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Is there a universally acknowledged human right to water?
An analysis of obligations under international, regional and national law:
A case study of Germany and South Africa

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Acronyms

AfCRC  African Charter on the Rights and Welfare of the Child
AU    African Union
CEDAW  Convention on the Elimination of Discrimination against Women
CRC   Convention of the Rights of the Child
CSR   Corporate Social Responsibility
ECHR  European Convention on Human Rights
ECTHR European Court of Human Rights
ECI   European Citizens’ Initiatives
ESC   European Social Charter
EU    European Union
GC    General Comment
HRC   Human Rights Council
ICCPR International Covenant on Civil and Political Rights
ICESCR International Covenant on Economic, Social and Cultural Rights
MDG   Millennium Development Goals
TEU   Treaty on European Union
UDHR  Universal Declaration of Human Rights
UN    United Nations
UNESCO UN Educational, Scientific and Cultural Organisation
UNGA  UN General Assembly
UNHCR UN Human Rights Commission
WHG   Wasserhaushaltsgesetz
A. Chapter I – INTRODUCTION AND CONTEXTUALISATION

I. INTRODUCTION

There is no doubt that water is essential to human life. A lack of water leads to disease, distress and death. Furthermore, a lack of access to water impedes the enjoyment of other human rights such as the right to an adequate standard of living,1 the right to life2 and the right to education.3 Nevertheless, more than half a billion people lack access to this most essential requirement for life,4 health and dignity on a daily basis.5 Notwithstanding the fact that water is a basic necessity for survival and basic living conditions, a human right to water has not been codified in the core international human rights conventions.6 The right may derive and be inferred from other human rights in international conventions or from non-binding declarations. Yet, in practice there is still no state consensus and only a few states have recognised an explicit right to water, be it at international or national level.7

The year 2015 was important with regard to the human right to water and sanitation as the United Nation’s Millennium Development Goals (MDG) area came to an end.8 Goal No. 7 was to ensure environmental sustainability. This encompassed the target to halve, by 2015, the number of people without sustainable access to safe drinking water and basic sanitation.9 By 2010, the world met the target to halve the number of people that live without access to an

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9 ibid. para. 19.
improved source of water.\textsuperscript{10} Altogether, 2.6 billion people gained access to an improved drinking water source between 1990 and 2012.\textsuperscript{11} With regard to the number of people having access to improved sanitation the world did not meet the target. Despite progress it is estimated that in 2015, 663 million people worldwide still used unimproved drinking water sources and 2.5 billion people in developing countries still lacked access to improved sanitation facilities,\textsuperscript{12} which is counterproductive to maintain safe water sources.

While the number of people without access to clean water and sanitation has declined relatively over the past years,\textsuperscript{13} the global water crisis still remains evident, especially amongst poor populations in rural areas.\textsuperscript{14} This issue is multifaceted and does not only relate to personal use and need of water.\textsuperscript{15} It is apparent in the drying up and shrinking of rivers and lakes.\textsuperscript{16} Such occurrences, alongside the pollution of these water bodies, do not only reduce the water available for human usage and are related to health issues, but have an ecological dimension as well.\textsuperscript{17} Water is used for many different purposes such as agriculture and industrial sectors. It is fundamental for food security, economic development and livelihood security. The water crisis can thus be described as a multi dimensional crisis.\textsuperscript{18} This dissertation, however, focuses on the human dimension of the water crisis only, addressing the issue strictly from a human rights perspective. Furthermore, due to spatial constraints, this dissertation focuses on the water component of the human right to water without addressing the sanitation component.

One way to deal with the global water crisis is to try to create a legal means that provide a right to safe drinking water and enough water for basic

\textsuperscript{10} UNICEF and WHO ‘Progress on sanitation and drinking water’ (2015) 29.
\textsuperscript{11} Ibid. 7.
\textsuperscript{12} Ibid.
\textsuperscript{13} Ibid.
\textsuperscript{15} IT Winkler ‘The Human Right to Water, Significance, Legal Status and Implications for Water Allocation’ (2012) 1.
\textsuperscript{17} IT Winkler ‘The Human Right to Water, Significance, Legal Status and Implications for Water Allocation’ (2012) 1.
\textsuperscript{18} Ibid.
personal needs for all humans. The UN General Assembly and the Human Rights Council passed matching resolutions in 2010 recognising the right to water.\textsuperscript{19} Notwithstanding these affirmations, which are important political steps towards the recognition of a human right to water, questions still remain from a legal perspective as to the status and scope of such a right to water and whether or not it is legally binding and based in international human rights law.\textsuperscript{20} This is because only few international human rights instruments mention a right to water explicitly.\textsuperscript{21} Furthermore, the human rights instruments that do mention a human right to water explicitly do so only for specific groups of people, such as children and women.\textsuperscript{22} Lastly, all explicit recognitions that aim at granting a universal right to water to all humans, for example the aforementioned resolutions do not have binding character for states parties.\textsuperscript{23}

Thus, this minor dissertation attempts to address the following questions: Whether or not there is a universally acknowledged human right to water in international human rights law? If such a right exists, to what extent does it do so and how are states obligated to respect, protect and fulfil such a right under international, regional and national law? Furthermore, this dissertation considers to what extent private water companies are legally obligated under a human right to water under international law.

This dissertation discusses the aforementioned research questions in six chapters. After the introduction, some background information and statistics concerning the world water situation are provided and the consequences of a lack of water for health and development issues are outlined. The second chapter provides an analysis of the current legal status of a right to water in international human rights instruments and other potential international legal

\textsuperscript{19} United Nations General Assembly (UNGA) Resolution 'The human right to water and sanitation' adopted 28 July 2010 A/RES/64/292, 3 August 2010; Human Rights Council (HRC) 'Human rights and access to safe drinking water and sanitation' A/HRC/RES/15/9, 6 October 2010.
\textsuperscript{20} IT Winkler 'The Human Right to Water, Significance, Legal Status and Implications for Water Allocation' (2012) 11.
\textsuperscript{22} Ibid.
\textsuperscript{23} P Thielbörger 'The Right(s) to Water, The Multi-Level Governance of a Unique Human Right' (2014) 2 et seq.
foundations for such a right. Furthermore, it is argued that the attempts of the UN to acknowledge a human right to water in resolutions such as UNGAR2010 (A/RES/64/292) and HRCR2010 (A/HRC/RES/15/9) are only expressions of growing awareness and sensitivity since they do not provide a legally binding recognition of the human right to water. An outline is provided as to how the aforementioned resolutions interpret the right to water and deal with the promotion of such a right by linking it to other recognised human rights.

In order to make the discussion more descriptive and to support the understanding of the legal basis, the third chapter offers case studies on the laws regarding water and their implementation in Germany and South Africa and discusses whether or not those two states comply with their obligations under the international, regional and national legal systems. Chapter four looks at companies as important stakeholders in the sphere of the right to water. Consideration is given to how they are involved in implementing the right to water and which risks for violating the human right to water this entails. Furthermore, potential sources for holding companies legally responsible for their violations of a human right to water are discussed. Chapter five provides brief remarks on discrepancies regarding the implementation of the right to water and offers findings. Chapter six provides a concluding summary.

II. CONTEXTUALISING THE PROBLEM

1. The World Water Crisis - How Much Water is There?

Fresh water is relatively limited on earth. Oceans cover 70 per cent of the world’s surface. This amounts to 97 per cent of the total water supply on earth. But, this is all salt water. The majority of drinkable water is stored in permanent snow covers and frozen in inaccessible glaciers. In addition freshwater from rivers and lakes only makes up less than one per cent of drinkable water. Moreover, it is an alarming reality that the world’s water supply is under great stress due to the ongoing growth of the world population, pollution,

unsustainable consumption patterns, low efficiency in water-use, poor management practices and inadequate investment in infrastructure.\textsuperscript{26} It is estimated that 1.8 billion people will be living in countries with absolute water scarcity by 2025.\textsuperscript{27}

The lack of access to water is not always necessarily a question of availability. Although it is scarce, there is sufficient water to meet all people’s basic needs, even in countries where water availability is insufficient because of geographical circumstances.\textsuperscript{28} Only a small percentage, around five to 10 per cent, of the total water consumption can be allotted to household uses,\textsuperscript{29} including non-essential uses such as watering lawns, car-washing or filling swimming-pools.\textsuperscript{30} Other sectors such as industry and agriculture use a much greater amount of water than private households.\textsuperscript{31} The Human Development Report 2006 concludes that “[t]he scarcity at the heart of the global water crisis is rooted in power, poverty and inequality, not in physical availability.”\textsuperscript{32}

2. Inequalities in Accessing Water

In developed countries water and sanitation appropriate for personal needs is almost universally available. This relative abundance of water has blunted public recognition of the fundamental connection between clean water and human life.\textsuperscript{33} In those industrialised societies most people take access to clean

\textsuperscript{28} "IT Winkler ‘The Human Right to Water, Significance, Legal Status and Implications for Water Allocation’ (2012) 7.
\textsuperscript{30} "IT Winkler ‘The Human Right to Water, Significance, Legal Status and Implications for Water Allocation’ (2012) 7.
\textsuperscript{31} Ibid.
water and sanitation for granted. However, in most parts of the world and for a huge number of people clean water is a scarcity.

The problem of access to water does not only exist because of the relative scarcity of water that cannot be substituted by any other resource. A huge issue are the inequalities that govern access to water worldwide. Consumption greatly differs between the Global North and the Global South. Private water demands increase if an adequate quality of life and acceptable sanitary conditions are ensured. The data here ranges from 20 to 80 litres of water per person per day. However, not even the minimum standard can be assured for half of the world’s population. While in African rural areas in arid environments approximately 20 litres are at a person’s disposal per day, a US citizen uses approximately 300 litres per day. Inequalities regarding access to water even exist within countries or even within the same city. The wealthier neighbourhoods in the Global South are often provided with abundant water at low prices, whereas people living in disadvantaged neighbourhoods or informal settlements often have access to less than 20 litres per day. People living in underprivileged, low-income urban areas are particularly disadvantaged regarding access to water. It is estimated that more than 30 to 60 per cent of the world’s population live in such informal settlements. The improvement of living conditions in these areas is rarely a priority for politicians. Since such settlements are regularly not supplied with water through the public water network, inhabitants are often forced to buy water from private water vendors, whose prices can be significantly higher than piped water supply, or they are

34 Ibid.
35 Ibid.
37 Ibid. 3.
39 Ibid. 142.
40 Ibid.
forced to use water from unsafe sources.\textsuperscript{43} The amount people need to spend on drinking water can sometimes be a great portion of their income, for example up to 25 per cent in Mexico City.\textsuperscript{44} A similar picture to poor living conditions in urban disadvantaged areas can be found in poor rural settlements. Those are usually given low priority when it comes to development and resource distribution.\textsuperscript{45} According to assessments for the framework of the MDGs, 96 per cent of the global urban population used improved drinking water sources in 2015, compared to 84 per cent of the population living in rural areas. This means eight out of ten people without access to improved drinking water sources live in rural areas.\textsuperscript{46}

### 3. Impact on Health and Development

The lack of clean water and adequate sanitation are two of the main causes of poverty, malnutrition and have dire health impact in general.\textsuperscript{47} Water is the most essential element for human life. A person can survive without water for three to five days, whereas the same person could survive without food for about eight weeks.\textsuperscript{48} Especially amongst children in developing countries, where access to clean drinking water is scarce and poor hygiene and inadequate sanitation are common, water-related diseases are a leading cause of death.\textsuperscript{49} Nearly 4000 children die every day of the consequences of such water-related diseases.\textsuperscript{50} Drinking untreated, unsafe water causes water-borne diseases, such as diarrhoea, typhoid and cholera.\textsuperscript{51} The most common disease is diarrhoea; estimated to account for 21 per cent of all deaths of children under the age of

\begin{itemize}
\item \textsuperscript{43} C Tortajada ‘Water Management in Mexico City Metropolitan Area’ (2006) 22 International Journal of Water Resources Development 361.
\item \textsuperscript{44} Ibid.
\item \textsuperscript{45} IT Winkler ‘The Human Right to Water, Significance, Legal Status and Implications for Water Allocation’ (2012) 4.
\item \textsuperscript{46} UNICEF and WHO ‘Progress on sanitation and drinking water’ (2015) 4.
\item \textsuperscript{50} Ibid.
\item \textsuperscript{51} B Hartley and HJ van Meter ‘The Human Right to Water: Proposal for a Human Rights-Based Prioritization approach’ (2011) 68.
\end{itemize}
five in developing countries. This results in 1.5 million deaths of children under the age of five each year. On a daily basis, a lack of safe drinking-water and adequate sanitation claims about 6,000 lives, most of them children. This amounts globally to more people dying from diarrhoea than from tuberculosis or malaria and more people dying from water-related diseases than in armed conflicts.

Furthermore, the lack of water has a profound impact on human development. Water-related diseases prevent children from attending school which results in the loss of 443 million unattended school days per year. Such a lack of education has subsequent negative effects on developing prosperous societies and eradicating poverty. In addition, water has to be carried from its source where water supply is not easily accessible. Data representing 48 per cent of the Sub-Sahara African population indicates that girls and women are primarily responsible for such water collection. The hours spent daily to collect water lead to girls not being able to attend school and women being unable to engage in productive social activities. Thus, addressing the lack of access to water would not only have direct benefits, but it would also play a huge role for improvements in health and education issues, poverty reduction and sustainable development.

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54 UN News Centre ‘Ban Ki-moon urges greater efforts to tackle ‘silent crisis’ of safe water for all’ (24 October 2007).
57 Ibid. 6.
III. THE NEED FOR A HUMAN RIGHT TO WATER

An explicitly recognised and codified human right to water can play a pivotal role in addressing the world water crisis, its related health, education and poverty issues as well as in the allocation of resources.\(^\text{61}\) A human right to water would, as any human right, impose three kinds of obligations on states. First, governments would need to respect the right to water. This is achieved by refraining from unfairly interfering with people’s access to water. Secondly, governments would have to protect the right to water, by protecting people’s access to water from interference by others.\(^\text{62}\) Thirdly, governments would have to fulfil the right by adopting necessary actions and provisions directed towards the full realisation of the right. This can be achieved by passing legislation, enunciating and implementing programmes and allocating budgets.\(^\text{63}\) However, in the absence of a legally binding recognition of rights in general, the corresponding obligations of states to respect, protect and fulfil the respective right do not apply in practice.\(^\text{64}\) This means that right holders would not be able to exercise their rights, therefore, violations would remain without remedy.\(^\text{65}\) To address a lack of access to water, this would mean, that until a legally binding self-standing right to water is established in international law, the lack of access to water results in situations where “there is no breach of obligation, nobody at fault, nobody who can be held to account, nobody to blame and nobody who owes redress.”\(^\text{66}\) The problem with only a derivative right to water that is inferred from other human rights, is that state obligations would as well depend on the violation of the primary right. However, a “moral” right to water may sometimes be infringed upon whereas the primary right is not. This would leave victims without any legal redress until a human right to water is established as a primary and not only a derivate right.\(^\text{67}\) Thus with still a very high number of people lacking access to clean water and the world water crisis worsening the

\(^{61}\) Ibid. 8.
\(^{63}\) Ibid.
\(^{64}\) TS Bulto ‘The Emergence of the Human Rights to Water in International Human Rights Law: Invention or Discovery?’ (2011) 4.
\(^{65}\) Ibid.
situation of access to water, the need for the acknowledgment of a human right to water is keeping its importance.

IV. JUSTIFICATION FOR CASE STUDY

This dissertation considers the case studies of Germany and South Africa in Chapter III Part C for the following reasons.

On the international level both states have ratified the relevant international human rights instruments, so the international obligations are comparable.\(^{68}\) In contrast, at a regional level, the European context is distinct from the African one given the former’s relatively well working water supply system as opposed to the scarcity of water and the problem of access to water in (Sub-) Saharan Africa.\(^{69}\) A comparison between Germany and South Africa can therefore exemplify the similar as well as divergent obstacles that arise in the protection and fulfilment of a human right to water. Furthermore, the fact that South Africa, a developing country,\(^{70}\) enshrined a right to water in its constitution, while Germany, one of the world’s largest economies,\(^{71}\) has not, raises some interesting questions. For instance does the fact that there is no water scarcity in Germany, which has a good water supply system, mean that there is no need to entrench such a right in the constitution? Or has the existence of legislation regulating access to water and water quality led to the situation that there is no scarcity of water in Germany? At the same time, even though South Africa has enshrined a right to water in its constitution, there are still problems regarding a comprehensive water supply and access to water.\(^{72}\)


B. Chapter II - LEGAL STATUS OF A HUMAN RIGHT TO WATER UNDER INTERNATIONAL LAW

This chapter analyses the legal status of a human right to water under international law and under international customary law. Firstly, international human rights instruments that mention a right to water explicitly, however, only apply to specific groups of individuals, are discussed. Subsequently this dissertation takes a closer look at the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the provisions in those two conventions one could infer a human right to water from, since they both do not mention such a right explicitly. Furthermore, international declarations and resolutions that have been passed on a human right to water, as well as the UN’s General Comment No. 15 are analysed as a potential legal basis for a universal human right to water. Finally, this chapter discusses whether or not an explicit human right to water may have been established under international customary law.

I. A HUMAN RIGHT TO WATER UNDER INTERNATIONAL LAW

To positively assume the existence of a human right to water under international law and to take it seriously, it should meet at least three criteria that are inherent in the term “human right”.\(^73\) It is not assumed, however, that this applies necessarily to all human rights. The human right to water needs to be comprehensive in terms of universal, legally binding and self-standing.\(^74\) Foremost, as a “human” right it would need to be applicable to all human beings and not only to certain individuals or groups. As a “right”, different from a mere political aim, it would need to be accepted by states as a binding obligation for them.\(^75\) Lastly a human right to water would have to be a right on its own and not only derive from other explicitly recognised human rights, such as a right to life, food or health.\(^76\) Only if a right to water is explicitly codified as a self-

\(^73\) P Thielbörg ‘The Right(s) to Water’ (2014) 56.
\(^74\) Ibid.
\(^75\) Ibid.
standing right and not only another claim under an already existing explicit human right, can it be taken seriously.\textsuperscript{77} The key to a comprehensive protection of the right requires governments to enforce such a right by providing and protecting access to water.\textsuperscript{78} To ensure government enforcement and to enable individuals to hold their governments accountable, justiciability of the right to water is crucial. The problem with only a derivative right to water that is inferred from other human rights is that state obligations would as well depend on the violation of the primary right.\textsuperscript{79} Hence, justiciability is more difficult and complicated if a right is not explicitly codified.\textsuperscript{80} International human rights instruments, UN resolutions and other international political documents are analysed in this section in order to assess whether or not such a right currently exists under international human rights law.

1. International Human Rights Instruments

a) CEDAW and CRC

A right to water is mentioned in only few human rights treaties explicitly at the universal level. Art. 14 (2) (h) of the Convention on the Elimination of Discrimination against Women (CEDAW) obligates states parties to ensure to rural women the right to enjoy adequate living conditions in particular in relation to water supply.\textsuperscript{81} Furthermore, the right to water is mentioned in Art. 24 (2) (c) of the Convention on the Rights of the Child (CRC).\textsuperscript{82} States parties are mandated to implement children’s rights to health by taking appropriate measures to combat diseases and malnutrition through \textit{inter alia} the provision of clean drinking-water.\textsuperscript{83} The above two provisions, in CEDAW and the CRC, are the only explicit codification of a right to water in international human rights treaties.

\begin{footnotes}
\item[77] P Thielbörger ‘The Right(s) to Water’ (2014) 57.
\item[79] See Part A. Chapter I: III.
\item[80] Ibid.
\item[81] UNGA CEDAW, A/34/180 (1979).
\item[82] UNGA CRC, A/44/25 (1989).
\item[83] Ibid. Art. 24 (2) (c).
\end{footnotes}
Applying the three criteria mentioned above, it becomes clear that the above two provisions cannot be regarded as a recognition of a universal human right to water. Firstly, indeed the provisions are legally binding, at least on those states that have ratified the conventions and accepted them as binding upon them. Secondly, whether or not the above two forms of recognition of a right to water are also self-standing is arguable. Since the right to water is not only implied but explicitly mentioned, one could argue it is self-standing in the two aforementioned conventions.\textsuperscript{84} On the other hand, the provisions are far from comprehensive in terms of being self-standing.\textsuperscript{85} For instance, the provision in the CRC only relates to the quality of water (clean drinking-water), thus it deals with only a certain aspect relating to water, but it does not deal with access to, or the amount of water. Furthermore, the provision is set in the context of the right to health rather than stated as an independent right to water.\textsuperscript{86} The conventions are also limited to a certain group that are afforded the right, namely women and children. By definition, a universal right to water would have to be applicable to all human beings.\textsuperscript{87} Therefore, neither convention can be regarded as incorporating recognition of a universal human right to water.

b) International Bill of Human Rights

A human right to water is not mentioned explicitly in the International Bill of Human Rights despite being the most comprehensive and general human rights framework of our time. Neither the Universal Declaration of Human Rights (UDHR),\textsuperscript{88} ICCPR\textsuperscript{89} nor the ICESCR\textsuperscript{90} mention a right to water, or water in any other context specifically. However, one can infer a right to water from several human rights explicitly mentioned in the conventions which have strong links to the basic need for water. Amongst them are the right to life,\textsuperscript{91} the right to the highest attainable standard of physical and mental health\textsuperscript{92} or an adequate

\textsuperscript{84} P Thielbörger ‘The Right(s) to Water’ (2014) 58.
\textsuperscript{86} Ibid.
\textsuperscript{87} P Thielbörger ‘The Right(s) to Water’ (2014) 58.
\textsuperscript{88} UNGA UDHR (1948).
\textsuperscript{89} UNGA ICCPR (1966).
\textsuperscript{90} UNGA ICESCR (1966).
\textsuperscript{91} Art. 6 (1) UNGA ICCPR (1966).
\textsuperscript{92} Art.12 (1) UNGA ICESCR (1966).
standard of living including the right to housing or food.93 Whether a derivative right to water would be accepted as a right of its own, it was suggested that the attribution “right with a unique status” would, however, have to be added.94

(1) Universal Declaration of Human Rights
When considering the UDHR, Art. 25 (1) is of particular interest. It states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself (...), including food, clothing, housing and medical care (...).”95 A right to water is not specifically mentioned, despite there being a reference to the right to food. This raises the following questions: Whether the drafters of the UDHR did not think about water during the drafting process; or whether they did not regard it as important as food; or whether they simply assumed it to be included anyway, since human beings cannot survive without water.

One reason for why water was not explicitly mentioned in the UDHR is that the drafters did not want the explicitly mentioned rights like food and housing to be understood to be exhaustive but rather representative or indicative for rights that could be included.96 Thus, it is argued that the drafters of the UDHR did not explicitly exclude water; they considered water too obvious to be included as one of the “component elements” since it is so critical to the preservation of life that it did not need to be spelled out.97 However, this reason is not all that convincing, given that water related issues were already obvious to the drafters of the UDHR in the 1930s and 1940s where droughts were common in the industrialised world. Hence the drafters could have engaged with the problem further. Furthermore, there has been no official UN explanation as to why a right to water has not been included in the UDHR.98

93 Ibid. Art. 11 (1).
94 P Thielbörg ‘The Right(s) to Water’ (2014) 88.
95 Art. 25 (1) UNGA UDHR (1948).
97 Ibid.
(2) ICCPR
When considering the ICCPR, the relevant article one can infer a human right to water from is the inherent right to life in Art. 6. The basic notion in Art. 6 that “[e]very human being has the inherent right to life”99 was tacitly invoked by the UNGA in its 2010 resolution.100 The UNGA2010 included a reference, amongst others, to the ICCPR. Stating that it “[r]ecognises the right to safe and clean drinking water (…) as a human right that is essential for the full enjoyment of life (…).”101 However, despite the fact that water is undeniably necessary for the existence of human life, the connection between the ICCPR’s right to life and the human right to water was not made by referring to Art. 6 explicitly.102

In the same year, the Human Rights Council linked its recognition of the right to water not to the right to life in Art. 6 ICCPR.103 Instead the HRC’s derivation was linked to the right to an adequate standard of living stated in Art. 11 ICESCR,104 dealt with below. Furthermore, it was only stated that a right to water is “inextricably related to the right to (...) life (...)”105. The different conceptions in the two aforementioned resolutions lead to the fact that states that have ratified the ICCPR but not the ICESCR may not be required to recognise the human right to water under the HRC’s perception.106 This includes the United States since they still have not ratified the ICESCR.107

(3) ICESCR
There is no explicit mention of a human right to water in the ICESCR. Art. 11 (1) recognises “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing (...)."108 In addition to Art. 11 (1) ICESCR, Art. 12 ICESCR recognises "the right of

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99 Art. 6 UNGA ICCPR (1966).
100 UNGA ‘The human right to water and sanitation’ A/RES/64/292, 28 July 2010.
101 Ibid. para. 1.
103 See HRC ‘Human rights and access to safe drinking water and sanitation’ A/HRC/RES/15/9, (2010).
104 Ibid. para 3.
105 Ibid.
everyone to the enjoyment of the highest attainable standard of physical and mental health.”\textsuperscript{109} Since water is a necessary prerequisite to maintain even the most basic standard of living and, is necessary for maintaining a person’s health, one should assume that it must be tacitly included in any definition of those human rights.\textsuperscript{110} Thus all states that signed the ICESCR would have agreed to take appropriate actions to ensure the right to water for all their citizens.\textsuperscript{111} However, since the right to water is not explicitly mentioned, this assumption cannot be easily made, even though it may seem the logical conclusion. However, this perception was incorporated into the UN’s General Comment No. 15 which recognised the human right to water as part of Art. 11 and Art. 12 ICESCR.\textsuperscript{112} Since, the right to water is essential to achieve the human rights to “an adequate standard of living”\textsuperscript{113} and “the enjoyment of the highest attainable standard of health”\textsuperscript{114} the human right to water must be inferred from them. General Comment No. 15 is dealt with in detail in section B. Chapter II: I. 3. of this dissertation.

One difference to note is, that unlike the ICCPR, the ICESCR contains a “progressive realisation” provision allowing states to realise the rights set out in the ICESCR gradually, with no timetable given.\textsuperscript{115} This means that even if a human right to water could be inferred from the ICESCR, states would not be under pressure to conduct measures for the full realisation of the right immediately or in any specific period of time. This seems like a necessary approach to give states facing water shortage enough time to realize their obligations regarding a right to water. However, this “progressive realisation” provision could conversely encourage states that are not willing to enforce their obligations under a human right to water, to not act at all. Also of note is that the ICESCR is not universally enforceable for individuals. An optional protocol to the ICESCR has been adopted in 2008 and has entered into force in May

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\textsuperscript{109} & Art. 12 (1) UNGA ICESCR (1966). \\
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\textsuperscript{111} & Ibid. \\
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\textsuperscript{112} & P Gerber and B Chen ‘Recognition of the Human Right to Water. Has the Tide Turned?’ (2001) 21. \\
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\textsuperscript{113} & Art. 11 (1) UNGA ICESCR (1966). \\
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\textsuperscript{114} & Art. 12 (1) UNGA ICESCR (1966). \\
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\textsuperscript{115} & B Hartley and HJ van Meter ‘The Human Right to Water: Proposal for a Human Rights-Based Prioritization approach’ (2011) 74. \\
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2013 to create an individual complaint process.\footnote{\textsuperscript{116} United Nations General Assembly ‘Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (10 December 2008) entered into force 5 May 2013.} However, only 45 states have signed it and 21 states have ratified it. With neither Germany nor South Africa having signed nor ratified it.\footnote{\textsuperscript{117} United Nations Treaty Collection, 3. a Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Chapter IV Human Rights <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en> accessed: 20.09.2015.} This is why, even if a human right to water would be recognised and linked to the ICESCR by General Comment No. 15, there are currently no means or timelines for realisation, individual complaint or enforcement, that would allow to determine an actual universal enforceable right.\footnote{\textsuperscript{118} B Hartley and HJ van Meter ‘The Human Right to Water: Proposal for a Human Rights-Based Prioritization approach’ (2011) 74 \textit{et seq.}}

2. \textbf{International Declarations and Resolutions}

Over the decades different international declarations and resolutions have been passed on a human right to water that could function as a basis for a human right to water besides the international human rights treaties. An analysis of relevant declarations and resolutions follows in this section.

\textbf{a) Early Recognition of the Right to Water}

The awareness of the importance of the right to water was firstly enunciated in the 1970s. The “Mar del Plata Declaration” stated that “[a]ll people (...) have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”\footnote{\textsuperscript{119} Report on the UN Water Conference ‘Mar del Plata’, 14-25 March 1977, E/CONF.70/29’, 66 <http://www.ircwash.org/sites/default/files/71UN77-1616.pdf> accessed 15.09.2015.} Further “[i]t is universally recognised that the availability to man of that resource is essential both for life and his full development, both as an individual and as an integral part of society.”\footnote{\textsuperscript{120} Ibid. 67.} In its Agenda 21 the UN Conference on Environment and Development reaffirmed the Mar del Plata Declaration provisions in the early 1990s.\footnote{\textsuperscript{121} UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Agenda 21 <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=52> accessed: 15.09.2015.} Moreover, the Programme of Action of the International Conference on Population and Development in Cairo,
which was attended by almost 180 states,\textsuperscript{122} stated that people have a right to an adequate standard of living including adequate water and sanitation.\textsuperscript{123} Furthermore, the UN General Assembly reaffirmed in its resolution 54/175 concerning the right to development, the rights to food and clean water as fundamental human rights.\textsuperscript{124}

b) Present Recognition of a Right to Water

Two more recent resolutions, the UNGAR2010 and the HRCR2010, both adopted in 2010, are politically important when it comes to the recognition of a human right to water. The UNGA adopted a resolution utterly devoted to “[t]he human right to water and sanitation” (hereinafter referred to as the UNGAR2010).\textsuperscript{125} It “[r]ecognises the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”\textsuperscript{126} The fact that this resolution was passed without any votes against it, strongly suggests that a human right to water is now recognised by the international community as part of the international human rights body.\textsuperscript{127}

Another recent UNGA resolution “[r]eaffirm[ed] the recognition of the right to safe drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights” in 2013.\textsuperscript{128} However, these two resolutions, as well as the others mentioned above, have no binding character. They have all suggested recognising a human right to water explicitly by identifying it as a right on its own and, therefore, giving it self-standing entitlement.\textsuperscript{129} The resolutions also understand the right to be comprehensive in terms of being applicable to all humans.\textsuperscript{130} However, these resolutions are only political affirmations. They may be called “declarations of intent” or “global

\textsuperscript{123} ibid. Principle 2 p. 11.
\textsuperscript{125} UNGA ‘The human right to water and sanitation’ A/RES/64/292 (2010).
\textsuperscript{126} ibid. para 1.
\textsuperscript{129} P Thielbörger ‘The Right(s) to Water’ (2014) 59.
\textsuperscript{130} ibid.
appeals”, but in the end they are no more than that, since they cannot provide a legal recognition of the human right to water that could be legally binding on states parties. This is why they cannot be considered a legal source for a human right to water.\(^\text{132}\)

Another resolution was adopted by the Human Rights Council (HRC) on “human rights and access to safe drinking water and sanitation” in 2010 (hereinafter referred to as the HRCR2010).\(^\text{133}\) The resolution confirmed 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.\(^\text{134}\)

This led to the publication of a press statement by the Special Rapporteur on the human right to water, stating that “this means that for the UN, the right to water and sanitation, is contained in existing human rights treaties and is, therefore, legally binding.”\(^\text{135}\) However, this statement can be easily misunderstood and must be read with caution.\(^\text{136}\) Since Art. 10 and Art. 14 of the UN Charter refer to UNGA resolutions as “recommendations”\(^\text{137}\) it is well established in international law that UNGA resolutions are of no legally binding character.\(^\text{138}\) The same applies to resolutions of the HRC, which was founded as a subsidiary organ of the UNGA.\(^\text{139}\) Therefore, the human right to water could not become legally binding as treaty law only by the means of this single HRC resolution. The resolution could not establish an actual right to water as being part of hard law, and thus could not change its status. Neither did it create a new right nor did it provide a legally binding interpretation of Art. 11

\(^{131}\) Ibid.
\(^{132}\) Ibid.
\(^{133}\) HRC ‘Human rights and access to safe drinking water and sanitation’ A/HRC/RES/15/9, (2010) para. 3.
\(^{134}\) Ibid.
\(^{136}\) P Thielbörger ‘The Right(s) to Water’ (2014) 59.
\(^{138}\) P Thielbörger ‘The Right(s) to Water’ (2014) 59.
ICESCR. Nevertheless, when examining the UN Special Rapporteur’s statement precisely one will assert that she said “(...) for the UN (...)” the human right to water is legally binding. She did not claim that it was binding on States, but stated only that the UN would accept it as part of Art. 11 ICESCR. It can thus be assumed that the UN will never challenge the existence of a human right to water, otherwise it would behave in an undesirable way and against good faith, which the UN most likely would want to prevent.

3. General Comment No. 15
   a) Content and Scope of General Comment No. 15

The most important step for the recognition of a human right to water was the acknowledgment in General Comment No. 15 (GC No. 15), adopted by the UN’s Committee on Economic, Social and Cultural Rights (Committee) in 2002. There it was determined that:

[...]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

GC No. 15 was supposed to clarify the content of a human right to water and support states in realising their obligations respectively to the right to water. GC No. 15 has established a moral obligation and potential violations of states parties to the right to water have been determined. The Committee stated that “[t]he human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other human rights.”

The Committee linked the human right to water to two provisions of the

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140 P Thielbörger ‘The Right(s) to Water’ (2014) 60.
141 Ibid.
142 Ibid. et seq.
144 Ibid. para. 2.
146 Ibid.
ICESCR: the “right to an adequate standard of living (...) including adequate food, clothing and housing (...)” under Art. 11 ICESCR\textsuperscript{148} and Art. 12 ICESCR which makes states recognise “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.\textsuperscript{149} This is not a novelty since the Committee has previously acknowledged access to safe drinking water as a determinant for health, in its General Comment No. 14.\textsuperscript{150} To a much lesser degree GC No. 15 also linked a right to water to other human rights enshrined in the UDHR, especially the right to life and human dignity.\textsuperscript{151} Furthermore, GC No. 15 sets out a normative content of the human right to water for the first time. It acknowledges that due to diverse conditions and circumstances all over the world the actual scope and dimension essential for the full realisation of the right to water can differ.\textsuperscript{152} However, the right to water “entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”.\textsuperscript{153} Another prerequisite is that it must be available on a non-discriminatory basis.\textsuperscript{154} Hence water must be available in sufficient and continuous amounts for personal and domestic use. Water must predominantly be provided for the purpose of drinking, sanitation, laundry, preparation of food and personal as well as household hygiene.\textsuperscript{155} Water must also be of acceptable quality, which means that it must be safe, thus free from micro-organisms, chemical substances and radiological hazards that could create risks to a person’s health.\textsuperscript{156} What is more, water must be accessible, which calls for access to water within safe physical reach for every human being.\textsuperscript{157} This is especially with regard to women, who are often responsible for fetching water from distant sources in many communities, therefore, safety must be ensured while the women access the water source.\textsuperscript{158} Finally, the requirement of affordable water does not entail that water should be

\begin{itemize}
\item \textsuperscript{148} Art. 11 (1) UNGA ICESCR (1966).
\item \textsuperscript{149} Art. 12 (1) UNGA ICESCR (1966).
\item \textsuperscript{150} UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, (2000) UN Doc. E/C.12/2000/4, para 11.
\item \textsuperscript{151} General Comment No. 15 (2002) UN Doc. E/C.12/2002/11, para. 3.
\item \textsuperscript{152} Ibid. para. 12.
\item \textsuperscript{153} General Comment No. 15 (2002) UN Doc. E/C.12/2002/11, para. 2.
\item \textsuperscript{154} Ibid. para. 12 (a) – (c).
\item \textsuperscript{155} Ibid. para. 12 (a).
\item \textsuperscript{156} Ibid. para. 12 (b).
\item \textsuperscript{157} Ibid. para. 12 (c) (i).
\item \textsuperscript{158} P Thielbörger ‘The Right(s) to Water’ (2014) 66.
\end{itemize}
provided for free. However, water, water facilities and services have to be affordable to each and everyone in society or in a certain community.\(^{159}\)

Moreover, states are, as for every human right, called upon to respect, protect and fulfil the human right to water.\(^ {160}\) Furthermore, they are obligated to respect some general obligations outlined in GC No. 15, which have to be attended to with immediate effect. Included is the provision of access to the minimum essential amount of water for personal and domestic use on a nondiscriminatory basis, access to water in distances reachable and fair and reasonable distribution of the water available.\(^ {161}\) In order to comply with these obligations national water plans of action and strategies have to be formulated, monitoring instruments and programmes to protect vulnerable groups have to be adopted and appropriate measures need to be taken up to prevent water-related diseases.\(^ {162}\)

\[b\] Significance and Critique of General Comment No. 15

GC No. 15 is the most explicit acknowledgment of a human right to water in an independent and universal perception. However, there exist points of criticism. Especially the use of General Comments as tools for international law-making in general, as well as the specific style and content of GC No. 15 were subject to criticism.

One obvious weakness of General Comments is that they are authoritative interpretations of treaty provisions only.\(^ {163}\) GC No. 15 can thus not be a legally binding interpretation of the ICESCR. Furthermore, General Comments are only interpretations and not part of “hard law”.\(^ {164}\) However, they are interpretation of a committee of specialists who are asked to provide their expert opinion in expressing general interpretations of a certain convention.

\(^{160}\) Ibid. para 20-29.
\(^{161}\) Ibid. para 37.
\(^{162}\) Ibid. para 37 (f-i).
\(^{164}\) P Thielbörger ‘The Right(s) to Water’ (2014) 67 et seq.
Such interpretations must, therefore, be regarded as very valuable and influential. However, GCs cannot create new legal obligations for states and in the end remain, like the resolutions analysed above in this chapter, not more than an expression of intent and global appeals.

Additional criticism was expressed by Tully against the normative content of GC No. 15. The Committee drafting GC No. 15 assumed that the word “including” indicated that the catalogue in Art. 11 ICESCR was not intended to be exhaustive. It was argued by Tully that “including” is an imprecise term which can lead to speculations about what other characteristics should be included in Art. 11 ICESCR. Tully points to the danger of creating ever new human rights by arguing that rights such as access to electricity or the internet could then as well be included and be considered new human rights derived from Art. 11 ICESCR. He argues that the Committee’s purpose to render the access to water an inherent right is not served well, because of too much inference from other human rights. The approach to infer the right to water from the existing human right to an adequate standard of living which is quite vague itself subverts the principle of legal security. Tully criticised the Committee for exceeding its interpretative competence. He argued that the Committee interpreted the Convention against the will of the drafters, by working out a new right under Art. 11 ICESCR. Thus the Committee has not respected the decision of the drafters and has tried, without having the power to do so, to rewrite the Convention and, therefore, has taken a position non-concordant with the view of the states parties.

Tully further argues that one can interpret the preparatory works during the drafting process of GC No. 15 in a way that water was seen by the drafters as such a fundamental right, similar to air, that its inclusion was not necessary.

165 Ibid. et seq.
168 Ibid.
169 Ibid.
170 Ibid.
171 Ibid.
and thus it was omitted deliberately.\textsuperscript{173} The deliberate omission of circumstances must in Tully’s opinion weigh more than arguments suggesting that water was understood to be implicitly included.\textsuperscript{174} Tully’s view is not fully convincing regarding the point that a deliberate omission is more significant than an implicit inclusion. Nevertheless, an inclusion of an important right should never be implicit but always explicit to avoid such speculations. However, ultimately one can only guess whether the right to water was deliberately omitted or not, since the preparatory work does not give clear evidence for any one of the two sides.\textsuperscript{175} The right to water was briefly alluded during the drafting process of the ICESCR but in the end not incorporated.\textsuperscript{176} What is more, Tully points out that state practice does not provide evidence that states are willing to accept a human right to water, since their reactions to GC No. 15 were not very enthused.\textsuperscript{177} Especially the disagreement of some influential governments, such as the United States, China, Japan and Australia, point out that insufficient consensus on a right to water is prevalent in international law.\textsuperscript{178}

Despite all the criticism, GC No. 15 was an important step on the path to recognising a human right to water, even without being legally binding. However, a lack of clarity still remains, since the legal uncertainty of the status of the right could not be eradicated through GC No. 15.\textsuperscript{179} In addition, it has been argued, that in some respect, GC No. 15 has also brought some disadvantages for the human right to water.\textsuperscript{180} This is due to the fact that the discussion around the human right to water has almost only focused on an adequate standard of living. It is true that the Committee mentioned Art. 11 and Art. 12 ICESCR as very closely linked to a right to water, but it seems as if it has been neglected by the public that the Committee as well mentioned the

\textsuperscript{174} Ibid.
\textsuperscript{175} P Thielbörger ‘The Right(s) to Water’ (2014) 70.
\textsuperscript{176} Ibid.
\textsuperscript{180} P Thielbörger ‘The Right(s) to Water’ (2014) 75.
relation to other human rights, such as the right to life and human dignity.\textsuperscript{181} The human right to water should be conceived as being associated with other rights as well, especially the right to life and human dignity.\textsuperscript{182} Furthermore, as GC No.15 stated, all elements to the right to water must be suitable for human health and also human dignity and life.\textsuperscript{183} This should be kept in mind by states and the public in general, so that a narrow perception of a right to water only related to an adequate standard of living can be avoided. This is even more, because the Committee did not want to implicitly suggest that these rights were less important or relevant for serving as a legal basis for a human right to water.\textsuperscript{184}

II. A HUMAN RIGHT TO WATER UNDER INTERNATIONAL CUSTOMARY LAW

The next logical step regarding the sources of international law stated in Art. 38 ICJ Statute\textsuperscript{185} is to analyse whether or not there is a basis for a right to water in international customary law. Due to space restraints this section provides only a brief overview. A human right to water recognised under international customary law would even have a wider extent than one recognised in treaty law. It would have legal effects even on those states that have not signed potential relevant treaties like the ICESCR, the ICCPR or CEDAW and CRC.\textsuperscript{186} Generally customary international law arises when states behave in a certain pattern of practice consistently over a period of time.\textsuperscript{187} Furthermore, the practise has to go along with \textit{opinio juris}, which is the states’ sense that they were legally bound to conduct the practice.\textsuperscript{188}

\textsuperscript{181} Ibid.
\textsuperscript{183} Ibid. 11.
\textsuperscript{184} P Thielbörger ‘The Right(s) to Water’ (2014) 75.
\textsuperscript{185} Art. 38 1. b. UN Statute of the International Court of Justice (ICJ Statute), 18 April 1946.
\textsuperscript{186} P Thielbörger ‘The Right(s) to Water’ (2014) 76.
\textsuperscript{187} TW Bennett and J Strug ‘Introduction to International Law’ (2013) 14.
\textsuperscript{188} Ibid.
1. **UNGA Resolution 2010**

As pointed out above, resolutions adopted by the UNGA are legally not binding and are of recommendatory character only. However, they can be expressions of customary law norms. In regard to the UNGAR2010, a high rate of approval for the resolution could be an indicator for state consent on a human right to water and thus *opinio juris*. The resolution was adopted with 122 states in favour, no votes against it, 41 abstentions and 29 states not being present at the vote. With 192 UNGA members at the time of the vote, this makes a two third majority. When looking at the drafting process, it becomes apparent that it was not a process of constant consent. States’ complaints and regrets about certain suggestions were not taken into account and were prevalent throughout the process. Certain states even made clear that their abstention should not be confused with an actual acceptance of a human right to water. In the end many of the abstentions can be seen as “quasi-negative” votes, since like Thielbörger assumes, states abstained instead of voting against the resolution only out of respect for the victims and the severity of the world water crisis. Since too many states pointed out that they did not understand the resolution to create a new right or any legal obligations, *opinio juris* regarding the UNGAR2010 cannot be assumed. Furthermore, no explicit and clear enough content was outlined in the UNGAR2010. This is another point proving, why no assumption of recognition of a human right to water under customary law is possible regarding the UNGAR2010.

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189 UNGA Resolution, A/RES/64/292, 3 August 2010.
190 P Thielbörger ‘The Right(s) to Water’ (2014) 78.
193 P Thielbörger ‘The Right(s) to Water’ (2014) 79.
194 *Ibid.* for a more detailed analysis of the drafting process.
198 P Thielbörger ‘The Right(s) to Water’ (2014) 81.
2. **HRC Resolution 2010**\(^{199}\)

In terms of the HRCR2010 similar criteria apply as for the UNGAR2010 concerning the creation of customary law. The HRCR2010 was adopted without a vote, which must be seen as a great success, since this expresses common consent in so far that states did not even need a vote to adopt the resolution.\(^{200}\) States were generally more positive in their statements towards a human right to water than they were regarding previous resolutions. Not long after the adoption of the UNGAR2010, in which several states had still abstained from a vote, states were regarding the HRCR2010 willing to articulate a generally positive position towards a right to water.\(^{201}\) Furthermore, in regard to content the HRCR2010 was much more enunciated and clearer than the UNGAR2010. However, the HRCR2010 could not have created a norm of international customary law in terms of a shared *opinio juris* amongst all States, because it is a body only consisting of 47 members. Those cannot represent the opinion of all 192 states at that time. Hence it cannot be assumed that all states would feel legally bound.\(^{202}\) Admittedly, the resolution was not completely worthless on the way of creating custom. A certain trend can be concluded.\(^{203}\) Some states were present at both the UNGAR2010 and the HRCR2010 voting and changed their position towards the human right to water during those voting processes. This can be seen as an indication that a strict division between states in favour and against a human right to water is becoming blurry.\(^{204}\)

3. **Millennium Development Goals**

It could be argued that some of the UN Millennium Development Goals (MDG)\(^{205}\) have reached the status of international customary law.\(^{206}\) As Tomuschat suggested, in human rights law a norm should be recognised as

\(^{199}\) HRC Resolution, A/HRC/RES/15/9, 6 October 2010.
\(^{200}\) Ibid. 82.
\(^{201}\) Ibid.
\(^{202}\) Ibid.
\(^{203}\) Ibid. 83.
\(^{204}\) Ibid.
\(^{206}\) P Alston ‘Ships passing in the night: the current state of the human rights and development debate seen through the lens of the millennium development goals.’ Human Rights Quarterly Vol. 27, 771.
customary law if the norm is necessary to protect physical integrity and human life.\footnote{C Tomuschat ‘Human Rights, Between Idealism and Realism’ (2004) 35.} According to this argument one could argue that some of the MDGs are so crucial for human life that they should be considered part of customary law.\footnote{P Thielbörger ‘The Right(s) to Water’ (2014) 78.} However, even if it is desirable to widen the scope of customary law onto the MDGs, so that state accountability for them could be strengthened, it may create reluctance amongst states to commit themselves to political goals, if these were turned into legal obligations afterwards and thus prevent states from committing themselves.\footnote{Ibid.} Therefore, MDG No. 7 should not, and cannot be regarded as an appropriate basis for a human right to water under customary law.\footnote{Ibid. 84.}

4. \textbf{State Practice}

The affirmations mentioned in this section provide reason to the assumption that there is a growing \textit{opinio juris} in terms of the recognition of a human right to water.\footnote{B Hartley and HJ van Meter ‘The Human Right to Water: Proposal for a Human Rights-Based Prioritization approach’ (2011) 84.} However, this is the case only if the affirmations are regarded as a combined ensemble. Every single resolution or MDG on its own is not strong enough to make such a claim.\footnote{Ibid. 84.} In terms of state practice, as the other relevant component of international customary law, the evidence is not too convincing either. Currently there is no consistent state practice affirming a human right to water, nor providing clean drinking water nor a sense of legal obligation.\footnote{Ibid.} One should not forget to keep in mind, however, that this is also due to water needs being different and diverse in every part of the world and thus uniform practice from all states is a difficult thing to achieve. In fact, only very few domestic constitutions or laws recognise a right to water or have national plans to provide access to water and sanitation to everyone in their jurisdiction.\footnote{B Hartley and HJ van Meter ‘The Human Right to Water: Proposal for a Human Rights-Based Prioritization approach’ (2011) 85.} Even though state practice is not sufficient enough to support a human right to water

\footnote{See e.g. Sec 27 (1) (b) Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) adopted on 8, took effect on 4 February 1997.}
in international customary law for now, there is some evidence of strongly developing *opinio juris*, especially with the UN having acknowledged a human right to water, only waiting for state practice to follow and to create international customary law in the future.\(^{216}\)

### III. CONCLUSION

This chapter highlighted that the protection and promotion of the human right to water arose and developed in many different ways over the past years. Acknowledgment of a human right to water ranged from explicit to derivative recognition, from being inferred from socio-economic rights stated in the ICESCR to being inferred from civil and political rights included in the ICCPR.\(^{217}\)

However, none of the universal human rights instruments mention a human right to water explicitly. CEDAW and CRC as the only conventions explicitly having codified a right to water are not universal. In addition, all the other inferences of a human right to water from provisions in the International Bill of Human Rights are not explicit and thus open to interpretation and not clear enough to constitute a legally binding self-standing human right to water. Politically very important steps on the path to the universal recognition of a human right to water were enunciated in the UNGAR2010 and the HRCR2010 at UN level. However, these acknowledgments are open to interpretation and thus not clear enough to constitute a legally binding self-standing right. Furthermore, a uniform state consensus could not be found yet. This is why those acknowledgments are unable to constitute legally binding provisions themselves neither as treaty law, nor as international customary law. GC No. 15, as the most important tool to promoting progress in terms of a human right to water, implied that a human right to water is already existent in the ICESCR’s right to an adequate standard of living. However, GC No. 15 is an interpretative tool and thus not binding either.

In spite of all this, if a derivative right would be accepted as a right of its own it would be possible to conclude that the human right to water exists in international human rights treaty law. But as it was suggested the attribution

\(^{216}\) *Ibid.*

\(^{217}\) P Thielbörger ‘The Right(s) to Water’ (2014) 88.
“right with a unique status”\textsuperscript{218} would have to be added. Furthermore, it was also suggested that one could conclude, considering the right to water part of international customary law, if a certain flexibility between the two main elements of customary law, \textit{opinio juris} and state practise, was accepted.\textsuperscript{219} Yet, in the end these conclusions are all vague, although desirable interpretations and none of these constitute an explicitly codified universal human right to water.

\textsuperscript{218} Ibid.
\textsuperscript{219} Ibid.
C. Chapter III - A RIGHT TO WATER IN GERMANY AND SOUTH AFRICA

This chapter analyses the legal status of a human right to water in a German and a South African context. Firstly, in order to better understand legislative decisions made in the two countries, the general water situation in Germany and South Africa is characterised. Subsequently a brief overview is provided of obligations arising for those two countries under international law, regional as well as national laws. The situation of a right to water in the European context is then analysed followed by an analysis of German laws related to water. Since no explicit fundamental right can be found in the Germany constitution, legal concepts that could generate such a right are highlighted as well as the protection of a right to water by German courts. Subsequently the situation of a right to water in the context of the African Union is discussed. This is followed by an analysis of the protection of a right to water under South African legislation, especially the Constitution as well as South African courts.

I. WATER SITUATION IN GERMANY

The amount of water available varies significantly from country to country. Germany is very rich when it comes to water resources. Only about a quarter of the available resources are actually used; four percent of which are used as drinking water.\(^{220}\) Average water consumption per person within the European Union (EU) amounts to 150 litres per day,\(^{221}\) whereas in Germany for the past decades average water consumption per person continuously decreased. In 1990 it amounted to 147 litres per person per day\(^{222}\) whereas in 2015 it was around 120 litres.\(^{223}\) This decrease is attributed to a change in consumption behaviour and the usage of modern technologies. Thus, Germany has one of the lowest per person water consumption averages of the industrialised


\(^{221}\) S Malz / U Scheele ‘Wasserbedarf und Wasserverbrauch privater Haushalte und der Industrie nach Ländern’ (2011) 142.

\(^{222}\) Ibid.

There are generally no problems with availability and access to water in Germany. In 2010 connection to the water supply system was available for more than 99 per cent of the German population. Since there are no problems with access, legislation as well as the water supply industry mainly focus on water quality, safety and a high standard of sewage water disposal as well as sustainability and economic efficiency. In an international and European comparison Germany is very efficient when it comes to regulating water quality and safety; therefore, water in Germany is always available for everyone and that in a high quality and adequacy.

II. WATER SITUATION IN SOUTH AFRICA

Opposed to the German water situation, water resources in South Africa are scarce and extremely limited, with South Africa, in a global comparison, being the 30th lowest country in regard to water availability per person. This is due to geographical conditions, few major groundwater aquifers and limited rain fall. What is more, South Africa’s water resources are unevenly spread across the country. Over the past decade South Africa has invested greatly in water infrastructure. This is why access to water has improved from 58 percent of the population having access to clean water in 1994 to 91 percent in 2009. Access to sanitation improved from 34 percent to 76 percent during the same period. This means South Africa has met the MDG targets for water supply.

\[^{224}\text{S Malz / U Scheele ‘Wasserbedarf und Wasserverbrauch privater Haushalte und der Industrie nach Ländern’ (2011) 142.}\]
\[^{225}\text{P Thielbörger ‘The Right(s) to Water’ (2014) 10.}\]
\[^{226}\text{Branchenbild der deutschen Wasserwirtschaft, 2015 Kurzfassung, 2 et seq.}\]
\[^{227}\text{Ibid.}\]
\[^{231}\text{African Ministers’ Council on Water (AMCOW) ‘Water Supply and Sanitation in South Africa: Turning Finance into Services for 2015 and Beyond’ (2015) 8}\]
\[^{232}\text{Ibid.}\]
Despite these improvements ten percent of the population are still lacking access to water. This indicates that South Africa is on a good path of providing comprehensive access to water but still has some work to do to facilitate access to water to everyone. One of South Africa’s main problems, is the lack of access to sanitation. Mainly in rural communities this leads to contamination of water in rivers which leads to serious health problems. Overall a general lack of infrastructure, be it old pipes or the lack of access to sanitation, still affect millions of people in their access to clean water. The solution to the problem is for the government to take care of the rural population, which will also improve the water situation in the cities, given that water resources are mostly located outside of urban agglomerations. This is because damage to the water supply starts in the rural communities due to the lack of access to sanitation.

III. OBLIGATIONS FOR NATIONAL GOVERNMENTS

As outlined above, water situations can greatly differ from country to country. Even if obligations under international law are similar for each country, different water situations call for different legislative and protective measures of a right to water. Even though many states have signed international resolutions and agreements that acknowledge a right to water, most states have not incorporated such a right, or policies to protect and promote the right, in their national laws. However, some states embodied the right to water in their laws or even in their constitution, amongst them South Africa, which is working towards realising access to clean water for all citizens.

Even though there is no explicit universal human right to water in international law that would be able to impose legally binding obligations on states, Germany and South Africa are parties to the ICCPR and the ICESCR

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233 Ibid.
235 Ibid.
236 Ibid.
238 Ibid.
and thus bound to respect, protect and fulfil the rights set out in these conventions. They are also parties to CEDAW\textsuperscript{239} and CRC\textsuperscript{240} and thus bound to respect, protect and fulfil the rights relating to water explicitly set out in these specific thus not universal conventions. Furthermore, several political acknowledgments, despite not being legally binding, impose a certain tacit obligation on states through their political commitment. This commitment is given regarding Germany and South Africa since both states voted in favour for the UNGAR2010\textsuperscript{241} and the HRCR2010 was adopted without a vote.

This commitment to the acknowledgment of a human right to water is also embodied in regional and national laws. In addition, there are several regional agreements relating to the right to water. These can be more aggressive than international agreements at UN level in their establishment and protection of a right to water. This is because at regional level it is easier to focus and thus address specific water problems of states in the same regions of the world.\textsuperscript{242} However, what is obvious is that since regional and national laws only apply at their own level they cannot be applicable to all human beings and thus they are not suitable to constitute a legal basis for a universal human right to water. This section, nevertheless, has a closer look at the European and the African level to further examine how Germany and South Africa comply with contingent obligations under international as well as regional and national treaty law.

In each part of the section it is initially analysed if regional laws under the EU and the African Union (AU) create any obligations in terms of a right to water for Germany and South Africa. Furthermore, it is analysed how the two countries protect and implement a right to water.

\textsuperscript{241} UNGA 'General Assembly adopts resolution recognizing access to clean water, sanitation as human right' Press release GA/10967, 28 July 2010.
\textsuperscript{242} L. Watrous 'The Right to Water – From Paper to Practice’ (2011-2012) 118.
IV. LEGAL STATUS OF A RIGHT TO WATER IN EUROPE AND GERMANY

1. A Right to Water in the European Context

As well as having international obligations at UN level, Germany is a member state of the EU and, therefore, bound by the EU’s legal instruments. Consequently, consideration is given to the EU’s protection of a right to water, before looking at German laws related to water.

a) European Law

No explicit right to water is mentioned in any of the human rights or other legal instruments at European level. Neither the European Convention on Human Rights (ECHR) by the Council of Europe, the Charter of Fundamental Rights of the EU nor the European Social Charter (Revised) (ESC) contain any explicit reference to a right to water or water in any other regard.

The right to water at EU level can, similar to UN level, only be inferred from different provisions contained in those charters and conventions. For the ESC as a relatively weak instrument, since it is not enforceable by a court but only subject to the European Committee of Social Rights’ supervisory mechanism, a right to water can be inferred from Art. 11 ESC. The provision confirms that states parties are obligated to the protection of their citizens’ health. Therefore, states parties are obliged to remove causes of illness and epidemics as far as possible. This clearly implicates the access and provision of safe and clean water.

The ECHR embodies in Art. 2 the right to life. Water is not explicitly mentioned, but since life cannot exist without access to safe and clean water,

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244 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
246 Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163.
247 Ibid. Art. 11.
248 P Thielbörger ‘The Right(s) to Water’ (2014) 37.
249 Art. 2 ECHR (1950).
the right to life cannot be ensured without the acknowledgment of the right to water. Regarding these legal inferences, only a few cases were brought to the European Court of Human Rights (ECtHR) relating to water; this was mostly with regard to Art. 3 ECHR, which prohibits torture and inhuman and degrading treatment.250 The ECtHR found in several cases251 that not providing a prisoner with sufficient water and restricting regular access to sanitation violates Art. 3 ECHR.252 Hence, a right to water can be inferred from Art. 3 ECHR as well.

The same applies to the Charter of Fundamental Rights. A right to water can be inferred from several provisions, like the right to life, the right to human dignity as well as the prohibition of torture and inhumane and degrading treatment.253

The Council of Europe played a huge role in creating awareness for water issues, by acknowledging the right to water in its European Water Charter in 1967 and affirming it in the European Charter for Water Resources in 2001.254 The 2001 Charter states in its Art. 5 “that everyone has the right to a sufficient quantity of water for his or her basic needs.”255 The Charter of Fundamental Rights and the European Water Charter are, however, non-binding instruments and thus not suitable as a basis for a human right to water.256

Furthermore, many directives have been adopted in the EU inter alia dealing with the quality of drinking water. The Drinking Water Directive 98/83/EC deals with the quality of water intended for human consumption.257 Quality standards at EU level were laid down in this Directive, which aims to protect human health by ensuring the provision of clean and safe drinking

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250 Ibid. Art. 3.
252 P Thielbörger ‘The Right(s) to Water’ (2014) 36 et seq.
253 Art. 1, 2, 4 EU Charter of Fundamental Rights, 2012/C 326/02.
Directives at EU level are not directly applicable in the member states. However, they are binding as to the results the directive intends to achieve. Member states have to translate the Drinking Water Directive into their own national legislation. Germany did so by passing its Drinking Water Ordinance (Trinkwasserverordnung) in 2001 implementing the EU Directive.

Furthermore, in 2000 the EU established a framework for “Community action in the field of water policy” with passing its Directive 2000/60/EU (Water Framework Directive - WFD). Stating in its preamble para. 1 that “[w]ater is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such”. Furthermore, member states are obliged to contribute to “the provision of the sufficient supply of good quality surface water and groundwater as needed for sustainable, balanced and equitable water use”. Germany implemented this EU Directive in its national law by passing the Federal Water Act (“Wasserhaushaltsgesetz” WHG) in 2009.

Directives at EU level like the Drinking Water Directive reveal that within the EU there is awareness of the importance of clean water and its link to important values such as human health, despite an explicit right to water not being mentioned in the EU’s legal framework.

b) European Citizens’ Initiative

There is no explicit human right to water at EU level. However, events at EU level give hope that this could change and a human right to water and sanitation at EU level could become a legislated reality. One of the first European Citizens’

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262 Preamble para. 1 EU ‘Directive 2000/60/EC.
263 Art. 1 EU ‘Directive 2000/60/EC.
265 P Thielbörger ‘The Right(s) to Water’ (2014) 33.
Initiatives (ECI) (Water is a Human Right)\textsuperscript{266} invited the European Commission to initiate legal acts to implement a human right to water and sanitation in the EU.\textsuperscript{267} The ECI reached the necessary amount of more than one million signatures from EU citizens as required by the procedures set out in Art. 11 (4) of the Treaty on European Union (TEU)\textsuperscript{268} and refined by regulation 211/2011.\textsuperscript{269} Important to note is that the ECI cannot oblige the Commission to initiate legislative acts, it can only call upon the Commission to do so. This stems from the clear wording of “invite the Commission” in Art. 11 (4) TEU and from the principle, that the Commission has a monopoly to initiate legislation.\textsuperscript{270} Art. 11 (4) TEU was not designed to challenge this monopoly.\textsuperscript{271} In June 2015 the Committee on the Environment of the European Parliament voted on a report about the ECI on the human right to water and sanitation. This report expressed strong support for the right to water from the Parliament.\textsuperscript{272} Subsequently, this support was confirmed when on 8 September 2015 the European Parliament voted for the Right to Water in its plenary vote.\textsuperscript{273} The European Parliament adopted a “Resolution on the follow-up to the European Citizens’ Initiative Right2Water”,\textsuperscript{274} by 363 votes to 96, with 231 abstentions.\textsuperscript{275} The Parliament acknowledged that the full implementation of the human right to water and sanitation, as acknowledged by the UN, is essential for human life.\textsuperscript{276} The Parliament’s resolution stated that, as declared in the

\textsuperscript{266} ECI ‘Water is a Human Right’ <http://www.right2water.eu/> accessed: 20.10.2015.
\textsuperscript{271} Ibid.
\textsuperscript{276} Ibid.
WFD, “water is not a commodity but a public good” that is essential to human life and dignity.\textsuperscript{277} The Commission was appealed to come forward with legislative proposals. Furthermore, if appropriate, an amendment of the WFD was demanded by the Parliament, that would acknowledge the human right to water and universal access to water.\textsuperscript{278} Moreover, it was supported, that universal access to safe drinking water and sanitation has to be recognised in the Charter of Fundamental Rights of the European Union.\textsuperscript{279} Now, it remains to be seen, how and when the Commission is going to take action. It would be desirable if the Commission would not take too much time to initiate legislative proposals, since the common consensus on a human right to water in the EU seems clear after the Parliament’s resolution. Furthermore, a legislated human right to water in Europe could encourage recognition and legislative processes at UN level, and thus contribute to the creation of a universal human right to water.

2. The Right to Water in Germany

To comply with its regional obligations, Germany, especially by translating EU directives into national laws, created a comprehensive legal framework protecting water in many different ways. An analysis of the most important laws follows.

a) Water in the Constitution and in Federal Water Laws

The German Constitution (Basic Law) ensures the protection of several basic and human rights (Grundrechte).\textsuperscript{280} However, an explicit right to water is not included. It can, certainly, like at international and regional level be inferred from provisions like the right to dignity in Art. 1 (1) Basic Law or the right to life in Art. 2 (2) Basic Law.\textsuperscript{281} It has been argued, that as a derivative basis for a human right to water in the German context, the right to life in Art. 2 (2) Basic Law

\textsuperscript{277} Ibid.  
\textsuperscript{278} Ibid.  
\textsuperscript{279} Ibid.  
\textsuperscript{281} Art. 1 and Art. 2 German Basic Law (1949).
should be considered severely. This right should, however, be limited to the amount of water essential for human survival.282

In addition, there are some federal German laws that deal with the issue of water, many of them implementing EU directives, especially the EU’s WFD. Important in this regard is the Federal Water Act (”Wasserhaushaltsgesetz” WHG).283 The use and protection of groundwater, surface water and coastal water is regulated in this act. Water use as defined in the act usually requires the permission of a German administrative body.284 The highest German Administrative Court stated that such permissions have to be refused, if the public welfare, especially public water supply and human health, may be threatened through the intended use of water.285

Furthermore, the German Law to prevent and control infectious diseases (Infektionsschutzgesetz (IfSG))286 contains, in its Section 7, provisions about the quality of water intended for human use.287 The general requirement for such water is that it cannot do harm to human health if being used.288 Another German set of binding provisions is the Drinking Water Ordinance.289 Since the Ordinance is based on the EU Directive 98/83/EG, it is basically valid Europe-wide. To some extent the German Drinking Water Ordinance is, however, stricter in its provisions than its EU Directive counterpart. Those stricter provisions are necessary and permissible to ensure that national values for the protection of human health in Germany are met.290

However, the issue of an individual right to water, thus a right that provides individuals with an active power to demand actions or omission, is not dealt with in the German water-related laws. Instead, they address

283 Wasserhaushaltsgesetz – WHG (2009), BGBl. 2009 Nr. 51, S. 2585 ff.
285 BVerwG Case No. 4 C 30/88, 17 March 1989, BVerWG 81, 347, 350.
287 Ibid. Section 7.
288 Ibid. § 37 (1).
governmental control of water resources, standards for drinking water quality and general planning, while implementing EU demands. To find legal approaches to an individual right to water, it is necessary to have a closer look at more general legal concepts in German law.

**b) Legal Concepts Generating a Right to Water**

There are three basic legal concepts that lay at the basis of the German Constitutional State that could generate a right to water. The concept of “Daseinsvorsorge” (“services of general (economic) interest”) can be understood as services of basic goods that are to be provided by the welfare state to its citizens. Daseinsvorsorge is traditionally understood to “include an element of the citizens’ needs for certain goods that the individual cannot achieve by its own means, due to an increasingly industrialised environment”. In areas where effective supply of crucial services and goods cannot be assured efficiently by the free market, the state is obliged to create structures and frameworks to guarantee this itself, which would include efficient and necessary water supply and access to water. However, this concept does not generate rights. On the contrary, it must be understood as a concept that aims to remind the state of its social obligations. Thus, the concept focuses on the state’s responsibilities and does not award individual rights.

Furthermore, the concept of “Anschluss- und Benutzungszwang” (compulsory connection and usage), which is incorporated in several municipal laws, guarantees compulsory connection to the water supply and sewage system. The concept’s aim is to increase water supply coverage. However, it is intended as a duty, especially for real estate proprietors to get connected to

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291 P Thielbörger ‘The Right(s) to Water’ (2014) 12.
292 ibid.
293 ibid. 12.
294 ibid. 13.
295 ibid. 13.
297 P Thielbörger ‘The Right(s) to Water’ (2014) 13.
298 See for example § 19 Hessische Gemeindeordnung (HGO), GVBl. I 2005 S. 142 as of 17.03.2005.
299 P Thielbörger ‘The Right(s) to Water’ (2014) 14.
the water infrastructure system, rather than it is designed to serve as an individual right to access to water.\textsuperscript{300}

The third concept is the principle of “Sozialstaatsprinzip” (the principle of the social state) that is incorporated in Art. 20 of the German Basic Law\textsuperscript{301} and understood as one of the fundamental principles of the German constitution.\textsuperscript{302} The principle itself again does not generate rights, is has to be regarded rather as guidelines for the state’s political and legal actions.\textsuperscript{303} In very few cases the principle of the social state combined with certain fundamental rights set out in the constitution, creates individual rights towards certain services that have been determined by the German judiciary.\textsuperscript{304}

A basis for a human right to water cannot be found in the legal concepts alone that constitute the foundation of the German Constitutional State. Consequently, a brief look at how German Courts deal with the issue of a right to water especially in connection with these legal concepts follows.

c) Protection through German Courts

The three main German Courts have ruled several decisions regarding water, specifying the aforementioned vague legal concepts and terms such as the “social state principle”. The German Constitutional Court has recognised in several decisions that the social state principle combined with the right to dignity set out in Art. 1 (1) of the German Basic Law, compose an obligation for the German state to assure the “very basic requirements for an existence on human dignity” (“Existenzminimum”).\textsuperscript{305} The court’s decision did not concern access to water. However, the court stated, that “Existenzminimum” includes physical existence, meaning the right to be alive, as well as to live a life in dignity and to be able to participate in cultural life.\textsuperscript{306} However, the Constitutional Court has so far only decided about questions on financial aid to ensure the

\textsuperscript{300} Ibid.
\textsuperscript{301} Art. 20 German Basic Law (1949).
\textsuperscript{303} P Thielbörger ‘The Right(s) to Water’ (2014) 14.
\textsuperscript{305} P Thielbörger ‘The Right(s) to Water’ (2014) 15.
\textsuperscript{306} BVerfG 1 BvL 10/10 (BvL 2/11) Urteil vom 18. Juli 2012 para 2.
“Existenzminimum”.\textsuperscript{307} In other cases the Court addressed the issue of water more explicitly. In 1981 the Constitutional Court decided that the provision of drinking water of adequate quality and quantity is essential for life.\textsuperscript{308} Additionally, the Federal Administrative Court followed a similar opinion. It acknowledged water as an important common good\textsuperscript{309} and acknowledged that the principle of “Daseinsvorsorge” entails the supply of water infrastructures and services to huge parts of the population,\textsuperscript{310} determining, however, an obligation for the state rather than individual rights.

\textbf{d) Analysis}

The German Basic Law grants and protects several fundamental rights. However, an explicit right to water cannot be found in the German legal system. Therefore, the question arises why access to water was not included in the German Basic Law. This is due to a quite simple explanation. The German legislator did not feel the urge to incorporate a right to water or a more precisely designed right, since Germany is not a water stressed country and there is more than sufficient water available to all citizens.\textsuperscript{311} This minimalist legal approach in German legislation is, however, contradictory with Germany’s involvement at international level. As Germany, together with Spain, promoted the right to water internationally and took actions that led to the first resolution on the right to water and sanitation by the UN HRC in 2008,\textsuperscript{312} a more consistent approach for Germany would be desirable. This could be achieved by incorporating the right to water in the German Basic Law. Thereby, Germany would join those states on the international plane that already incorporated a right to water in their constitutions.\textsuperscript{313} What is noteworthy is that, no EU state has incorporated the right to water in its constitution yet.\textsuperscript{314}

\textsuperscript{307} BVerfG-Beschluß vom 29.5.1990 (1 BvL 20/84, 1 BvL 26/84, 1 BvL 4/86) BStBl. 1990 II S. 653.
\textsuperscript{308} BVerfG 1 BvL 77/78, 15 July 1981, BVerfGE 58, 300, 344.
\textsuperscript{309} BVerwG 6 C 2/97, 17 December 1997, BVerwGE 106, 64.
\textsuperscript{310} Ibid.
\textsuperscript{311} P Thielbörger ‘The Right(s) to Water’ (2014) 16.
\textsuperscript{314} P Thielbörger ‘The Right(s) to Water’ (2014) 19.
legislated human right to water in Germany would not even involve significant legal changes, since the major Courts already created a well-designed framework around the general principals of the social state principle and “Daseinsvorsorge”. It would, however, generate legal certainty for German citizens, who are usually not aware of all the abstract principles created by the judiciary.\textsuperscript{315}

As only German ordinary laws deal with the right to water and set out essential elements concerning in particular the quality of drinking water,\textsuperscript{316} a constitutional incorporation of the right to water would be important. This is because, in case of a potential clash of values, constitutional values always prevail over values only protected by ordinary laws.\textsuperscript{317} It is regrettable that a right to water is missing in the German Basic Law. Nevertheless, Germany is a good example of how the right can be protected effectively only through ordinary laws and judiciary but without the explicit inclusion and recognition of a fundamental right.\textsuperscript{318}

V. LEGAL STATUS OF A RIGHT TO WATER IN THE AFRICAN UNION AND SOUTH AFRICA

Opposed to the German approach to protecting the right to water, this section analyses the different South African approach. Firstly, consideration is given to South Africa’s obligations under the AU’s legal system. This is followed by an analysis of the protection of the right to water through South African legislation and Courts.

1. A Right to Water in the Context of the African Union

As well as having international obligations, South Africa is a member state of the AU and, therefore, bound by the AU’s legal instruments.\textsuperscript{319} However, at AU level a right to water is only explicitly mentioned in treaties dealing with the

\textsuperscript{315} Ibid. 17.
\textsuperscript{317} P Thielbörger ‘The Right(s) to Water’ (2014) 18.
\textsuperscript{318} Ibid.
same legal subjects as the ones at international level mentioning the right to water explicitly. Similar references to the right to water such as in the international human rights treaties can be found in the African Charter on the Rights and Welfare of the Child (AfCRC).\textsuperscript{320} Art. 14 AfCRC states a right to the “best attainable state of physical, mental and spiritual health.” States parties are obliged to take measures to fully implement this right by ensuring \textit{inter alia} the provision of safe drinking water for children.\textsuperscript{321}

Further, the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa states in Art. 15 (a) that women have the right to nutritious and adequate food. In this regard states parties are obliged to provide women with access to clean drinking water.\textsuperscript{322} Akin to international level these two conventions cannot function as the basis for a universally applicable human right to water. This is because their normative content is not clear enough. Both provisions do, for instance not mention the quantity of water that has to be provided or define the quality.\textsuperscript{323} Furthermore, they only apply to certain groups of people, and thus not to every human being, which would be a prerequisite for a right to be a universal human right.

Thus, a universal right to water is not explicitly mentioned in human rights instruments at AU level. However, of course a right to water could be inferred again from rights like the right to life and integrity,\textsuperscript{324} the right to dignity\textsuperscript{325} and the right to health.\textsuperscript{326}

In February 2015, the African Commission on Human and Peoples’ Rights (Commission) adopted a “Resolution on the Right to Water Obligations.”\textsuperscript{327} The Commission “[u]rges African Union Member States to meet their obligations in providing clean drinking water for all their populations and to

\begin{footnotesize}
\begin{itemize}
\item[321] Ibid. Art. 14.
\item[325] Ibid. Art. 5.
\item[326] Ibid. Art. 16.
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conscientiously cooperate in the management and protection of water resources.\textsuperscript{328} Furthermore, member states are urged to “ensure [...] access to drinking water in sufficient quantity for personal and domestic use [...]” and to “guarantee the justiciability of the right to water”.\textsuperscript{329} This resolution could indicate an important step forward, in terms of implementing a more comprehensive framework of a right to water in Africa. However, the Commission failed to elaborate a clear normative content.\textsuperscript{330} In addition, resolutions by the Commission are comparable to UN General Comments, and are, therefore, not legally binding on member states.\textsuperscript{331} General Comments are authoritative interpretations of treaty provisions only,\textsuperscript{332} thus, they cannot be legally binding interpretations or create new law. The same applies to thematic resolutions of the Commission. However, it is not said, that member states will not try to work to implement the provisions set out in the resolution because of political commitment, since some states are actually already trying to do so, amongst them South Africa.

It is noteworthy that although there is no explicitly mentioned universal human right to water at AU level most of the states at the international plane that have included a right to water explicitly in their national constitutions are African countries.\textsuperscript{333} Amongst them is South Africa, that states a right to water in Sec. 27 1 (b) of its Constitution.\textsuperscript{334} This could be seen as a general African trend and indicate commitment to a right to water that African states appear to have, even without an explicit incorporation in Africa’s regional human rights instruments. The next section looks at the efforts South Africa has gone through to implement a comprehensive right to water for its citizens.

\textsuperscript{328} Ibid. \\
\textsuperscript{329} Ibid. para 2 and 5. \\
\textsuperscript{330} TS Bulto ‘The human right to water in the corpus and jurisprudence of the African human rights system’ (2011) 343. \\
\textsuperscript{333} See for a list of those countries: P Thielbörger ‘The Right(s) to Water’ (2014) 39 et seq. \\
2. The Right to Water in South Africa

After the end of Apartheid, South Africa implemented an effective access to water policy, to comply with its international and regional obligations, and hence has made important steps to make the right to water a reality for all its citizens. This was necessary, as under Apartheid most of the population did not have equal and permanent access to clean water.  

This section has a closer look at South African legislation concerning the right to water and the protection of such a right by South African Courts.

a) Protection through South African Legislation

South Africa is one of the few countries that has set out an explicit right to water in its constitution incorporating it in its Bill of Rights. As Sec. 7 (2) of the Constitution states, “the state must respect, protect, promote and fulfil the rights in the Bill of Rights”, thus it is obliged to do so with the right to water as well. This is stated explicitly in Sec. 27 (1) (b) of the Constitution: “everyone has the right to have access to sufficient food and water [...]”. Further Sec. 27 (2) states 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”. Taking into consideration the availability of resources, is an approach that allows the South African government to implement the right to water in the time needed. This progressive approach seems appropriate and concordant with the “progressive realisation” approach in the ICESCR, as water scarcity demands time for organisation and thus realisation of the right to water. This approach leaves the power with the constitutional legislator to decide which rights shall be protected. The Courts, however, have the power to decide and review what the notion “reasonable” entails. To elaborate on

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337 Ibid. Sec. 27 (1) (b).
338 Ibid. Sec. 27 (2).
339 See p. 20 of this dissertation.
341 Ibid.
these constitutional obligations the South African Water Services Act of 1997 and the National Water Act of 1998 were passed.

The Water Services Act states that “[e]veryone has a right of access to basic water supply and basic sanitation.” And that “[e]very water services institution must take reasonable measures to realise these rights”. The intention of the Act is mainly to set out obligations for local governments, in their role as water service authorities, in their function to provide water and to protect the consumers’ interests. Hence, the Act includes a provision allowing the water service provider to limit or even discontinue the supply of water services if the consumer fails to comply with the conditions for such water provision. However, the “procedures for the limitation or discontinuation of water services have to be fair and equitable” and they cannot result in the refusal of water services for non-payment if the person can prove to be unable to pay for the basic water supply. The term “basic water supply” as defined by the White Paper on Water Supply and Sanitation Policy, issued by the South African Department of Water Affairs and Forestry in 1994, entails a supply of 25 litres of water per person per day. This is considered to be the “minimum required for direct consumption, for the preparation of food and for personal hygiene.”

The other important law concerning water in South Africa is the National Water Act. It sets out responsibilities of the national government, as the legal framework for the sustainable and effective management of South Africa’s water resources. The Act recognises in its Preamble water as a natural resource that belongs to all people and that discriminatory, unequal access to water has to be prevented. This was a new approach, since under the old
Water Act of 1956 water belonged to those only who owned the land the water source was located. This "private" water belonged to the landowner only and the state had limited control.\textsuperscript{353} However, the disadvantaged majority of the population did not own land and thus did not have unhindered or assured access to water.\textsuperscript{354} This unequal, discriminatory approach was finally abolished with the new Water Act in 1998.\textsuperscript{355} The Act states that the national government must assure that “water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons.”\textsuperscript{356} In Chapter five the Act established a system of pricing that allows for different charges to achieve social equity.\textsuperscript{357} This means, it allows for different pricing structures based on the consumer’s economic situation.\textsuperscript{358} According to the “Free Basic Water Policy”\textsuperscript{359} water must even be provided to poor households by the government for free to assure that no one gets denied access to water supply simply because of economic impossibilities. An average amount of 25 litres per person per day is set to be the standard that has to be supplied, since this is the amount of a “basic level of water supply”.\textsuperscript{360} This stipulated amount of 25 litres of water, was, however, the issue of a landmark case of the Constitutional Court dealt with in the following section.

\textbf{b) Protection through South African Courts}

Decisions by the South African Constitutional Court, supported by the South African High Courts made clear that the judiciary could be more progressive concerning a right to water, following South African legislation.\textsuperscript{361}

\begin{footnotesize}
\begin{enumerate}
\item[354] Ibid.
\item[356] Ibid. Chapter 1, 3(1).
\item[357] Ibid. Chapter 5, Part I.
\item[358] P Thielbörger ‘The Right(s) to Water’ (2014) 42.
\item[360] Ibid. 5.
\item[361] C Human ‘The Human Right to Water in Africa: the South African Example’ (2006) 86; for an example where the Court rejected a woman’s claim for basic water supply, because the constitutional arguments were made to late and the court had no mandate to interpret the content of a right to water in the Water Services Act, see: Mangele v. Durban Transitional Metropolitan Council, 2002 6 SA 423(D) High Court (Durban and Coast Local Division) of South Africa.
\end{enumerate}
\end{footnotesize}
In the *Grootboom Case*\(^{362}\) the applicant and her children have been evicted from their home, where they lived in extreme poverty. Before the Constitutional Court Grootboom claimed that the government was required to supply adequate basic housing including the provision of water services until they obtained permanent housing.\(^{363}\) The Court decided that the local government has failed to fulfil its obligations arising from the constitution. It affirmed that positive actions have to be taken by the state to give socio-economic rights a real existence apart from being put to paper.\(^{364}\) Thus in regard to water the municipality was obligated to provide continuous water supply.\(^{365}\)

In the *Bon Vista Case*\(^{366}\) the High Court held that the municipality was not allowed to take actions that impede existing access to water.\(^{367}\) If a person cannot afford to pay for water services, such services cannot be disconnected regardless.\(^{368}\) By doing so, the local council infringed upon the applicants constitutionally protected right of access to water.\(^{369}\)

In the *Mazibuko Case* the Constitutional Court had, for the first time, to interpret the right of access to sufficient water. In this decision the Court illustrated the state’s obligations with regard to that right as well.\(^{370}\) Prior to the Constitutional Courts decision, the High Court decided, that the practice of the City of Johannesburg to install obligatory pre-paid water meters, especially in poor neighbourhoods, was unconstitutional.\(^{371}\) The High Court urged the City to provide its citizens with the option of “normal metered” water supply instead. Those do not require upfront payment and are generally used in wealthier neighbourhoods as well.\(^{372}\) The pre-paid meters were discriminatory otherwise; because once the allocation of an average of 26 litres per person per day is...


\(^{363}\) *Ibid*. para. 4.


\(^{365}\) *Ibid*. para. 4.

\(^{366}\) High Court (Witwatersrand Local Division) of South Africa, *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*, 2002, (6) BCLR 625 (W).


\(^{368}\) *Ibid*. para. 27.

\(^{369}\) *Ibid*. para. 20.


\(^{371}\) High Court (Witwatersrand Local Division) of South Africa, *Lindiwe Mazibuko and Others v. City of Johannesburg and Others*, Case No. 13865/06, Judgment 30 April 2008, para 183.

reached the meter shuts off the supply of water unless new water credit, which has to be paid for in advance, is obtained by the consumer. This shutting off is, effectively, the same as a limitation or disconnection, which is also not lawful when the consumer is not able to pay for his “normal metered” water supply. Further, the High Court decided that the City has to provide its citizens in poor neighbourhoods with free basic water supply of 50 litres per person per day. This is an enormous increase from the practice before, which provided a person with only 25 litres per day. The Court, however, found 25 litres to be insufficient.

In the appeal decision the Supreme Court confirmed the findings of the High Court on the pre-paid meters being unlawful. Regarding the amount of the free water supply the Supreme Court regarded that 42 litres per person per day would constitute sufficient amount of water regarding Sec. 27 (1)(b) of the Constitution.

Subsequently, the case was taken to the Constitutional Court. Unfortunately, the Constitutional Court’s decision differed from the other previous two judgments on these issues. Regarding the pre-paid water meters the Court found them to be lawful, since they were not unfair or discriminatory, according to the City’s Water Services By-Laws. Regarding the free basic water policy, the Court stated, that the Constitution only obligates the state to “take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources”. This means sufficient water cannot be claimed from the state immediately, and thus the Court found the City’s free water policy was reasonable. Further, the Court stated, that it was inappropriate for a court to “determine precisely what the achievement of any particular social and economic right entails [...] since

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373 Ibid. para. 84.
374 Sec. 11 (2) (g) Water Services Act (1997); see as also stated in the Bon Vista Case: Residents of Bon Vista Mansions v. Southern Metropolitan Local Council, 2002, (6) BCLR 625 (W).
375 High Court Mazibuko and Others v. City of Johannesburg and Others, para. 183.
376 Ibid. para. 167 et seq.
378 Ibid. para. 62.
379 Constitutional Court of South Africa, Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) 2010 (4) SA 1 (CC), 8 October 2009, para. 9.
380 Ibid. para. 105 et seq. and 123.
381 Ibid. para. 56.
382 Ibid. para. 9.
this is a matter of the legislature and the executive”. Thus the Court did not
determine what a “sufficient” amount of water was in the Constitutional Court’s
opinion.

c) Analysis

South Africa has one of the most progressive constitutions in the world. One,
that recognises and makes both civil and political rights as well as social and
economic rights justiciable. The fundamental right to water is set out in the
Constitution and is specified by national laws regarding water. Further it has
been subject to some important judgments. The Mazibuko Case was a
landmark case that could have helped fill gaps in the interpretation of the right
to water. The High Court started with making a strong argument for the poorest
of society with determining what an effective protection of a right to water has to
entail. However, in the end of the proceedings the Constitutional Court failed
to back up the High Court’s decision and, thus, failed the opportunity to advance
the standing of socio-economical rights by clarifying and determining a positive,
self-standing and directly enforceable right to a specific amount of water. This
failing of the Court could even be seen as the undermining of the enforcement
of the human right to water in South Africa, since the position of the Court on
Sec. 27 (1) (b) of the Constitution may discourage people from bringing similar
cases before the Court. The Court should have accepted its role to be
determined to fill the gaps left by the legislator instead of leaving this challenge
entirely to the legislator and the executive. Despite this, South Africa takes its
obligations to respect, protect and fulfil the right to water seriously. There are
differences to countries such as Germany where water is a resource that is
available in abundance, thus practically different measures are required to
satisfy different conditions. The introduction of the fundamental right to water
in the South African Constitution has greatly improved the situation. Particularly

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383 Ibid. para. 60.
385 P Thielbörger ‘The Right(s) to Water’ (2014) 48.
387 Ibid.
388 P Thielbörger ‘The Right(s) to Water’ (2014) 48.
389 Ibid. 49.
the cooperation of legislator and judges, not considering the shortcoming of the Mazibuko decision, created a framework of effective protection as far as resources allow. However, one should not forget that South Africa still has a long way to go to solve its water problems entirely, especially with regard to supplying comprehensive access to water to the poor population.\footnote{Ibid.} Judges should be more progressive and try to fill the gaps in legislation, because creating a tight protective legal framework on paper only, will never lead to effective and comprehensive protection of a right to water in South Africa.

\section*{VI. CONCLUSION}

This chapter highlighted the differences in the German and the South African approach to the protection of a human right to water. Differences in the approaches are foremost due to different water situations in the two countries. Germany is a country with water in abundance, whereas South Africa is a water stressed country. Thus, it appears that different water situations call for different legislative and protective measures. A legal basis in Germany for a right to water is missing in the Constitution. However, it can be found in legal principles which are interpreted and equipped with contents by the Courts. The German system for the protection and fulfilment of the right to water emphasises the responsibilities of the state.\footnote{P Thielbörger 'The Right(s) to Water' (2014) 30.} In comparison, South Africa pursues a rights-based approach by acknowledging the right to water as a right through incorporating it in its Constitution.\footnote{Ibid. 55.} Furthermore, national laws elaborate on the protection and fulfilment of the constitutionally protected right. The German and the South African approach are respectively responsive to their different contexts, however, they could still learn from each other. Germany could incorporate a fundamental right to water in its constitution and demonstrate a more consistent approach. Conversely, South African judges could try to be more progressive, similar to German judges who were never shy to fill the gaps in legislation to elaborate an even more efficient system of protection of the right to water. Concluding it must be said, that both case studies are positive ones in regard to the right to water. Both legal systems recognise such a right, which is

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\begin{itemize}
\item \textit{Ibid.}
\item P Thielbörger 'The Right(s) to Water' (2014) 30.
\item \textit{Ibid.} 55.
\end{itemize}
still a rare thing for states to do. What is needed to effectively respect, protect and fulfil such a right is a cooperation of the legislator and the judiciary in both legal systems.

However, protection through legislative means that obligate states only, is not enough to effectively implement and protect a right to water, given that other stakeholders are more and more involved in the provision of water services and the sphere of the right to water in general.

The next chapter identifies companies as relevant stakeholders and analyses their involvement and international legal possibilities for company responsibility under the human right to water.
D. Chapter IV - THE ROLE OF COMPANIES AS STAKEHOLDERS IN IMPLEMENTING A HUMAN RIGHT TO WATER

The implementation process of a right to water requires different stakeholders to cooperate. States are the main stakeholders, as highlighted in the previous chapters. They are obligated by international as well as regional and national laws, either explicitly or implicitly, to respect, protect and fulfil the right to water. Therefore, states are required to provide access to the necessary amounts of water for those who do not have access yet and to protect existing access to water. However, through the global trend of water privatisation these state obligations may be eluded; with states handing over their obligations to private companies. Water is submitted to the logic of the market, therefore, it is often considered an economic good solely which opens the door for infringements.

In addition, companies may get involved in the sphere of the right to water in other ways then privatisation, such as pollution, and therefore have an impact and infringe on the right to water.

Notwithstanding the debate, which this dissertation does not further look into due to spatial constraints, whether water privatisation is a way to improve availability and access to water or whether water services should remain in the hands of the public body, this dissertation takes into account that water privatisation is a global trend and thus water companies cannot be ignored as stakeholders in the implementation process. Therefore, it is important to stipulate and determine companies' obligations and responsibilities.

For the purpose of this dissertation “company” is defined in a broad way as “any entity that engages in business”, including “transnational corporations” and “other business enterprises” as defined by the UN in its Norms on the Responsibilities of Transnational Corporations and Other

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396 See Ibid. 581 et seq.

See for a discussion of the debate: GA Cavallo 'The Human Right to Water and Sanitation: Going Beyond CSR’ (2013) 43 et seq; traditionally “human rights treaties create legal obligations only for states, not for private companies. Therefore, these companies cannot violate human rights norms because they do not have international human rights obligations. Consequently, the expression ‘human rights violations’ is traditionally reserved for States and the expression ‘human rights abuses’ for non state actors” such as companies.

Ibid. 44-46, also supported by General Comment No. 15 UN Doc. E/C.12/2002/11 para. 33, where the term “violating” is put in direct relation to “companies”.

Business Enterprises with Regard to Human Rights in 2003.398 No separation between multinational companies acting globally and national companies is made.

This chapter addresses how companies are involved in the right to water and which risks of violating the right to water this entails. It is analysed if there are any legal provisions to regulate company’s conduct in the sphere of a human right to water to prevent and remedy potential violations of that right. The analysis focuses on international responsibility of companies for human rights abuses and only addresses the national level briefly. What is more, despite the doctrinal debate whether to use the term “violate” or “abuse” regarding companies’ conduct in the human rights sphere,399 these terms are used interchangeably in this dissertation. This is due to practical changes that do not call for a strict separation anymore.400

I. COMPANY INVOLVEMENT

Companies can have different impacts on the right to water; depending on their involvement they can be positive or negative. This section identifies different situations in which companies can be violators of a human right to water. This is illustrated by small examples. Violations of the right to water related to companies generally occur in the following three contexts.

Firstly, violations of the right to water may occur when companies act as users; when they need water for their day-to-day business. This may become a problem in regions where water is scarce and companies compete with other,
particularly private, users over the water available. This can result in unfair allocation of water resources especially for less affluent private users. Such a situation may emerge for instance, because investment decisions can influence municipalities to allocate water resources unequally. For instance, such a scenario occurred, when the Indian Government decided to divert water that was meant for 20,000 peasant families, to a water theme park in 2003. Another scenario was reported by the non-governmental organisation FIAN International: Coco Cola bottling plants led to depletion and contamination of groundwater in Kerala, India. To supply a Coca Cola bottling plant, 1,500,000 litres of water were extracted from boreholes every day. Consequently the groundwater levels decreased significantly, causing depletion, contamination and affecting agricultural activities. The right to water of many people living in the area was affected, as the quality and the quantity of the water were not adequate anymore for human usage. In addition, other water sources were too far away to guarantee sufficient provision of water.

Secondly, violations of the right to water can arise when actions by companies that are intrinsically unrelated to water have an impact on water resources; this is mainly the case where industry provokes pollution to water sources. A prominent case to illustrate this scenario is the Niger Delta. Great oil deposits can be found in the Niger Delta area. For years they have been extracted by the Nigerian Government and multinational oil companies, such as Shell. Since then, oil from oil spills oozes into the Delta’s soil and water sources every year. Most of the Delta’s population has limited access to adequate clean water. They rely on boreholes and the nearby streams and

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404 Ibid. 13.
405 Ibid.
rivers. Oil spills from the Shell pipelines have contaminated those water sources and deprived thousands of people of their main water source and made fishing and agriculture regionally impossible.

Thirdly, violations of the human right to water by companies may occur, when companies get involved in the course of privatisation as suppliers of water services. They may violate the right to water by not providing enough water, not being able to guarantee water for every right-holder or not being willing to provide water if right-holders are unable to pay for the services. One example for this scenario is the “Cochabamba water war” in Bolivia. Water prices increased after water privatisation in 1999. The poor population was not able to afford the essential resource anymore and was either forced to somehow purchase the only expensive water available or to look for other potentially unsafe sources of water.

Such company involvement leads to the logical assumption that companies must be legally responsible for their actions. The questions is, how companies can be obligated when they act in the sphere of the right to water, particularly at an international level, since global company involvement is the reality. The next section identifies potential sources to determine company responsibility.

II. COMPANY OBLIGATIONS UNDER A HUMAN RIGHT TO WATER

Traditionally, only states as the main subject of international law can be held legally responsible for violations of human rights. However, in our globalised world this perception cannot be maintained anymore. Transnational companies and other businesses operating globally are main stakeholders of our globalised world and thus get involved in the sphere of human rights inevitably. Yet, states remain to be the primary subjects responsible to guarantee human rights.

410 Ibid.
411 P Thielbörger ‘The Right(s) to Water’ (2014) 147 et seq.
413 Ibid. 124.
However, there is no insinuation in international law that denies such responsibility regarding companies. Sources for such responsibility can be found in national as well as international law. Due to spatial constraints, this section only provides a brief overview of potential sources, focusing at the international level. After an outline of potential sources at national and international level soft law is discussed, such as UN initiatives.

Under the human right to water a state’s obligation comprises the protection of the right. The state complies by protecting the right from interference by others. The state has to ensure that companies as third parties do not take actions that result in violations of the right to water. This is mostly regulated by legislation. Several sources can be found in different national laws that include the protection of human rights as well as oblige companies to comply with these provisions. Such human rights obligations for companies under the right to water may be found in “ordinary criminal legislation, civil law legislation, consumer protection laws, company law, and national law covering the extraterritorial operations of corporations”. In addition, a state’s constitution, if it has included the right to water, may be a source for company responsibility at national level. In this regard it must be argued that constitutional law is applicable horizontally, between individuals, as well, rather than only vertically, between the state and individuals, as argued by a traditional approach. Therefore, the horizontal approach includes the obligations of private actors to respect the human rights of each another. It is interesting to mention that the German and the South African jurisdiction both provide for such a direct horizontal application.

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415 Ibid. 39.
419 Ibid.
421 Ibid. 332.
422 Ibid.
423 Ibid.
Human rights obligations for companies could also derive from the international level. However, this raises the question of the ongoing debate of whether companies can have direct or only indirect legal obligations under international law. Traditionally international human rights instruments impose indirect responsibility on companies. This encompasses responsibilities under national laws in accordance with the obligations states have under international law. As previously mentioned, some international human rights conventions include state obligations to protect the right to water against activities of companies in the course of the state’s duty to protect the enjoyment of the right against third parties.

Conversely to the traditional view, commentators argue that direct legal responsibilities may be imposed on companies by international human rights instruments, but there is a lack of direct mechanisms to actually hold companies accountable. Černič argues that “articulating direct human rights obligations of [...] companies should not depend on establishing a jurisdiction of implementing them.” Černič’s view is convincing, since the existence of responsibility should be independent from means of implementation. However, the question prevails, whether or not the core international human rights treaties establish such direct legal responsibility for companies? Several of the conventions include terms such as “every individual” or “every organ” in their preambles, recognising that individuals have duties towards each other. These terms surely include juridical persons, like companies, as well. However, a preamble exists of explanatory notes only that are non-binding and other operational paragraphs do not address company responsibility explicitly. Concluding, it does not seem as if the international human rights instruments impose direct legal company responsibilities.

424 Ibid. 324.
426 Ibid.
427 JL Černič ‘Corporate Obligations under the Human Right to Water’ (2010-2011) 324.
428 Ibid. 325.
429 Ibid.
430 See e.g. UNHR (1948) preamble.
Nevertheless, companies are on the radar of the international human rights mechanisms. While there may be no binding international human rights standards for companies, some “soft law” standards, such as corporate codes of conduct and initiatives have been established by states and companies themselves that may be crucial for further development of establishing company responsibility for human rights.\(^{434}\)

The growing international pressure and the need for regulations in the sphere of company responsibility for human rights led to the appearance of corporate codes of conduct.\(^{435}\) These codes are voluntary and can be summarised under the concept of “corporate social responsibility”. Consequently no legally enforceable obligations can arise from these codes.\(^{436}\) Almost every large company drafted a code of conduct.\(^{437}\) All of them support and uphold human rights and the protection of human dignity and the environment. However, it has to be considered that companies may feel safe behind these codes and use them to cloud and hide their human rights violations instead of upholding their declarations.\(^{438}\) There are several examples mentioned above in this chapter that lead to this assumption. Coca Cola’s human rights violations in India or Shell’s violations in the Niger Delta are only two of many examples in which a code of conduct exists and human rights violations happen nevertheless, as the examples mentioned above indicate. Therefore, it is not surprising that allegations are expressed, that these codes “appear to benefit brand image more than the community interests”.\(^{439}\) However, these codes can be regarded as an expression of a growing human rights sensitivity and awareness amongst the corporate world. In addition, they


\(^{436}\) GA Cavallo ‘The Human Right to Water and Sanitation: Going Beyond CSR’ (2013) 50 et seq.


\(^{439}\) Ibid.
may be an essential tool in promoting compliance with human rights obligations amongst companies.\textsuperscript{440}

In addition to codes of conduct, not legally binding guiding frameworks and concepts emerged at the international level. The UN’s Global Compact Initiative, determining ten principles, provides an example of such a guiding framework. None of the ten core principle protects the right to water explicitly. However, the Global Compact Initiative states that companies should comply with international human rights norms that encompass the right to water.\textsuperscript{441} Furthermore, the UN Global Compact Initiative has drafted the CEO Water Mandate, which is a "unique public-private initiative designed to assist companies in the development, implementation and disclosure of water sustainability policies and practices."\textsuperscript{442}

Another UN initiative, were the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.\textsuperscript{443} These UN norms state that companies are required to promote, respect and protect “human rights recognised in international as well as national law”\textsuperscript{444} and contain direct obligations and direct attributions of responsibility to companies.\textsuperscript{445} This is what differentiates them from voluntary codes of conduct and other initiatives. Further they differ because at international level they were the first serious approach to achieve international legally binding standards.\textsuperscript{446} Regarding the right to water they seemed to provide great potential, as they stated that companies “shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realisation, in particular the rights to [...] and drinking water”.\textsuperscript{447} However, the norm’s legal authority was contested and it was soon

\textsuperscript{442} UN ‘CEO Water Mandate’ <https://www.unglobalcompact.org/take-action/action/water-mandate> accessed: 06.01.2016.
\textsuperscript{444} \textit{Ibid.} para. 1.
\textsuperscript{446} \textit{Ibid.} 59.
determined by the Commission on Human Rights that they had “no legal standing”.

In 2005 a new approach was initiated, when the Commission on Human Rights requested the appointment of a Special Representative with a mandate that included “identify[ing] and clarify[ing] standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights.” In June 2011 the Human Rights Council approved the Guiding Principles on Business and Human Rights (Guiding Principles). This framework outlines how states as well as companies should implement the UN “Protect, Respect, and Remedy” Framework on Business and Human Rights, which seeks to prevent and remedy human rights violations that are related to companies. The framework is set on three principles: “the state duty to protect against human rights abuses by companies, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access for victims to effective remedy, judicial and non-judicial.”

The responsibility for companies to respect human rights is described as a “minimum standard”, which is not legally binding. While giving important guidance to companies that are willing to consider the Guiding Principles, the Principles will, however, not reach those companies that are not interested in assuring that their actions respect human rights. Yet, this still applies to too many companies. Therefore, when it comes to human rights violations by companies, only an effective realisation of the states’ legal duty to protect human rights can have considerable impact in the sphere of the Guiding Principles.

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453 Ibid. 53.
454 Ibid. 52, 53.
Even if direct human rights responsibility for companies is not easy to find under international law, it has to be mentioned that “companies have never been granted immunity under any known international treaty or customary law with regard to violations of treaty-based law or international customary law.”\textsuperscript{455} This means that there is no conceptual obstacle in international law that would prevent holding companies internationally responsible for their human rights violations, thus also the human right to water. The only thing preventing this is the lack of regulation and state practice as well as \textit{opinio juris}, which is what is needed now.\textsuperscript{456}

\section*{III. CONCLUSION}

This chapter highlighted that it is not easy to find norms determining direct responsibility of companies for human rights violations. At national level company obligations and responsibility can be found in different ordinary laws. However, it does not seem as if the international human rights instruments impose direct legal company responsibility. At international level the primary responsibility to respect and protect the right to water is still with the state. However, with the powerful position companies occupy, especially with regard to privatisation in the sphere of the right to water, it must be argued that companies have to carry an additional particular responsibility.\textsuperscript{457} While there may be no binding international human rights standards for companies, some soft law standards and initiatives have been established by states and companies themselves that seem likely to be crucial for future development of establishing company responsibility for human rights. It is very desirable for companies to become directly obligated and responsible under international human rights law. In particular, when governments are not able or willing to enforce their obligations and companies take over these unattended state obligations; direct company responsibility is urgently needed. Otherwise, individuals will be left with a potential legal vacuum where no one is responsible for human rights violations.

\textsuperscript{455}GA Cavallo ‘The Human Right to Water and Sanitation: Going Beyond CSR’ (2013) 63.
\textsuperscript{456}Ibid. 64.
E. Chapter V - DISCREPANCIES IN IMPLEMENTING A HUMAN RIGHT TO WATER

Various international and regional agreements create, either explicitly or implicitly, a right to water. GC No. 15 is the first official UN document on the right to water that determines in detail the scope and the nature of the right. One could think the right should then be recognised and realised by everyone anywhere in the world. However, when looking at the facts it becomes clear that this is not the reality, with millions of people dying every year because they lack access to water. An obvious discrepancy exists between the implementation at national level and the agreements at state-level.\textsuperscript{458} For states that have signed the relevant international and regional agreements protecting the right to water, but did not incorporate a right to water into their national laws the discrepancy prevails because there may be less inducement to provide the right throughout the state, since national laws do not force the state to do so.\textsuperscript{459} This lack of incentive may be seen in the failure to incorporate the right to water in the national laws. Consequently, for those states the next step is to incorporate the right in national laws and subsequently work on mechanisms to implement the right.\textsuperscript{460} However, improvements regarding access to water achieved by states that already took the step and incorporated the right to water into national laws and in addition, spent energy, money and time trying to realise the right for their population but still have many people without access to water and dying of the consequences, can sometimes seem disillusioning to other states and thus create hesitation.\textsuperscript{461} However, there is hope that when improvement shows more and more in states that have included the right to water in there national laws, other states will follow to incorporate it in their own laws.\textsuperscript{462}

For those states that already have incorporated the right into their national laws, the discrepancies have different reasons. It may be that a state is simply water stressed and struggles to provide water to its citizens or a state struggles to provided government assistance where part of the population is

\textsuperscript{458} L. Watrous ‘The Right to Water – From Paper to Practice’ Regent Journal of International Law Vol. 8 (2011-2012) 122 \textit{et seq.}

\textsuperscript{459} Ibid. 123.

\textsuperscript{460} Ibid.

\textsuperscript{461} Ibid.

\textsuperscript{462} Ibid.
simply too poor to afford water services; an example where government assistance is needed would be South Africa.\textsuperscript{463} Another issue may be water privatisation. States are, as part of their duty to protect, “obligated to prevent third parties from interfering in any way with the enjoyment of the right to water”.\textsuperscript{464} Privatisation of water does not always seem to comply with this state obligation.\textsuperscript{465} The water privatisation in Cochabamba (Bolivia) is such an example, as mentioned above in this chapter.

Irrespective of obvious discrepancies, after an evaluation of international law, declarations of governments as well as state practice, access to at least a basic water requirement has to be considered a human right. It may, however, be considered a human right of second-class, given that it is not yet explicitly codified in international law; and thus weaker than other human rights. This is because the non-codification makes it difficult for individuals to claim the right. This means they are dependent on benevolent interpretations by judges of other explicit human rights to infer the right to water from. A right that cannot be claimed is not as strong as a codified human right. This is why Gleick offers a possible formulation that fits into the existing human rights declarations:

\begin{quote}
All human beings have an inherent right to have access to water in quantities and of a quality necessary to meet their basic needs. This right shall be protected by law.\textsuperscript{466}
\end{quote}

Now it is on the international community to incorporate this possible formulation into the existing human rights declarations, next to the right to life, an adequate standard of living and the right to food and create a self-standing human right to water.

\textsuperscript{463} Ibid. 124.
\textsuperscript{466} PH Gleick ‘The Human Right to Water’ Pacific Institute (2007) 5
F. Chapter VI - CONCLUSION

This dissertation highlighted the huge gap between the acknowledgement of the importance of a right to water and the implementation of such a right, particularly at international level. Because of the world water crisis, the international community is more and more recognising water as a human right. A human right to water is, however, not explicitly codified in the relevant human right instruments at international level nor does it result from customary law. Human rights instruments that do mention a human right to water explicitly do so only for specific groups of people; therefore they are not suited as a basis of a universal human right to water. An indicator of growing recognition of the right to water may be states signing international conventions and politically important resolutions and documents, such as the UN’s GC No. 15, that recognise a right to water explicitly. These political steps are important on the path to the universal recognition of a human right to water, even though they are not constituting a legally binding self-standing right to water. Furthermore, the case studies of Germany and South Africa highlighted that different water situations, in different countries, call for different legislative and protective measures regarding a right to water. However, this impedes the development of a universal human right to water which by definition must be the same for every person in every country.

The development of recognising the right to water marks only the beginning of a still long way to a universally acknowledged human right to water. This is because there are too many states that have not recognised the right to water yet. Furthermore, at international level an extensive protection of a right to water cannot be ensured, given that no binding international human rights standards for companies exist, that impose direct legal company responsibility. However, with the powerful position companies occupy, action is required from the international community; otherwise, individuals will be left with a potential legal vacuum where no one is responsible for human rights violations.

This dissertation assessed that, through the growing recognition, a human right to water exists. However, since the right is not yet codified as a self-standing right itself, this current human right to water is derived from other
explicitly codified human rights or non-binding declarations. Since the right is not explicitly mentioned in any of the universal human rights instruments which apply to every human being it is a weak human right compared to explicitly codified ones. It could be argued that this is a very formalistic approach, but since a non-codification brings difficulties for individuals to claim the right and thus fully enjoy it, a codification is inevitable for the full enjoyment of a human right to water. A codification could also clarify obligations and responsibilities of companies in the sphere of the right to water. The universal recognition and codification of the human right to water may not improve conditions worldwide immediately. But it would be a statement that the right to water is as important as any other human right and states or other stakeholders such as private companies could not hide their actions behind the notion of the right to water not being an explicit universal human right. The devastating water situation of millions of people around the world and the growing political acknowledgement is hopefully impulse enough for the international community to work diligently towards a self-standing normative recognition of the human right to water in international law.
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