, it specifically referred to

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<sup>27</sup> *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96, October 13–27, 2001.

<sup>28</sup> *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96, paras. 52–54, October 13–27, 2001.

<sup>29</sup> *Centre on Housing Rights and Evictions v. The Sudan*, African Commission on Human and Peoples' Rights, Communication Nos. 279/03 and 296/05, May 2009.

water services as necessary to support the dignified and safe return of internally displaced persons and refugees. It called for the establishment of a National Reconciliation Forum to address the long-term sources of the conflict, and in doing so it identified the resolution of issues related to water rights as a particularly important way to prevent future conflict.

Cases concerning armed conflict have also been addressed through the Inter-American human rights system, which includes both a court and a commission. In the *Plan de Sánchez* case, the Inter-American Court of Human Rights called for monetary and infrastructure reparations as compensation to the victims of the 1982 massacre that destroyed the village of Plan de Sánchez in central Guatemala. The state of Guatemala subsequently implemented development programs in the water sector to maintain and improve the sewage system and potable water supplies for the Plan de Sánchez villagers affected by armed conflict.<sup>30</sup> This form of reparation was seen as necessary for effective implementation of post-conflict reconstruction and social development.

### **Truth commissions**

The right to water and sanitation in post-conflict settings can also be analyzed through the lens of the practice of truth commissions. Former UN High Commissioner Arbour has emphasized that truth commissions are particularly well suited for investigating violations of socioeconomic rights and for promoting protection of those rights, given that a truth commission's mandate often includes redress for the causes and the consequences of a conflict (Arbour 2006; UNOHCHR 2006b). This approach is exemplified in the final report of the Timor-Leste Commission for Reception, Truth and Reconciliation, which dedicates an entire chapter to the effects of the Indonesian occupation on the socioeconomic rights of the people of Timor-Leste.<sup>31</sup>

In the reparation program recommended to the government of Sierra Leone, the Sierra Leone Truth and Reconciliation Commission dealt with several socioeconomic rights, including health and education. It noted, for instance, that social services such as health care "should be universally provided," particularly to vulnerable people whose needs require prioritization (SLTRC 2004, 235). Furthermore, it was recommended that services be extended to people throughout Sierra Leone: "The government must be seen to be establishing infrastructure

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<sup>30</sup> *Plan de Sánchez Massacre v. Guatemala*, Inter-American Court of Human Rights, Ser. C, No. 116, Reparation, November 19, 2004.

<sup>31</sup> In its report, the commission in Timor-Leste noted that the conflict's effect on socioeconomic conditions "was equally damaging and possibly more long-lasting" than the threats to civil and political rights (CAVR 2005, 140). The commission found that Indonesia had failed to "meet the basic needs of the population for food, shelter and essential medicines" and had caused "their economic and social situations to deteriorate . . ." (CAVR 2005, 141–142).



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and delivering health, education, justice and security . . .” (SLTRC 2004, 123). Those recommendations may be interpreted as including improved access to water facilities as part of the process of national reconciliation.

Another example is provided by the Moroccan Equity and Reconciliation Commission, which was established to inquire into human rights violations that had occurred between 1956 and 1999, the most serious having occurred in the Western Sahara conflict with the Polisario Front (Amnesty International 2008). The commission recommended “communal reparations” to strengthen the economic and social development of specific regions that had been particularly affected by political violence and had been marginalized and excluded (ICTJ 2005). In this case as well, economic and social development may be interpreted to include access to safe drinking-water supplies and basic sanitation services.

To date, no truth commission has expressly addressed the right to water and sanitation or the topic of legislative and institutional reforms in the water sector. However, the recognition of the right to water and sanitation by the UNGA and the Human Rights Council in 2010 strengthens the importance of the right to water and sanitation among socioeconomic rights. Moreover, the scarcity of water and risks related to the degradation of water resources underscore the need to enhance legislation on water in post-conflict states. Truth commissions may stimulate the creation of new domestic legislation by recommending measures to protect the right to drinking-water supplies and basic sanitation services.

Restoring the rule of law in post-conflict situations is a problem with many potential solutions. Approaches should be adapted to the specificities of each conflict and each affected society (Stromseth 2009). Criminal trials, human rights tribunals, and truth commissions are among the many means by which peace can be pursued in post-conflict states, and each of these mechanisms has the potential to interact with the right to water and sanitation.

## OBSTACLES AND THE WAY FORWARD

The right to water and sanitation has been explicitly referenced less often than other socioeconomic rights in post-conflict arrangements, but that is beginning to change. Many aspects of the right to water and sanitation are implicated in the realization and protection of other socioeconomic rights, such as the right to health and the right to food and housing, but reliance on this implication alone undermines consideration of the right to water as an autonomous right (Cahill-Ripley 2005). When dealing with deliberate destruction of water installations, discriminatory practices, or the denial of access to drinking-water aid, international criminal courts, human rights bodies, and truth commissions must address the right to water and sanitation separately from other human rights obligations.

Post-conflict states are often reluctant to integrate the right to water and sanitation into legislation. One explanation for this reluctance might be a perceived incompatibility between the short- and long-term investments demanded by the right and the inadequate financial, technical, and human resources many

post-conflict states possess. However, such resources are a necessary precondition for compliance with all of a state's human rights obligations, not only the right to water and sanitation. For example, the establishment of a criminal justice system with fair trials and humane conditions of detention may also require a large amount of financial and human resources (Arbour 2006).

In the aftermath of a conflict, the first concerns of international institutions are to provide security and to establish functioning and accountable legal and administrative institutions, so few post-conflict constitutions and peace agreements have thus far included an explicit reference to a right to water and sanitation. However, the UN and other international organizations assisting in the drafting of post-conflict arrangements can promote the inclusion of this right and can help mobilize financial resources for water and sanitation projects. United Nations Security Council Resolution 1272, on Timor-Leste, provides an example. According to the resolution, the objectives of the UN administration in Timor-Leste included assisting in the "development of civil and social services" and ensuring "the delivery of humanitarian assistance" (UNSC 1999). Although it does not deal with the satisfaction of human water needs as a legal entitlement, the resolution may be considered to include provision of water services under the umbrella of "humanitarian assistance."

Ensuring access to water is often considered a task of humanitarian agencies that does not have any significant implications for human rights law. Now that the UNGA and the Human Rights Council have recognized the right to water and sanitation, mechanisms—such as international criminal tribunals, regional human rights courts, and national truth commissions—must assess violations of the right to water and sanitation. This is a requisite of long-term peace and justice in post-conflict states.

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