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Rethinking the right to water in rural Limpopo

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Summary: *For decades Africa has been losing billions of dollars every year as a result of illicit financial flows. When export and import figures are tampered with this has the tendency to erode the tax base. It is common cause that in Africa a large percentage of state revenue emanates from taxation. The consequence of tax base erosion is that the government has less revenue. With less revenue, the government is increasingly unable to provide social services. The consequences for women are particularly dire as women have to end up subsidising the state in providing services, reproductive and care work. This article argues that the government has a responsibility to ensure that the maximum 'available resources' are allocated to the attainment of socio-economic rights, particularly the right to water, especially for the poorest in the country. The article is limited in scope to the province of Limpopo in South Africa. The article highlights the impact of illicit financial flows (IFFs) on women and girls living in rural communities, particularly in Limpopo. It sets out the nature and extent of IFFs in South Africa, and describes the socio-economic context*

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of Limpopo and the extent to which the right to water has not been realised in selected rural parts of Limpopo. The article further outlines the relevant legal framework and finally analyses the gendered implications of the right to water and the duty on the state.

Key words: *socio-economic rights; rights-based approach; right of access to water; illicit financial flows; rural communities; Limpopo*

1 Introduction

Illicit financial flows (IFFs) came to the forefront after the publication of the ground-breaking report of the United Nations Economic Commission for Africa.¹ Several authors have written on IFFs, largely from a social or economic perspective.² The article adds a rights-based approach to the discourse on the impact of IFFs. The issue is that IFFs negate an essential source of revenue which should be used to realise socio-economic rights. IFFs shift profits and erode the tax base, thereby undermining the development agenda of the investment host country. We argue that the government has a responsibility to ensure that the 'available resources' are allocated to the attainment of socio-economic rights, especially for the poorest in the country. We further argue that the government has a responsibility to provide access to water, which right can be realised through improved tax enforcement. The article is limited in scope to the province of Limpopo in South Africa. The argument is made that IFFs are depleting the available resources of South Africa, which resources ought to be allocated to the provision of access to water. The article further highlights the impact of IFFs on women and girls living in rural communities, particularly in the Limpopo Province.

First, the article highlights the nature and incidence of IFFs in South Africa with the aim of illustrating the potential resources that could be allocated to realising the right to water. Second, the article describes the socio-economic context of Limpopo and the extent to

1 United Nations Economic Commission for Africa (UNECA) 'Illicit Financial Flows (IFFs) Report of the High Level Panel on Illicit Financial Flows from Africa Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development' (2014) 9.

2 See D Kar & J Spanjers *Illicit financial flows from developing countries: 2004-2013* (2015); JD Nkurunziza 'Illicit financial flows: A constraint on poverty reduction in Africa' (2012) *Association of Concerned Africa Scholars Bulletin* 87; A Cobham & P Janský *Estimating illicit financial flows: A critical guide to the data, methodologies, and findings* (2020); AA Goldsmith 'Out of Africa? Elections and capital flight revisited response' (2020) 64 *International Studies Quarterly* 248-254.

which the right to water has not been realised in selected rural parts of Limpopo. Third, the article outlines the legal framework insofar as it governs the right to water, starting with the domestic provisions, and broadening to include regional and international provisions. The article finally highlights the gendered impact of the right to water.

2 Understanding illicit financial flows

The paragraphs below seek to clarify what is meant by IFFs in order to provide clarity on how IFFs constitute 'available resources' that may be used for the progressive realisation of the right to water. IFFs are defined by the United Nations Economic Commission for Africa as

money that is illegally earned, transferred or utilised. These funds typically originate from three sources: commercial tax evasion including trade misinvoicing and abusive transfer pricing; criminal activities, including the drug trade, human trafficking, illegal arms dealing, and smuggling of contraband; and bribery and theft by corrupt government officials.³

Another definition for IFFs proffered by the Organisation for Economic Co-operation and Development (OECD) notes that most activities that result in IFFs are criminal.⁴ This report cites as examples 'money laundering', 'corruption' and 'tax evasion'.⁵ The Global Financial Integrity (GFI) Illicit Financial Flows Report 2017 highlights two main streams as the main sources of illicit financial flows, namely, 'deliberate misinvoicing in merchandise trade ... and leakages in the balance of payments (also known as "hot money flows")'.⁶

From the definitions above, IFFs refer to a broad range of activities that ultimately result in the transfer and use of 'illegally earned, transferred or utilised money'. This article focuses on IFFs originating

3 UNECA IFF Report (n 1) 9.

4 UNECA IFF Report 15.

5 OECD Illicit financial flows from developing countries: Measuring OECD responses (2014) 15. The importance of perspectives from the OECD lies in the realisation that the majority of investments received in South Africa derive from OECD member states. In this regard see OECD 'South Africa and the OECD', <http://www.oecd.org/southafrica/south-africa-and-oecd.htm> (accessed 28 January 2020).

6 Global Financial Integrity (GFI) Illicit financial flows to and from developing countries: 2005-2014 (2017) vii; see further in A Korinek 'Hot money and serial financial crises' University of Maryland (2011) 2 Paper prepared for IMF Eleventh Jacques Polak Annual Research Conference and the IMF Economic Review, <https://www.norges-bank.no/globalassets/upload/konferanser/2011-06-09/korinek.pdf> (accessed 28 January 2020); T Lai 'Capital flows to China and the issue of hot money: An empirical investigation' 4 City University Hong Kong (2010), <https://www.rba.gov.au/publications/workshops/research/2010/pdf/lai.pdf> (accessed 28 January 2020).

from commercial tax evasion, specifically trade misinvoicing and abusive transfer pricing.

2.1 Trade misinvoicing and abusive transfer pricing

Trade misinvoicing often occurs deliberately between companies that are unrelated, whereas abusive transfer pricing occurs within groups of companies in intra-group transfer of goods and services.

2.1.1 Trade misinvoicing

Trade misinvoicing occurs when companies alter their paper trail to record profits in jurisdictions that offer low taxes, and quite often these are offshore tax-free jurisdictions. This is a critical challenge because in some instances companies operating in South Africa have shell companies hosted by corporate firms in low-tax or tax-free jurisdictions, and have a front such as having only a few employees who are junior-level staff, diverting profits from the real source to the low-tax or tax-free jurisdiction.⁷

The Global Financial Integrity Report notes that 'trade misinvoicing is the primary measurable means for shifting funds in and out of developing countries illicitly' and that 'an average of 87 per cent of illicit financial outflows were due to the fraudulent misinvoicing of trade'.⁸ Trade misinvoicing occurs when companies intentionally write incorrect amounts on invoices. Some of the reasons for this include avoidance and evasion of taxes such as customs duty when exporting or importing goods, money laundering, and profit-shifting to foreign low-tax jurisdictions.⁹

This is prejudicial to developing economies that stand to lose more when profits are shifted and re-directed outward. The taxable amount is reduced and opportunities for re-investment and job-creation are lost. Governments need tax revenue to finance the national budget and to support the provision of socio-economic rights, such as the right to water.

⁷ T Faccio 'What are tax havens?' *Mail & Guardian*, first published in The Conversation 7 April 2016, <https://mg.co.za/article/2016-04-07-explainer-what-are-tax-havens> (accessed 28 January 2020).

⁸ GFI (n 6) 10.

⁹ As above.

2.1.2 *Abusive transfer pricing*

The United Nations (UN) Practical Manual on Transfer Pricing for Developing Countries defines 'transfer pricing' as 'the setting of prices for transactions between associated enterprises involving the transfer of property or services'.¹⁰ With globalisation there is an increase in multinational companies, and intra-group transfers are inevitable. Transfer pricing is a normal practice which on its own is not necessarily unlawful.

However, in order to be lawful, transfer pricing must comply with both national and international law. The problem arises when multinational companies act unlawfully, and abuse loopholes in the system to syphon out money or resources under the guise of intra-group transactions with sister companies. Abusive transfer pricing involves a manipulation of prices so as to shift profits from a high-tax jurisdiction to an entity located in a low-tax jurisdiction.¹¹ The lower the income reported in the high-tax jurisdiction, the lower the tax to be paid to government. Hence shifting the profit to a low-tax jurisdiction means that the multinational corporation pays less in taxes.¹² The International Bar Association's Human Rights Institute notes that transfer pricing leads to revenue losses, perpetuates inequality, creates an unfair competitive advantage for multinational corporations, and increases the cost of tax administration.¹³ In South Africa transfer pricing is regulated primarily by the Income Tax Act. Section 31(2) of the Income Tax Act provides:

Where any goods or services are supplied or acquired in terms of an international agreement and the acquirer is a connected person in relation to the supplier; and the goods or services are acquired at a price which is either

- (i) less than the price which such goods or services might have been expected to fetch if the parties to such a transaction had been independent persons dealing at arm's length (such price being the arm's length price), or
- (ii) greater than the arm's length price.

For the purpose of this Act in relation to the acquirer or supplier, the Commissioner may in the determination of taxable income of

10 United Nations *Practical Manual on Transfer Pricing for Developing Countries Ref: ST/ESA (2017) 24*, <https://www.un.org/esa/ffd/wp-content/uploads/2017/04/Manual-TP-2017.pdf> (accessed 28 January 2020).

11 S Sekhar 'Transfer pricing: The case of Vodafone' (2016) 6 *International Journal of Engineering Science and Computing* 6207.

12 International Bar Association's Human Rights Institute (IBA) 'The obligation to mobilise resources: Bridging human rights, Sustainable Development Goals and economic and fiscal policies' (2017) 69.

13 IBA (n 12) 69.

either the acquirer or supplier adjust the consideration in respect of the transaction to reflect an arm's length price for the goods or services.¹⁴

In other words, the Income Tax Act makes an adjustment so that in instances where more favourable terms were provided in intra-group trade, this is adjusted for tax purposes, so that the tax is calculated on the arm's length amount. Arm's length simply means the amount that would have been paid between independent or unrelated businesses trading in the open market. This essentially means that parent and sister companies are able to trade at lower or higher prices than normal market rates, and the state will only interfere in this in relation to the collection of taxes. This in essence means that multinational corporations still enjoy numerous other benefits and may engage in anti-competitive behaviour without suffering serious consequences, thereby distorting the market.¹⁵ Nonetheless, section 31(2) of the South African Income Tax Act is in line with international tax guidelines, such as the United Nations Model Double Taxation Convention (UNMDTC), which provides for associated enterprises.¹⁶ Article 9 of the UNMDTC states in summary that tax authorities may adjust the payable tax by reviewing a company's profits if there were any transactions between that company and a related company in another country and if such transaction(s) were not concluded at arm's length.¹⁷ Trade misinvoicing and abusive transfer pricing are detrimental to the advancement of human rights as they divert resources from the state. South African tax authorities are empowered through the Tax Act to levy taxes and therefore have the power (whether the power is used or not, and regardless of the nature and extent of the exercise of this power) to adjust the tax payable by corporations taking into account transfer pricing arrangements in order to offset abusive transfer pricing.

2.2 Base erosion and profit shifting

The importance of IFFs is that they constitute taxable income that escapes the tax collector, resulting in reduced national revenue. In

¹⁴ Act 58 of 1962.

¹⁵ SB Nielsen, D Schindler & G Schjelderup 'Abusive transfer pricing and economic activity' 2, http://www.tax.mpg.de/fileadmin/user_upload/Paper_Soren_Bo_Nielsen_Dirk_Schindler_Guttorm_Schjelderup.pdf (accessed 28 January 2020).

¹⁶ United Nations Model Double Taxation Convention between Developed and Developing Countries (2017) Ref ST/ESA/PAD/SER.E/213 (UN Model Tax Convention), <https://www.un.org/esa/ffd/wp-content/uploads/2014/09/DoubleTaxation.pdf> (accessed 28 January 2020).

¹⁷ As above.

other words, IFFs erode the tax base from which governments can collect taxes. This is a form of base erosion.

An argument is made that by failing to collect taxes effectively, the government is failing to meet its constitutional duty to realise socio-economic rights progressively. Governments indeed are entitled to engage strategies that enhance the growth of economies through foreign direct investment and the ploughing back of profits. This in no way includes the avoidance of tax by individuals and companies. Tax avoidance and evasion through trade misinvoicing and abusive transfer pricing are classified as IFFs and therefore are an impediment to government's collection of its due revenue towards the fulfilment of its obligation to provide water as a right to even the poorest of its people. The state must fully utilise international law to regulate tax issues. Article 21(5) of the African Charter on Human and Peoples' Rights (African Charter) provides that '[s]tate parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources'.¹⁸

Section 214 of the South African Constitution requires a law to be enacted to ensure the equitable allocation of resources among the three spheres of government (national, provincial and local). This law is the Division of Revenue Act, which annually allocates an equitable share to provinces and municipalities based on a specific calculation determined in the Act. The allocation of resources in terms of the Act should take into account 'the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them'. A reduced tax base means that the government has fewer resources to allocate. The Limpopo 2019/2020 budget allocates ZAR3,6 billion to public works, roads and infrastructure. This includes infrastructure for water,¹⁹ to enable the minimum access to water stipulated in the National Water Standard Regulations.²⁰ ZAR3,6 billion amounts to over

18 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986.

19 R Tooley 'Limpopo Provincial Budget Speech 2019/2020', <https://www.gov.za/speeches/mec-rob-tooley-limpopo-prov-budget-speech-201920-6-mar-2019-0000> (accessed 28 January 2020) which is an improvement on the 2016/2017 budget, infographic, <https://reviewonline.co.za/199065/infographic-r61-4-billion-budget-limpopo/> (accessed 28 January 2020).

20 Regulations Relating to Compulsory National Standards and Measures to Conserve Water, Government Gazette 22355, Notice R509 of 2001 (8 June 2001) published in terms of sec 9 of the Water Services Act 108 of 1997 (National Water Standards Regulations); para 23; *Mazibuko & Others v City of Johannesburg & Others* (CCT 39/09) [2009] ZACC 28.

US \$0,2 billion on the current exchange rate of US \$1 to ZAR14,6.²¹ When one considers the huge amounts of revenue lost as profits are illicitly shifted to low-tax jurisdictions, and under-invoicing in export trade, it is clear that US \$0,2 billion is miniscule.

The extractives sector of South Africa is particularly vulnerable to IFFs in the form of abusive transfer pricing, and trade mispricing in evasion of tax. This is a cause for concern as the mining sector ought to contribute significantly towards South Africa's national revenue. These resources could then be allocated equitably to provinces and municipalities because the levying of customs duties and income tax falls within the mandate of national government, to the exclusion of provincial and local government in accordance with sections 228 and 229 of the Constitution.

There is significant mining activity near the villages selected for this article, which is explained further in part 3 below. Of the selected rural communities in Limpopo, there is coal mining in Phalaborwa in Mopani and Vhembe, and chromite, asbestos and platinum group metals in Sekhukhune.²² Considering that Limpopo contributes 25 per cent of the national mineral production, and produces platinum, one of the most valuable minerals, it is imperative to consider the contribution of this sector to the realisation of the right to water in the province. It is noted that

[f]or South Africa, cumulative underinvoicing over the period 2000-2014 is reported in the UNCTAD study (in 2014 constant US dollars) for silver and platinum to have amounted to USD 24 billion, iron ore to USD 600 million, and gold to USD 78.2 billion. In total, underinvoicing for South Africa over the nearly 15 year period is stated by the UNCTAD study to have amounted to USD 102.8 billion (2014 US dollars).²³

21 Bloomberg 'Spot exchange rate', <https://www.bloomberg.com/quote/USDZAR:CUR> (accessed 28 January 2020).

22 M Mothetha, Z Nkuna & V Mema 'The challenges of rural water supply: A case study of rural areas in Limpopo Province' Council for Scientific and Industrial Research, http://researchspace.csir.co.za/dspace/bitstream/handle/10204/7593/Mothetha_2013.pdf;jsessionid=763AE7BEB08FA51EA8D83AED3F1041AB?sequence=1 (accessed 28 January 2020); Mopani District Municipality 'Mopani', <https://municipalities.co.za/featured/mopani.pdf> (accessed 28 January 2020); Department of Rural Development and Land Reform South Africa District Rural Development Plan Sekhukhune District Municipality Limpopo Province 56, http://www.ruraldevelopment.gov.za/phocadownload/SPLUMB/Dev_Plans2017/Limpopo/sekhukhune%20drdp.pdf (accessed 28 January 2020).

23 Open Society Initiative for South Africa (OSISA), Third World Network Africa (TWN), Tax Justice Network Africa (TJNA), Action Aid International (AAI), Christian Aid (CA) (2009) 'Breaking the Curse: How Transparent Taxation and Fair Taxes can Turn Africa's Mineral Wealth into Development', <https://www.oxfam.de/system/files/20150602-mb-money-talks-africa-g7-summit-en.pdf> (accessed 29 January 2020).

UNCTAD reports that Africa loses US \$100 billion a year to corporate tax avoidance schemes.²⁴ This exceeds the total amount of development assistance provided in 2009 under the OECD Development Assistance Committee.²⁵ OSISA et al note that

[i]n 2012, more than R300bn (US\$29.1bn) or close to 10 per cent of GDP left South Africa in the form of illicit financial flows. Among the worst offenders were the countries' mining giants who used a variety of dubious accounting practices to sidestep paying taxes. This has led to the South African treasury losing out on US \$359m a year.²⁶

South Africa loses US \$7,4 billion per year due to trade misinvoicing alone.²⁷ This is a significant amount of money, especially taking into account the state of access to socio-economic rights in South Africa.²⁸ When government fails to collect taxes, particularly by failing to adjust the accounts of associated companies in order to tax the arm's length trade figures as provided for in section 32(1) of the Income Tax Act, it reduces the state's tax base. Shrinking the tax base means that the government will receive less revenue and that ultimately the government will have less revenue to use to fulfil its numerous obligations, including providing for access to socio-economic rights. It is common cause that large multinational corporations generally have higher incomes through profits, and are more likely to evade tax than domestic companies, and wealthy individuals are more likely to evade tax than poor individuals.²⁹ This is because of the access that large multinational corporations and wealthy individuals have to expert legal and tax advisors, aggressive tax planning, global presence, and high incomes that are attractive and eligible for banking in tax havens.³⁰ This results in an exponential erosion of the tax base.³¹

The South African Revenue Authority introduced the Special Voluntary Disclosure Programme (SVDP) between October 2016 and August 2017 pursuant to the release of the Panama papers

24 OSISA, TWNA, TJNA et al 'Breaking the Curse' (n 23) 5.

25 R Balakrishnan et al *Maximum available resources and human rights* (2011) 13.

26 Oxfam Media Briefing (n 23) 5.

27 G Nicholson 'Illicit financial flows: Trade misinvoicing costs South Africa \$7.4bn in tax a year', <https://www.dailymaverick.co.za/article/2018-11-19-trade-misinvoicing-costs-south-africa-7-4bn-in-tax-a-year/> (accessed 28 January 2020).

28 OSISA Third World Network Africa, Tax Justice Network Africa, Action Aid International, Christian Aid (2009) 'Breaking the curse: How transparent taxation and fair taxes can turn Africa's mineral wealth into development', <http://documents.twnafrica.org/breaking-the-curse-march2009.pdf> (accessed 28 January 2020).

29 African Monitor 'Report 1: State of illicit financial flows in South Africa: A scoping exercise' 10 (African Monitor Report), <http://www.africanmonitor.org/wp-content/uploads/2017/04/IFF-Report-1.pdf> (accessed 28 January 2020).

30 As above.

31 As above.

and obtained R1 billion from approximately 2 000 tax payers.³² This is a gain that must be acknowledged, and more must be done to continue to boost the collection of taxes from multinational corporations. However, the amount collected under the SVDP is miniscule in comparison to amounts lost to IFFs. More must be done to secure the available resources in order to progressively realise women's rights to water in rural areas such as Limpopo.³³

2.3 Domestic tax burden

When the tax base is eroded, the state will have to find alternative sources to plug the gap in the national treasury in order to support the national budget. In an effort to plug the gaps left by enlarged spending such as free education,³⁴ the state tends to place the burden on the shoulders of its citizens. For example, the budgeted ZAR57 billion for free tertiary education conceded after three years of student protests under the Fees Must Fall movement requires the government to find a revenue source for this expenditure.³⁵ In such cases the state inevitably increases the burden on citizens, especially on poorer households.

The burden on citizens manifests itself as increased personal taxes such as value added tax (VAT) and income tax as seen in the 2018 Budget Speech in which VAT was increased. An increase of VAT by 1 per cent from 14 to 15 per cent is significant. Some may argue that globally VAT of 15 per cent remains relatively low, but that generalisation does not lighten the plight of the poor. This increase in VAT disproportionately affects the poorest households and the

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- 32 ANA Reporter 'SARS collects R1 billion from special voluntary disclosure programme' Business Report 12 October 2017, <https://www.iol.co.za/business-report/companies/sars-collects-r1-billion-from-special-voluntary-disclosure-programme-11555305> (accessed 28 January 2020). One thousand seven hundred South Africans were listed in the Panama Papers as holding shell companies in tax havens, where profits can easily be re-directed away from the stiff tax requirements of South Africa; M Ferreira '1700 South Africans named in Panama Papers', <https://www.iol.co.za/business-report/companies/1-700-south-africans-named-in-panama-papers-2026164> (accessed 28 January 2020).
- 33 Regulations relating to Compulsory National Standards and Measures to Conserve Water, Government Gazette 22355, Notice R509 of 2001 (8 June 2001) published in terms of sec 9 of the Water Services Act 108 of 1997 (Water Standards Regulations); *Mazibuko* (n 20) para 23.
- 34 Free education means available, accessible, free and compulsory primary education. For a more detailed discussion, see L Arendse 'The obligation to provide free basic education in South Africa: An international law perspective' (2011) 14 *PER/PELJ* 97.
- 35 M Gigaba, Minister of Finance, National Budget Speech of South Africa 2018 10, <http://www.treasury.gov.za/documents/national%20budget/2018/speech/speech.pdf> (accessed 28 January 2020).

missing middle.³⁶ It means that poorer households lose more buying power relative to wealthy households.³⁷ Additionally, the increase of 52 cents per litre of fuel, being 22 cents per litre fuel levy and 30 cents per litre Road Accident Fund levy, which the Minister at the time suggested ‘will not affect the poor’, increases production costs for companies, and filters through to consumers through increased prices of goods and services.³⁸

The IBA³⁹ notes the impact of resource diversion and foregone tax revenues in limiting the available resources for human rights fulfilment, including the right to water and highlighted the importance of the domestic state revenue for the realisation of Goal 16.4 of the United Nations Sustainable Development Goals (SDGs). The report notes that states have an obligation to mobilise resources and devote the maximum available resources towards the realisation of human rights.⁴⁰ In order to fully devote the maximum available resources to human rights, states have a duty not only to generate resources, but also to prevent the diversion of resources.⁴¹ The International Covenant on Economic, Social and Cultural Rights (ICESCR) has urged states ‘to “take rigorous measures” to combat illicit financial flows, tax evasion and fraud “with a view to raising national revenues and increasing reliance on domestic resources”’.⁴²

The Special Rapporteur on Extreme Poverty notes that

tax abuse is not a victimless practice; it limits resources that could be spent on reducing poverty and realising human rights, and perpetuates vast income inequality ... a state that does not take strong measures to tackle tax abuse cannot be said to be devoting the maximum available resources to the realisation of economic, social and cultural rights. Moreover, high levels of tax abuse undermine the principles of equality and non-discrimination.⁴³

36 Department of Higher Education Ministerial Task Team ‘Training Report: To develop a support and funding model for poor and “missing middle” students’ 7, http://www.dhet.gov.za/SiteAssets/Gazettes/MTT_Report.pdf (accessed 28 January 2020). The Minister of Finance effectively increases the definition of the ‘missing middle’ to include families whose combined annual income falls below R35 000; see National Budget Speech (n 35) 14.

37 National Budget Speech (n 35) 10; Balakrishnan et al (n 25).

38 Gigaba National Budget Speech (n 35) 11; J Cronje ‘Fuel and Road Accident Fund levies go up’ *Fin24* 21 February 2018, <https://www.fin24.com/Budget/fuel-and-road-accident-fund-levies-going-up-20180221> (accessed 28 January 2020).

39 IBA (n 12).

40 IBA (n 12) 10.

41 IBA (n 12) 67.

42 As above.

43 IBA (n 12) 68.

Article 24 of General Comment 24 of the Committee on Economic, Social and Cultural Rights (ESCR Committee) notes that when countries reduce corporate taxes in order to attract investors, this encourages a race to the bottom, which limits all states' ability to mobilise domestic resources and undermines their ability to fulfil their human rights obligations.

It has been argued that although the Working Group on Business and Human Rights acknowledges that all corporations have an obligation to respect human rights, the Independent Expert on Equitable International Order has noted that the Working Group's Guiding Principles on Business and Human Rights make no provision relating to the obligation of businesses to pay their 'fair share' of taxes, nor does it mention tax evasion, tax fraud or tax havens.⁴⁴

Regarding financial secrecy legislation, tax havens and low-tax jurisdictions, the Special Rapporteur on Extreme Poverty noted that tax havens facilitate large-scale tax abuse and illicit conduct, divert state revenue and worsen inequalities because 'most tax havens are located in – or under the jurisdiction of – wealthy countries'.⁴⁵

The following part of the article describes the extent and nature of access to water in Limpopo Province.

3 Access to water in Limpopo

Limpopo is selected as it is one of the two poorest provinces in South Africa (the other being the Eastern Cape).⁴⁶ It is argued that rural women in Limpopo face harsh economic conditions as they live in one of the poorest provinces, and constitute one of the most vulnerable groups affected by intersectional inequalities of poverty, gender and race.⁴⁷ Limpopo is home to many people who belong to the so-called 'second economy'. The second economy is

a metaphor implying that part of the economy is cutting-edge and globalised, and part is marginalised and underdeveloped. Obviously, these two economies don't occupy distinct geographic spaces, but are interconnected in many ways. About two thirds of the population is to be found in the first economy, as employers, workers, professionals and others. The development of the second economy has to be

44 IBA 72.

45 United Nations 'Report of the Special Rapporteur on Poverty, Magdalena Sepúlveda Carmona' (2014) UN Doc A/HRC/26/28 para 61.

46 Statistics South Africa 'Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015' 34, <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> (accessed 28 January 2020).

47 As above.

carried almost exclusively by the democratic state. The level of underdevelopment of this economy and the small size of its market makes it an unattractive target for the industrial economy.⁴⁸

As of 2016 Limpopo had 11,5 per cent multi-dimensionally poor households.⁴⁹ Inequality of access to water within the Limpopo Province is also an issue. Unlike the good fortunes of those living in Capricorn and Waterberg, who mostly have access to piped water (80,5 and 75,4 per cent respectively), only 53,2 per cent of citizens living in Mopani, Vhembe and Greater Sekhukhune have access to piped water.⁵⁰ Research conducted by the Council for Scientific and Industrial Research highlights a lack of access to water in Magona and Govhu villages, and the Vondo Cluster.⁵¹ These challenges are representative of a provincial dilemma. The main challenges noted by Mothetha et al are the lack of capacity and skills at municipalities, poor operation and maintenance of infrastructure, illegal connections and political interference.⁵²

The lack of capacity and skills at municipalities has contributed to residents going without access to potable water for long periods of time, ranging from two weeks to more than two years in some areas.⁵³ In this case, the community members will either buy water from those who have boreholes or, if they cannot afford it, resort to unprotected water sources such as rivers, wells and springs.⁵⁴ A similar challenge is experienced in Vhembe district where it is alleged that poor maintenance of water infrastructure and the incompetence of public officials appointed to manage water in the region are impacting the right to water negatively.⁵⁵ The reasons provided for this are that there is an information gap between communities and municipalities, and that case operators are not always available to attend to the maintenance and operation of water infrastructure.⁵⁶

48 V Gumede 'Poverty and the "second economy" in South Africa: An attempt to clarify applicable concepts and quantify the extent of relevant challenges' DPRU Working Paper 8/133, [https://www.vusigumede.com/content/academic%20papers/Poverty%20and%20Second%20Economy%20in%20SA%20DPRU%20WP%2008-133\].pdf](https://www.vusigumede.com/content/academic%20papers/Poverty%20and%20Second%20Economy%20in%20SA%20DPRU%20WP%2008-133].pdf) (accessed 28 January 2020).

49 Statistics South Africa (n 46).

50 Limpopo Provincial Government 'Budget Statement 2016/2017' 29, http://www.limtreasury.gov.za/lim_admin_trea/pages/sites/treasury_lim/documents/budget_statement/Overview%20of%20Provincial%20Revenue%20and%20Expenditure%20201617.pdf (accessed 28 January 2020).

51 Vondo Cluster includes Matondoni, Maranzhe and Murangoni.

52 See generally Mothetha et al (n 22).

53 As above.

54 As above.

55 LL Netshipale 'Water services delivery in Mukondeni Village in Limpopo Province, South Africa' unpublished thesis, University of Limpopo, 2016 5.

56 See generally Mothetha et al (n 22).

Since most areas do not have domestic water piping, the most common infrastructure used are street taps, boreholes, reservoirs and reticulation pipes. However, there are several leaking or broken pipes and taps owing to damage, theft, and lack of maintenance or refurbishment. Illegal water connections, together with leakages in water pipes, have over time caused a reduction in both water pressure and borehole water output. Moreover, the unequal distribution of water has caused villagers whose villages do not have water infrastructure to interfere with the infrastructure of those villages that do have water infrastructure. The argument put forward by the municipalities is that they sometimes receive a budget that does not allow them to cover the entire village, and that is why they provide access to one side of a village and not to the other. This is an issue of national resources, and possibly political interference and corruption. There clearly is a need for resources so that when resources are available, they can be allocated to capacity building for municipalities, and investment in water infrastructure so that the rural communities in Limpopo can access potable water.

The following part examines the right to water to highlight the domestic commitments undertaken by South Africa in terms of protecting, promoting and fulfilling the right to water and to show the particular link between women and their right to water.

4 Right to water

This article questions whether the South African government is meeting its mandate to use 'available resources' so that rural women in Limpopo can have access to water as envisaged in section 27 of the South African Constitution. In order to properly answer this question, one must examine the legal rules governing the right of access to water. The following part of the article explores the legal principles pertaining to the state's responsibilities in relation to the realisation of the right to water under domestic, regional and international law.

4.1 Domestic provisions under the Constitution

Section 27(1)(b) of the South African Constitution explicitly guarantees the right of access to water.⁵⁷ The right to access water is also set out in section 3(1) of the Water Services Act which provides that '[e]veryone has a right of access to basic water supply and basic

⁵⁷ African Charter on Human and People's Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986.

sanitation'.⁵⁸ This right is not absolute, as it is subject to section 27(2) of the Constitution which stipulates that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.⁵⁹ O'Regan J in paragraph 1 of her judgment in the *Mazibuko* case starts by highlighting that '[w]ater is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die'.⁶⁰

The right to water is entrenched in the Constitution, and where individuals consider the state to have failed to respect, promote and fulfil the Bill of Rights as mandated by section 7(2) of the South African Constitution, they have recourse to judicial review.⁶¹ The courts have considered claims relating to socio-economic rights, particularly the right to housing, health care and water, and selected cases will be noted below. This article is limited to an analysis of the concept of 'available resources'. Chenwi provides an analysis on progressive realisation.⁶² The cases below touched on the issue of available resources, but not definitively.

The Constitutional Court confirmed in the *Grootboom* case that South Africa is bound to use its available resources in the progressive realisation of socio-economic rights. It states in the relevant part that 'both the content of the obligation in relation to the rate at which it is achieved, as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources'.⁶³ The *Soobramoney* case considered the provincial budget as the 'available resources'.⁶⁴ Although the Court in the *Treatment Action Campaign (TAC)* case found that the government would not incur significant additional costs if it were required to provide anti-retroviral drugs, it did not in detail elucidate on the determination of what constitutes 'available resources'.⁶⁵ It took into account that

58 Act 108 of 1997.

59 The Constitution of the Republic of South Africa, 1996; L Chenwi 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness and some methodological considerations for assessing compliance' (2013) *De Jure* 742 743 .

60 *Mazibuko* (n 20).

61 South African Constitution; Chenwi (n 59).

62 Chenwi (n 59) 743.

63 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 46. This case dealt with the right to housing wherein Grootboom was facing eviction; Chenwi (n 59) 743; S Liebenberg 'The interpretation of socio-economic rights' in M Chaskalson et al (eds) *Constitutional law of South Africa Original Service* (2003) 44.

64 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) paras 24 & 29; Liebenberg (n 63) 45.

65 *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002) (TAC) para 71.

the Nevirapine HIV medication in question would be provided free of charge for five years, and the hospitals administering the medication already had facilities for HIV testing and counselling, and concluded that the government would not incur significant costs.⁶⁶

Although *Mazibuko* dealt specifically with the right to water, it did not fully address the question as to what constitutes available resources. Instead, the approach adopted in this case was to question the sufficiency of the amount of water provided for free, and to question the installation of pre-paid metres in Phiri, Soweto, in Gauteng Province.⁶⁷ The Court referred to section 27 of the Constitution, sections 1 and 3 of the Water Services Act, and Regulation 3 of the National Water Standards Regulations, being delegated legislation in terms of the Water Services Act, which provide for:⁶⁸

a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month –

- (i) at a minimum flow rate of not less than 10 litres per minute;
- (ii) within 200 metres of a household; and
- (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

The Constitutional Court in *Mazibuko* overturned the decision of the Supreme Court of Appeal, and rejected the use of a minimum core, relying on its reasoning and rulings in the cases of *Grootboom* and *TAC* cases. The Constitutional Court in *Mazibuko* concluded that section 27 of the Constitution does not grant a right to immediately claim sufficient water but, rather, that it places an obligation on the state ‘to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources’.⁶⁹ However, the *Mazibuko* case does not clearly state a position on the available resources. How does one determine the available resources? Does the phrase ‘available resources’ refer to the national budget alone, or other sources? Authors often narrowly interpret Limburg Principle 26 where it refers to ‘its available resources’ as ‘both the resources within a state and those available from the international community through international co-operation and assistance’.⁷⁰ However, this is not a *numerus clausus* as it is open to interpretation. Balakrishnan et al propose that there are

66 *TAC* (n 65) paras 32, 49 & 71; Liebenberg (n 63) 45-46.

67 *Mazibuko* (n 20).

68 National Water Standards Regulations; *Mazibuko* (n 20) para 23.

69 *Mazibuko* (n 20) para 57; *Minister of Health & Others v Treatment Action Campaign & Others* [2002] ZACC 15.

70 Para 26 Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights UN Doc E/CN4/1987/17, Annex.

other available resources, including monetary policy, state revenue, financial sector policy and deficit financing.⁷¹ They note further that '[t]ax avoidance and evasion lead to substantial loss of revenue for governments'.⁷² McLaren similarly argues:⁷³

[T]here is a growing consensus that resource generation for human rights fulfilment needs to look beyond the budget itself and evaluate fiscal and economic policies according to human rights principles ... [and that this] requires an assessment of the reasonableness and progressive nature of fiscal and tax policies and the broader macro-economic context within which budget decisions are made. The obligation to use the maximum available resources to fulfil SERs means that government must do everything possible to mobilise resources that can be directed to socio-economic programmes.

This article is in agreement and makes an argument that speaks to available resources in trade and investment, which are currently undermined, unaccounted for and untapped. These are resources lost to IFFs. It is further argued that, when potential revenue is removed from the treasury through IFFs, and it is redirected for the benefit of multinational corporations or foreign jurisdictions, it affects the rights of poor people to access basic socio-economic rights and, particularly, the rights of the women in rural Limpopo to access potable water.

The following part of the article examines the right to water in the context of regional human rights law applicable in South Africa in order to determine South Africa's regional commitments towards advancing the right of access to water.

4.2 Regional provisions

Sections 231(2) and 231(4) of the South African Constitution provide that as a general rule, international law will only become binding in South Africa when it has been ratified through a process of parliamentary approval, and has been translated into domestic law.⁷⁴

The African Charter appears to have left out the right to water completely, save for the broad provision in article 22(1) which

71 Balakrishnan et al (n 25) 4.

72 Balakrishnan et al 13.

73 D McLaren 'Within its available resources: Socio-economic rights and the national budget' Policy Brief 2016/01 *Studies in Poverty and Inequality Institute* 3, <http://www.spil.org.za/wp-content/uploads/2016/02/SPII-Policy-Brief-2016-1.pdf> (accessed 28 January 2020).

74 Constitution of the Republic of South Africa, 1996; Chenwi (n 59) 743.

entitles all people to economic, social and cultural development. One may argue that access to water facilitates 'social development' through good health, food preparation, personal hygiene and read in the right to water into article 22(1). The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) adds more context. Article 2(1)(b) of the African Women's Protocol states:⁷⁵

States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women.

This may be interpreted to include customary practices but, more importantly, modern practices that hinder access to the life-giving natural resource – water, such as water pollution, and denial of access to water. However, the African Charter and the African Women's Protocol do not sufficiently address the issue of water. This means that South African law offers better protection than that of the African Charter insofar as the right to water is concerned.

More importantly, the African Commission on Human and Peoples' Rights (African Commission) recently adopted Guidelines on the Right to Water which explain the obligation on states to mobilise resources for the advancement of the right to water in Africa. Article 4 states in summary:⁷⁶

- 4.1 The State shall mobilise available resources in order to respect, protect, promote and fulfil the right to water.
- 4.2 'Available resources' encompass both financial and non-financial resources, including technical and human resources, state resources and international assistance and cooperation.
- 4.3 When a state claims that it has failed to realise the right to water, due to whatever reason including economic constraints or adjustments, it shall show that it has allocated all available resources towards the realisation of human rights, including the right to water.

This provision places a duty on states not only to use their available resources, but to 'mobilise resources', both domestic and international. However, domestic resource mobilisation eliminates the reliance of

⁷⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).

⁷⁶ African Commission on Human and Peoples' Rights, Draft Guidelines on the Right to Water, https://www.achpr.org/public/Document/file/English/achpr_draft_guidelines_on_the_right_to_water_in_africa_eng.pdf (accessed 11 May 2020).

states on external aid, which is unpredictable and unsustainable. Furthermore, article 4.3 requires some level of accountability from states should they fail to realise the right to water, to show that they have allocated all available resources. However, the challenge is that there currently is no measure to determine whether all available resources have been allocated, which will make this provision difficult to implement.

Moreover, article 21 of the AU Guidelines requires states to empower women to participate on an equal basis with men, paying particular attention to ensuring access to water for rural women. Further, the Guidelines call on states to 'take action to reduce the disproportionate burden and amount of time women bear in water collection'.

Finally, the Southern African Development Community (SADC), of which South Africa is party, has a Regional Water Policy which requires member states to 'prioritise the allocation, access and utilisation of water resources for basic human needs over any other allocation, access and utilisation'.⁷⁷ This is a clearer provision, which rightfully sets access to water as a priority. However, this is merely a policy document and has no binding effect on South Africa.

Although the African Charter does not directly address the right to water, its recent Draft Guidelines on the Right to Water provide guidance on state responsibilities especially with regard to realising the right to water. Similarly, the SADC Water Policy requires states to prioritise the allocation, access and utilisation of water resources. It may be concluded that regional instruments of the AU require states to go beyond simply using their available resources for the realisation of human rights, but require them to go beyond that and actually mobilise resources for this purpose.

4.3 International provisions

South Africa has ratified ICESCR.⁷⁸ The right to water is incorporated into articles 11 and 12 of ICESCR which speak to the right to 'an adequate standard of living ... including adequate food, clothing

⁷⁷ Policy Statement 2.2.2 Southern African Development Community Regional Water Policy (2005), http://www.sadc.int/files/1913/5292/8376/Regional_Water_Policy.pdf (accessed 28 January 2020).

⁷⁸ International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with art 27, South Africa signed in 1994, and ratified in 2015, <http://indicators.ohchr.org/> (accessed 28 January 2020).

and housing’, and ‘the enjoyment of the highest attainable standard of physical and mental health’.⁷⁹ The right to water is incorporated as water is central to attaining good health. General Comment 15 of the ESCR Committee confirms the centrality of water in the attainment of an adequate standard of living, and highest attainable standard of health by re-enforcing the fact that water is pivotal to the production of food, hygiene, health, livelihoods, and cultural life.⁸⁰

However, similar to the South African Constitution, the right to water is not absolute due to the limitation found in article 2(1) of ICESCR which requires state parties to take steps using the maximum available resources to progressively realise socio-economic rights. This is similar to the provision in the South African Constitution, except that ICESCR refers to ‘maximum available resources’ whereas the South African Constitution refers to ‘its available resources’.

State parties have three main obligations which are to respect, protect and fulfil the rights in ICESCR. The duty to respect means that state parties must ‘refrain from interfering directly or indirectly with the enjoyment of the right to water’.⁸¹ To protect means that state parties must ‘prevent third parties from interfering in any way with the enjoyment of the right to water’.⁸² Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority’ and this interference includes pollution.⁸³ To fulfil means to facilitate access by taking ‘positive measures to assist individuals and communities to enjoy the right’, especially in rural areas, to promote through awareness education, and provision when individuals or communities cannot realise the right on their own such as by adopting strategies to ensure ‘sufficient and safe water for present and future generations’.⁸⁴

The Limburg Principles provide guidance in the implementation of ICESCR. The explanation provided for the phrase ‘to the maximum of its available resources’⁸⁵ is that ‘state parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all’, and the phrase ‘its available resources’ consists of ‘both the resources within a state and those

⁷⁹ As above.

⁸⁰ ESCR Committee General Comment 15: The Right to Water (arts 11 & 12 of the Covenant) para 6, adopted at the 29th Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (contained in Document E/C.12/2002/11) Office of the High Commissioner for Human Rights.

⁸¹ ESCR Committee General Comment 15 (n 80) para 21.

⁸² ESCR Committee General Comment 15 para 23.

⁸³ As above.

⁸⁴ ESCR Committee General Comment 15 (n 80) paras 25 & 27.

⁸⁵ Para 25 Limburg Principles (n 70).

available from the international community through international co-operation and assistance'.⁸⁶

Although the ESCR Committee's General Comment clearly addresses the right to water, the Universal Declaration of Human Rights (Universal Declaration), as the ICESCR, does not specifically speak to the right of access to water. However, the Universal Declaration does stipulate in article 25 that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security'.⁸⁷ Therefore, the Universal Declaration is in alignment with ICESCR and similar interpretations may be used for incorporating the right to water into article 25.

The right to water must be considered especially insofar as it relates to women as it has significant implications for women. South Africa ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1995. Article 3 of CEDAW states:⁸⁸

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, *for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.*

Furthermore, South Africa is not listed as a signatory to the Joint Declaration on Trade and Women's Economic Empowerment on the 11th WTO Ministerial Conference (Buenos Aires Declaration). It is a member of the World Trade Organisation (WTO) and section 39 of the Constitution provides that when interpreting law, the courts may be guided by international and foreign law. Although this Declaration is contested, parts of the Preamble provide good guidance in relation

⁸⁶ Para 26 Limburg Principles.

⁸⁷ Universal Declaration of Human Rights, 1948 adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

⁸⁸ Convention on the Elimination of All Forms of Discrimination Against Women adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with art 27(1) United Nations Treaty Series, vol 1249 13 (our emphasis).

to women's economic participation.⁸⁹ The Preamble of the Buenos Aires Declaration provides in the relevant part:⁹⁰

Acknowledging that international trade and investment are engines of economic growth for both developing and developed countries, and that improving women's access to opportunities and removing barriers to their participation in national and international economies contributes to sustainable economic development.

Although ICESCR does not specifically address the right to water, the right to water is inherent in other rights such the right to the enjoyment of the highest attainable standard of physical and mental health protected in ICESCR. In addition, General Comment 15 provides guidance and confirms the centrality of water in attaining an adequate standard of living. The international, regional and domestic instruments do not provide for an immediately enforceable right, but allow for the progressive realisation of the right to water to progressively realise socio-economic rights. This is similar to the provision in the South African Constitution, except that ICESCR refers to 'maximum available resources' whereas the South African Constitution refers to 'its available resources'. The ICESCR standard is for states to take steps using the 'maximum available resources', whereas the African Charter requires states to use 'available resources', but its Guidelines on Water require states to use 'all available resources', while the South African Constitution requires the use of its 'available resources'.

The following part analyses the interactions of women and water. Rural communities are mostly patriarchal in the distribution of work, with women taking the task of ensuring that water, food and health care are provided. A lack of access to water denies women access to economic opportunities because of the time spent fetching water from distant sources, as well as time spent caring for the sick who may contract water-borne diseases.

89 The Buenos Aires Declaration raised discontent as women's organisations urged states not to sign it as it 'fails to address the adverse impact of WTO rules and instead appears to be designed to mask the failures of the WTO and its role in deepening inequality and exploitation'; <https://www.world-psi.org/en/womens-rights-organizations-call-governments-reject-wto-declaration-womens-economic-empowerment> (accessed 12 May 2020).

90 Preamble Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017.

5 Women and water

When the right to water is undermined, women and children suffer the most. As noted in General Comment 15 and the *Mazibuko* case discussed above, 'water is life'. Women are entitled to exercise and enjoy human rights on the same basis as men, and yet societal and cultural norms impose a greater burden on women and children to access water. Traditional set-ups see women performing more tasks that require water, such as cooking, cleaning, washing clothes, bathing children and sick relatives, and gardening.

When the government fails to provide sufficient water as envisaged in the National Water Standard Regulations, within 200 metres, as is the case in parts of rural Limpopo, this places a burden on women who have to walk long distances to fetch water, which reduces their economically-productive hours each day.⁹¹ The absence of access to water coupled with inadequate sanitation pose substantial health risks for rural communities, and is a breeding ground for cholera and diarrhoea. Women need water for their personal hygiene, including during menstruation, childbirth, and caring for infants, such as cleaning and sterilising materials to be used for new-born babies and toddlers. Access to water is a gateway to the achievement of numerous other rights, and to the reduction of infant mortality rates in rural Limpopo. Recent research also shows that women and children presently are at risk of musculoskeletal disorders and related disabilities as a result of carrying containers of water.⁹²

Furthermore, women have one to four fewer hours per day to participate in market activities (or income generation) in comparison to men.⁹³ This means that great economic potential is lost and socio-economic gains are compromised. The lack of access to water forces women (and girls) to walk longer distances especially during droughts, and they spend additional time fetching water, which time could have been used to attend work or school, and to study in order to successfully compete. Relying on the upper estimate, women lose four hours every day, for 365 days each year. This amounts to 1 460 hours of economically-productive time re-allocated to provide a service which is the responsibility of the state. A denial of access to water deprives rural women of the chance to improve their economic status, because if they do not succeed at school, societal pressure

91 Water Standards Regulations; *Mazibuko* (n 20) para 23.

92 JL Geere, PR Hunter & P Jagals 'Domestic water carrying and its implications for health: A review and mixed methods pilot study in Limpopo Province' (2010) 9 *South African Environmental Health* 52.

93 World Bank Report: Gender Equality and Development (2012) 80.

forces them to marry early and bear children. This deprives women of their rights under article 3 of CEDAW to participate in economic, social and cultural life on an equal footing with men.

A study of 175 countries by Gadikou found that for each additional year of education for women at reproductive age, child mortality was reduced by 9,5 per cent.⁹⁴ The impact of access to potable water and free time would provide opportunities for women at reproductive ages to access education, and could potentially reduce the child mortality rate in Limpopo. A study was conducted in the Pietersburg Mankweng Hospital in Limpopo which found that diarrhoea was the second leading cause of death in infants and children. Diarrhoea accounted for 12,9 per cent in neonatal deaths and 34 per cent of deaths of children aged one to four years. Diarrhoea is so closely connected to the need for access to potable water and adequate sanitation, which in essence means that these deaths could have been avoided.⁹⁵ Additionally, because the majority of rural women in Limpopo do not have access to piped water within 200 metres of their homes, they resort to unprotected water sources such as rivers, dams and springs, and these alternative water sources are sometimes compromised.⁹⁶ Without access to water, the state deprives women of the right to have the highest attainable standard of physical and mental health guaranteed under article 2 of ICESCR.

Multinational corporations in the extractives and manufacturing sectors pose health risks by polluting water sources, especially where villages are situated downstream.⁹⁷ The pollution of water resulting from mining activities is causing land degradation and food insecurity for communities that live and grow crops in those areas, for example through nitrate pollution and acid water.⁹⁸ This exposes women, children and livestock to chemical ingestion which may have serious health impacts. The state must fully monitor the conduct of investors and maximise on the established international customary law principle 'polluter must pay' to ensure that companies that pollute natural resources bear the cost of such pollution, to correct improper

94 E Gakidou et al 'Increased educational attainment and its effect on child mortality in 175 countries between 1970 and 2009: A systematic analysis' (2010) 376 *The Lancet* 969.

95 ST Ntuli, N Malangu & M Alberts 'Causes of deaths in children under-five years old at a tertiary hospital in Limpopo Province of South Africa' (2013) *Global Journal of Health Science* 97.

96 See generally Mothetha et al (n 22).

97 C Bosman 'The hidden dragon: Nitrate pollution from open-pit mines: A case study from the Limpopo Province, South Africa', https://www.imwa.info/docs/imwa_2009/IMWA2009_Bosman.pdf (accessed 28 January 2020).

98 See generally Bosman (n 97).

cost allocation.⁹⁹ The state cannot simply turn a blind eye as this would be in contravention of article 2(1) of ICESCR and paragraph 23 of General Comment 15 of the ESCR Committee.

Finally, the state is obliged under ICESCR to protect the right to water, including 'to prevent third parties from interfering in any way with the enjoyment of the right to water'.¹⁰⁰ Customary law and patriarchal land rights tend to reduce the realisation of the right to water. The fact that women often do not have ownership of land also means that they may be denied access to natural resources from the land, including water. It is the state's duty to prevent customary practices that interfere with the enjoyment of the right to water.

In the *Bhe* case the Court simultaneously heard the matters of *Bhe & Others v The Magistrate, Khayelitsha & Others* and *Charlotte Shibi v Mantabeni Freddy Sithole & Others*. Both matters dealt with inheritance under customary law which followed the male primogeniture rule that excludes women from inheritance by granting succession to the oldest male child.¹⁰¹ In the first case, the applicant had been in a relationship with Mr Bhe (the deceased) and had two children by him although they were not married. The applicant lived with Mr Bhe and their youngest daughter on land acquired by the deceased in a temporary informal shelter built by the deceased. They had bought building materials, but had not yet started to build their house. Upon the death of the deceased the magistrate's court appointed the deceased's father, who lived in the Eastern Cape, as sole heir in terms of section 23 of the Black Administration Act.¹⁰² The deceased's father made it clear that he intended to sell the property on which the applicant lived in order to defray the costs of the funeral.¹⁰³ This would have left the applicant and her two children homeless.

In the second case, Ms Shibi's brother died unmarried, with no children or parents to inherit his estate. The magistrate appointed two male cousins as his heirs, overlooking his sister on the basis that customary law of succession is based on the male primogeniture rule.

99 See further OECD Polluter pays principle: OECD analyses and recommendations 1992, Paros Ref OCDE/GD(92) 81, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD\(92\)81&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(92)81&docLanguage=En) (accessed 28 January 2020); SA Joseph 'The polluter pays principle and land remediation: A comparison of the United Kingdom and Australian approaches' (2014) 1 *Australian Journal of Environmental Law* 25.

100 Para 23 ESCR Committee General Comment 15 (n 80).

101 *Bhe & Others v Khayelitsha Magistrate & Others* (CCT 49/03) [2004] ZACC 17 paras 174 & 176.

102 Act 38 of 1927.

103 *Bhe* (n 101) para 17.

The Constitutional Court held that section 23 of the Black Administration Act¹⁰⁴ was unconstitutional and declared it invalid. The Court also found that 'the rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property'. While this case deals with the inheritance of property, in this instance land that formed part of the deceased estate, land rights are intricately linked with ownership and the use of water resources on the land surface and below the surface. The owner of the land thus has the option to install a borehole or well, subject to compliance with provisions regulating water use as set out in the Water Services Act.¹⁰⁵ Additionally, as land owners women would have the right to be consulted in their own capacity should government or private actors wish to limit their land rights, for example through mining activity, whereas if those rights are passed on to a male heir, they would have very limited say. Although the *Bhe* case serves as a good starting point in the area of succession of land shifting from a patrimonial system to a system of equality for surviving children, more is to be done to address the living law which often does not match the letter of the law.¹⁰⁶

6 Conclusion and recommendations

When the maximum available resources are diverted or tampered with through trade mispricing and aggressive transfer pricing, this reduces state revenue and ultimately undermines the rights of women to access essential social services, such as access to safe drinking water. IFFs are one of the untapped available resources that can facilitate the realisation of the right to water. Therefore, until the government actively pursues and curbs IFFs, it is not fulfilling its constitutional mandate to use its available resources for the realisation of the right to water.

As it stands, rural women in Limpopo are subsidising both the state and multinational corporations and they are deprived of their right to water, economic participation, human dignity, and their right to be equal before the law, and not to be discriminated against. Curbing IFFs through deepening and widening the tax base in a progressive tax system, and fully utilising the remedies allowed in the Income Tax Act to collect revenues on the arm's length amount, will increase the

104 Act 38 of 1927.

105 Act 108 of 1997.

106 *Bhe* (n 101).

available resources for allocation to water infrastructure. By doing this, the government would reduce the burden on rural women in Limpopo, and enable them to have more time to participate in economic, educational, professional or cultural activities, or rest as they are entitled to do under the Universal Declaration.

The paragraphs below note recommendations, including selected actions in the OECD Action Plan on Base Erosion and Profit Shifting which can assist South Africa to reduce IFFs and boost its available resources.¹⁰⁷

First, the state must prioritise transparency and disclosure of multinationals' structures and transactions. Action 12 requires the mandatory disclosure of aggressive tax-planning arrangements. This Action presupposes a willingness and transparency of multinational corporations and technical capacity of the state to monitor compliance, neither of which is guaranteed. However, if mandatory disclosure is imposed in conjunction with mandatory tax information sharing between governments, this could seal some of the cracks through which IFFs are currently flowing out.

Second, the government should support global efforts to develop a multilateral instrument and to amend its existing bilateral tax agreements to plug loopholes and legal gaps, in line with Action 15. However, a multilateral instrument is more useful as a long-term rather than short-term solution as it will require global efforts before it can realise meaningful results, and it may take time to gain the support of the international community to develop such an instrument.

Third, in line with Actions 8-10 and 13, the state must reconsider its approach to transfer pricing and, where necessary, develop new rules or amend existing rules to address current challenges. Rules pertaining to the movement of intangibles, risk and capital must be revised to ensure that profits are allocated appropriately, and are not shifted illicitly. Action 5 notes the need for domestic tax rules to address the 'multiple layers of legal entities' which form the supporting structure for investments, and intra-group transfers through conduits. The state should draw lessons from companies that presented themselves for voluntary disclosure and identify loopholes that have been used, as well as to project potential IFFs, in order to plug these gaps, and protect the available resources.

¹⁰⁷ OECD Action Plan on Base Erosion and Profit Shifting (2013) OECD Publishing, <http://dx.doi.org/10.1787/9789264202719-en> (accessed 28 January 2020).

Finally, the state should monitor the realisation of the right to water through gender-disaggregated data, and it should streamline gender budgeting in line with its commitments under the African Women's Protocol, in order to better address gender-specific issues. The state should critically review and evaluate the progression of the realisation of the right to water in Limpopo, and ensure that it urgently allocates sufficient resources for citizens to access the minimum legal amount of six kilolitres of safe drinking water per person per month in Limpopo's rural areas. The state should reinforce the value of women's participation in economically-productive sectors such as trade and investment, and the state must ensure that it prevents resource diversion in order to direct its maximum available resources towards the realisation of the right to water for women in rural Limpopo.